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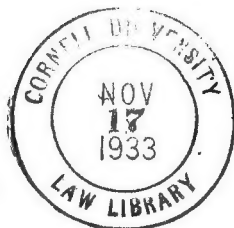
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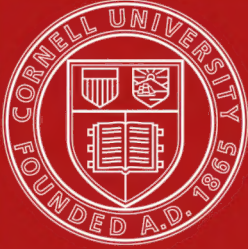
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CYCLOPEDIA

OF THE LAW OF

PRIVATE CORPORATIONS

By WILLIAM MEADE FLETCHER

Author of "Corporation Forms," "Illinois Corporations," "Equity
Pleading and Practice," etc.

VOLUME II

CHICAGO
CALLAGHAN AND COMPANY
1917

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PRIVATE CORPORATIONS

VOLUME II

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- § 699. — Subscriptions by agents, trustees or partners.
- § 700. — Subscriptions by insolvent or irresponsible persons.
- § 701. — Conditional subscriptions.
- § 702. — Subscriptions upon special terms.
- § 703. — Evidence.
- § 704. Waiver and estoppel—General principles.
- § 705. — Particular acts constituting waiver or estoppel.
- § 706. — Objections to counting particular subscriptions.

XI. PAYMENTS ON SUBSCRIPTIONS

- § 707. Effect of nonpayment on legality of incorporation or right to commence business.
- § 708. Effect of nonpayment on validity of subscriptions and liability of subscribers—In general.
- § 709. — Failure of one subscribing after incorporation to pay required deposit at time of subscription.
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- § 711. — Effect of requirement in by-law as to payment of deposit at time of subscription.
- § 712. Sufficiency of payment.

XII. OVERSUBSCRIPTION AND APPORTIONMENT OR DISTRIBUTION OF STOCK

- § 713. Effect of oversubscription.
- § 714. Distribution or apportionment by commissioners.

XIII. ESTOPPEL OF SUBSCRIBERS

- § 715. Estoppel to deny corporate existence.
- § 716. Estoppel to deny subscription or the validity thereof—In general.

§ 717. — Estoppel to set up release or discharge.

§ 718. — Estoppel to set up nonperformance of conditions precedent.

§ 719. — Estoppel to set up conditional delivery of subscription.

§ 720. — Estoppel of corporation and other subscribers.

I. NATURE AND FORMATION OF CONTRACTS OF SUBSCRIPTION AND OTHER AGREEMENTS

§ 520. Subscriptions and other agreements defined and distinguished. A contract of subscription to the stock of a corporation is a contract by which the subscriber agrees to take a certain number of shares of the capital stock of a corporation, paying for the same, or expressly or impliedly promising to pay for the same.¹ The effect of such a contract, as we shall see, the company being in existence at the time of the subscription, and having accepted the same, and the subscription being unconditional, is to make the subscriber a stockholder in the corporation, and to bind him to pay for his stock in accordance with the terms of his contract.

A subscription for stock is to be distinguished from a contract to purchase stock from a corporation,² and the two are to some extent

¹ *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

“A subscription for shares in a corporation is an agreement to take them upon the conditions of the charter * * *.” *Rockingham Bldg. Co. v. Burlingame*, 67 N. H. 301, 31 Atl. 23.

² *United States. Greene v. Sigua Iron Co.*, 88 Fed. 203. See also *Courtney v. Georger*, 228 Fed. 859, aff'g sub nom. *Wilson v. Wardo*, 221 Fed. 505.

Connecticut. See *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760.

Illinois. *Bates v. Great Western Tel. Co.*, 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254; *Wemple v. St. Louis, J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906; *Ottawa, O. & F. R. Val. R. Co. v. Black*, 79 Ill. 262. But see *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220, where these terms seem to have been confused.

Michigan. *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Minnesota. See *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149, 57 Minn. 456, 59 N. W. 532.

Missouri. *Palais Du Costume Co. v. Beach*, 163 Mo. App. 499, 143 S. W. 852; *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245. See also *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274.

Montana. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

Nebraska. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

New York. *Security Title & Trust Co. of New York v. Stewart*, 154 App. Div. 434, 139 N. Y. Supp. 74; *Kohlmertz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031.

North Dakota. See *German Mercantile Co. v. Metz*, 21 N. D. 230, 130 N. W. 221.

Oregon. *Astoria & S. C. R. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379. See also *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

governed by different rules. A contract for the sale of stock does not make the purchaser a subscriber or a stockholder until it is executed by delivery of the stock.³

"Subscribers, as generally understood, are those, who, upon the formation of a corporation, agree mutually to take and pay for shares of the capital stock, and, in the absence of any special provision, they agree with each other to pay therefor the par value of the stock. But after the organization is completed, * * * an individual may make any agreement to purchase stock from the corporation at any stipulated price, in which case the contract is binding on the corporation as well as the purchaser."⁴

"The difference in the relation arising out of the contract of membership resulting from the original subscription to the stock and that of purchase is that in the one case there is a bond of union between the shareholders, and in the other, when the purchase price is to be paid in the future, the contract is executory between the parties to it."⁵

Previous to the organization of the corporation one can only become a shareholder by subscription to the shares of stock to be issued. After incorporation he may do so by subscription, or by purchasing stock directly from the corporation, or from individual owners thereof.⁶

"When men subscribe for the stock of a company, it is for such stock as the company still owns and has not parted with."⁷

"Stock, which has been issued to or passed into the ownership of outside parties, cannot be subscribed for; it is not then the subject-matter of subscription."⁸ Nor can bona fide purchasers of shares

Pennsylvania. McDowell v. Lindsay, 213 Pa. 591, 63 Atl. 130.

South Dakota. See Barnard v. Tidrick, 35 S. D. 403, 152 N. W. 690.

Washington. See Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497.

³ The law applicable to original subscribers to the capital stock of a corporation has no application to a bargain and sale of treasury stock by the corporation. Palais Du Costume Co. v. Beach, 163 Mo. App. 499, 143 S. W. 852. See also Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

⁴ McDowell v. Lindsay, 213 Pa. 591,

63 Atl. 130. See also Peninsula Leasing Co. v. Cody, 161 Mich. 604, 126 N. W. 1053.

⁵ Kohlmetz v. Calkins, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031.

⁶ Galbraith v. McDonald, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

⁷ Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254.

⁸ Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254, followed in Continental Adjustment Co. v. Cook, 152 Fed. 652. And see Mann v. Cook, 20 Conn. 178;

from the original holder be regarded as subscribers because the shares, which have been voted but not issued to the vendor, are issued directly to them.⁹ Whether a particular contract is a subscription or a sale of stock is a matter of construction, and depends upon its terms and the intention of the parties.¹⁰ The fact that the word "sale" or

Goodwin v. Wilbur, 104 Ill. App. 45; *Great Western Tel. Co. v. Bush*, 35 Ill. App. 213.

Stock which has been subscribed for and issued and then transferred to the company to be sold as treasury stock cannot be subscribed for. *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245.

Persons who, without dealing or intending to deal with the corporation, obtain their stock from individuals who have previously subscribed for it, do not subscribe for it. *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904, followed in *Auld v. Caunt*, 216 Mass. 381, 103 N. E. 933.

A contract for stock made with officers of the corporation who own it as individuals is not a subscription. *Kelley v. Collier*, 11 Tex. Civ. App. 353, 32 S. W. 428.

⁹ *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

¹⁰ This intention is gleaned from the contract itself and the law applicable to the subject-matter of the contract. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

An instrument whereby a person undertakes to pay a certain sum to a railroad company, with interest, on a certain day, upon a certain condition, and providing for delivery of a specified number of the shares of stock of the company to the maker on such payment, is a contract of subscription. *Wemple v. St. Louis, J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906.

An agreement to pay a certain sum to a railroad company in instalments when track is laid between certain points, and whereby the company

agrees to deliver a certificate for a like amount of stock to the other party when payment is made, is a subscription. *Ottawa, O. & F. R. Val. R. Co. v. Black*, 79 Ill. 262.

In *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532, it was held that a transaction whereby the defendant, after signing an agreement to take stock, delivered the same to the company, and the latter agreed to deliver the shares to him when paid for, was a subscription and not a sale, since the evident intention was that the delivery of the shares and the payment of the final instalment were to be concurrent acts, one dependent on the other.

A writing reciting: "We, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our respective names in the Lincoln Shoe Manufacturing Company at fifty dollars per share; one-fourth of the amount so subscribed * * * to be paid when the foundation of the building is laid; one-fourth when the building is under roof, and the balance on call of the directors," was a contract of subscription, and not a purchase of stock. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480. See also *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

An agreement to allot certain persons shares in a corporation to be formed in the future in consideration of their agreement not to redeem the property of an existing corporation which had been sold in foreclosure proceedings, is a subscription to stock and not a sale of stock. *Clapp v.*

“purchase,”¹¹ or the word “subscribe,” or “subscriber,” or “sub-

Gilt Edge Consol. Mines Co., 33 S. D. 123, 144 N. W. 721.

In *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243, it was held that a certificate was not an option to the defendant to purchase stock, but that he was a subscriber.

In *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79, it was held that the claim of the defendants that they bought stock from other stockholders instead of subscribing for it, was not established.

Where a person subscribes for stock in a corporation without any notice of a fraudulent contract between the corporation and one of its officers, under which all its stock has already been issued to such officer, to be by him transferred to subscribers on payment to him of forty per cent. of its par value, the existence of the agreement does not change him from a subscriber to an assignee of the stock. *Bates v. Great Western Tel. Co.*, 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254.

On the other hand, where a contract provided that the maker, for a specified consideration, a part of which was a delivery to him by a railroad company of a specified number of shares of its capital stock, would pay to a contractor of the company a certain sum in monthly instalments, and the whole thereof on completion of the company's roadbed, it was held that the contract was not a contract of subscription to the capital stock of the company. *Clark v. Continental Improvement Co.*, 57 Ind. 135.

In *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172, a receipt was signed by the stockholders upon the stub of the certificate book at the time of the issuance of the stock, acknowledging that it was taken subject to the provisions and conditions of the

by-laws, and continuing: “I hereby agree and contract to pay to the corporation on the fifteenth day of February next the sum of one dollar per share of said stock, and thereafter a like sum on the fifteenth day of each and every month for thirty-four months.” The par value of the stock was two hundred dollars a share. It was held that this receipt and agreement was not a contract of purchase between the corporation and the stockholders, but was merely an agreement to pay a certain monthly amount to defray the operating expenses of the corporation until such time as it was estimated that it would be self-supporting, and was designed to relieve the corporation from the necessity of making calls and assessments upon the stock. For further examples see *Wemple v. St. Louis, J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

In *Provident Gold Min. Co. v. Manhattan Securities Co.*, 168 Cal. 304, 142 Pac. 884, a contract for the purchase of stock from a corporation was held not a mere option contract giving the defendant the right to take the stock or not at his election, but a contract of purchase and sale.

¹¹*Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

Where there was no written subscription, but the parties getting up the corporation orally agreed with each other that the corporation would sell all of its stock to the incorporators at a price less than par, which was afterwards done, it was held that the incorporators would be deemed subscribers and as such were liable to creditors for the difference between

scription''¹² is used is not conclusive, though the fact that the contract refers to the transaction as a "subscription" will be considered.¹⁸ In such cases the essential nature of the transaction as shown by the facts will govern.¹⁴

It has been held that a purchase from the corporation of shares which have never before been issued is equivalent to a subscription,¹⁵ and also that a subscription to stock in an existing corporation is, as between the subscriber and the corporation, simply a contract of purchase and sale.¹⁶ And it has been said that, while there is undoubtedly a distinction between subscriptions and executory contracts for the sale of stock, there is no distinction between subscribers and persons who have bought stock from the corporation where an actual sale has been made and the title to the stock has passed to the purchaser.¹⁷

It has been held that a contract to employ one as an officer of the corporation and to pay a part of his salary in stock, is neither a subscription to nor a sale of the stock;¹⁸ and the same has been held to be true of a railroad construction contract by which the work is to be paid for in stock and bonds of the company,¹⁹ although there is authority to the effect that a contract of the latter character is a subscription.²⁰

A contract of subscription is also to be distinguished from an agreement to subscribe in the future. A subscription, when it becomes

the price paid for the stock and its par value, and that the sale of the stock was an ineffective device to escape liability for subscriptions. *Vermont Marble Co. v. Deelee Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057.

¹² *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245. See also *Security Title & Trust Co. v. Stewart*, 154 N. Y. App. Div. 434, 139 N. Y. Supp. 74.

¹³ See *Bates v. Great Western Tel. Co.*, 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254.

¹⁴ *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245.

¹⁵ *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760.

¹⁶ *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947; *Philadelphia & Gulf Steam-*

ship Co. v. Clark, 59 Pa. Super. Ct. 415.

¹⁷ *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

¹⁸ *Wheeler v. Ocker & Ford Mfg. Co.*, 162 Mich. 204, 127 N. W. 332.

¹⁹ *Bostwick v. Young*, 118 N. Y. App. Div. 490, 103 N. Y. Supp. 607, aff'd 194 N. Y. 516, 87 N. E. 1115.

²⁰ *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

An agreement by a contractor on a railroad to take an amount of the capital stock of the railroad company equal to one-fourth of the amount received for work under the contract is an agreement to subscribe for the stock to that amount, and not to take it in part payment for the work. *McMahon v. New York & E. R. Co.*, 20 N. Y. 463.

binding by acceptance, makes the subscriber a stockholder, and liable to calls for the full amount subscribed; a contract to subscribe in the future does not make one a stockholder, but the remedy of the corporation, upon a breach thereof by refusal to subscribe, is by an action to recover damages for the breach, the measure of damages being, not the full amount of the promised subscription, but the difference between such amount and the value of the stock at the time of the breach.²¹

A contract of subscription is also to be distinguished from a contract by which a person promises that another shall subscribe for shares. Such a contract does not make the promisor a subscriber; but merely renders him liable to the corporation, if the other does not subscribe, for the actual damages sustained by the corporation.²²

A contract of subscription is also distinguishable from a contract between a number of persons by which they agree, merely between themselves, to form a corporation, and take stock therein, not intending a contract with the corporation when formed. On such a contract, the corporation, not being a party thereto, cannot maintain an action.²³

An ordinary contract of subscription is also distinguishable from a contract by which a number of persons agree between themselves to form a corporation and take stock therein, and pay the amount of their several subscriptions to an agent or trustee for the corporation. The agent or trustee may sue them on such a contract, and, having collected the money, he will be liable to the corporation therefor.²⁴

Whether a contract between a person and a corporation is a contract of subscription or a loan by the former to the latter depends entirely upon the terms of the contract and the intention of the parties,²⁵ and

²¹ See § 530, *infra*.

²² See § 531, *infra*.

²³ See § 532, *infra*.

²⁴ See § 533, *infra*.

²⁵ *McComb v. Barcelona Apartment Ass'n*, 134 N. Y. 598, 31 N. E. 613.

In *Sant v. Perronville Shingle Co.*, 179 Mich. 42, 146 N. W. 212, it was held that the evidence sustained a finding that certain money withdrawn from the assets of the corporation had been advanced to it as a loan, and was not paid on account of a subscription to stock.

A person who advanced money to a corporation is estopped, as against subsequent creditors, to assert that it

was a loan and not an addition to capital. *Cantor v. Baltimore Overall Mfg. Co.*, 121 Md. 65, 87 Atl. 1115.

In *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243, it was held that money advanced to a promoter of the corporation was not a loan to him individually, but was intended as part payment on defendant's subscription to stock.

A transaction whereby a note secured by a deed of trust was given for the price of stock subscribed for, cannot be regarded as a loan. *Prudential Life Ins. Co. of Texas v. Pearson*, —Tex. Civ. App.—, 188 S. W. 513.

is purely a question of fact,²⁶ unless the intention is to be determined from a construction of a written contract, or an oral contract as to the terms of which there is no dispute, when it becomes a question of construction.²⁷

An absolute agreement to take a certain number of shares in a corporation, and pay for them in instalments, is not rendered a loan to the corporation on the stock as collateral, as distinguished from a subscription, by the fact that it contains a provision giving the subscriber or the corporation an option to resell or repurchase the stock within a certain time.²⁸

The question whether one is liable as a subscriber to an increase of stock, or whether he took it as security merely, cannot be made to depend upon the value he placed upon it, nor upon his secret intention in taking it.²⁹

Whether an underwriting agreement made by subscribers to a new issue of corporate stock for the purpose of securing a loan to the corporation, whereby syndicate managers are appointed and each subscriber severally guarantees payment of the loan, if one is made, in proportion to the amount of his subscription, makes the subscribers principals and primarily liable to the lender, or whether they are merely guarantors that the loan will be paid, is a question of construction, to be determined according to the usual rules for construing written contracts.³⁰

Whether a written agreement is a contract of subscription or merely a promise to make a gift to the corporation in the future, is a question of construction.³¹

§ 521. Formation of contract of subscription—In general. A contract of subscription for stock in a corporation, when binding, is a

See also *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050; *Iserman v. International Stoker Co.*, 72 N. J. Eq. 708, 66 Atl. 605. And see *Smith v. McLain Orchard Co.*, 75 Wash. 27, 134 Pac. 469, where the evidence was held to show that advancements to a corporation were not loans.

²⁶ *McComb v. Barcelona Apartment Ass'n*, 134 N. Y. 598, 31 N. E. 613.

²⁷ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199. See also *Paine v. Copper Bell Min. Co.*, 13 Ariz. 406, 114 Pac. 964.

²⁸ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

²⁹ *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

³⁰ In *Kniekerbocker Trust Co. v. Evans*, 188 Fed. 549, such an agreement was held to make the subscribers principals, so that slight variances between the terms of the loan and of the underwriting agreement would not relieve them from liability.

³¹ In *Leshner v. Karshner*, 47 Ohio St. 302, 24 N. E. 882, the agreement was held to be a contract of subscrip-

contract between the subscriber or subscribers and the corporation, and its formation and validity are governed by the same principles, substantially, as any other contract, except in so far as such principles may be rendered inapplicable by particular charter or statutory provisions.³²

In the absence of elements of estoppel,³³ no person can become a stockholder in a corporation by virtue of a subscription for stock, unless there is a valid contract between him and the corporation.³⁴

tion, supported by a sufficient consideration, although containing the words "paid as donation."

³² *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423; *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125; *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. Rep. 434.

"Contracts for membership in a corporation are not different in their essential elements from other contracts." *Butler University v. Seoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

The subscription constitutes a contract between the corporation and the subscriber. *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317; *Melvin v. Hoitt*, 52 N. H. 61.

³³ See § 716, *infra*.

³⁴ *White v. Kahn*, 103 Ala. 308, 15 So. 595; *Glenn v. Garth*, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649; *Rochester & Kettle Falls Land Co. v. Roe*, 7 N. Y. App. Div. 366, 40 N. Y. Supp. 72; *Kelley v. Collier*, 11 Tex. Civ. App. 353, 32 S. W. 428.

A person cannot compel a corporation, without some agreement to that effect on its part, to accept him as a member, or to receive his interest in certain property and issue stock therefor. *Cornwall v. Burning Moscow Gold & Silver Min. Co.*, 1 Cal. Unrep. Cas. 172.

"Although it may be true," said the Indiana court, "that a binding

contract of subscription to the stock of a corporation, unless the statute or articles of association provide to the contrary, may be made, without actually signing a formal subscription paper or stock book, in any manner that the subscriber and corporation clearly manifest their purpose to enter into a contract whereby the relation of stockholder of the corporate stock is to result—yet there must in every case be some sort of subscription or contract whereby the subscriber obtains the right, upon some condition, to demand stock and to exercise the rights of a stockholder. Contracts for membership in a corporation are not different in their essential elements from other contracts. There must be contracting parties whose minds mutually assent to some proposition, and whose agreement creates corresponding obligations between the parties." *Butler University v. Seoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

Under Indiana Acts of 1869, Sp. Sess., p. 92, § 14, the mere voting of a tax by a township is not sufficient to constitute a subscription by it to the stock of a railroad company, but the subscription must first be made by the county board, which for that purpose acts as agent of the township, and until it acts there is no subscription. *Board Com'rs, Hamilton Co. v. State*, 115 Ind. 64, 17 N. E. 855, 4 N. E. 589, followed in *Pope v. Board Com'rs, Lake Co.*, 51 Fed. 769.

The defendant signed a subscription

No particular formalities are necessary, unless by reason of express charter or statutory provisions,³⁵ but, as has been seen above, a contract is always essential, and a valid contract involves an offer and acceptance of the offer, or the mutual assent of the subscriber and the corporation. Whenever this element is wanting, there is no valid subscription.³⁶

agreement with the understanding that the president of the company soliciting the subscription would agree to purchase certain supplies from him, and to certain conditions as to the management of the company, and would execute a written agreement to that effect. The president later refused to sign, and stated that she would have the agreement canceled. Neither the president, nor the corporation, nor the defendant ever regarded him as a shareholder, and the conduct of all of them for many years was incompatible with the idea that he was one. It was held that there was no contract of subscription even as to creditors. *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245.

³⁵ See § 534, *infra*.

³⁶ **United States.** *Pope v. Board Com'rs Lake Co.*, 51 Fed. 769.

Indiana. *Butler University v. Seconover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642; *Junction R. Co. v. Reeve*, 15 Ind. 236.

Kansas. *United States Wind-Engine & Pump Co. v. Davis*, 2 Kan. App. 611, 42 Pac. 590.

Louisiana. *Feitel v. Dreyfous*, 117 La. 756, 42 So. 259.

Maine. *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

Maryland. *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665.

Michigan. *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562.

Missouri. *State v. Garrouette*, 67 Mo. 445.

New Hampshire. *Melvin v. Hoitt*, 52 N. H. 61.

Pennsylvania. *Strasburg R. Co. v.*

Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49.

Tennessee. *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Thurman*, —Tex. Civ. App. —, 176 S. W. 762.

Virginia. *Stuart v. Valley R. Co.*, 32 Gratt. 146.

Wisconsin. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315; *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885.

Wyoming. *Natwick v. Terwilliger*, — Wyo. —, 157 Pac. 696.

Canada. *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. Rep. 434.

"Before parties are bound by a contract, there must be mutual assent to the same thing and in the same sense; or, in other words, there must be a meeting of minds." *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.

"An offer 'to take' shares in a corporation yet to be formed must not only be made, but it must also be accepted." *Carter, Rittenberg & Hainlin Co. v. Hazzard*, 65 Minn. 432, 68 N. W. 74.

A mere application or offer to the promoters of a proposed corporation to subscribe for stock therein does not constitute a binding contract until it is accepted. *DaPonte v. Breton*, 121 La. 454, 46 So. 571; *Feitel v. Dreyfous*, 117 La. 756, 42 So. 259.

"Until the subscription paper has been presented to the corporation and assented to by it, the signers are not stockholders." *Badger Paper Co. v.*

Whether a subscription is made before or after the formation of the corporation, it is formed by an offer by one of the parties,—the corporation or the subscriber, as the case may be,—and an acceptance of this offer by the other. As soon as an offer to take shares made by a person to a corporation is accepted by the corporation, or as soon as an offer of shares by a corporation is accepted by the person to whom it is made, there is a binding contract of subscription, under which the subscriber, without any further act on the part of himself or the corporation (unless required by statute), becomes a stockholder, with all the rights, and subject to all the liabilities, arising from such a relation.³⁷ “A subscription to capital stock is simply an offer to take and pay for the stock upon the terms and conditions stated in the offer.”³⁸ When made to the promoters of a proposed corporation, they may decline it,³⁹ and subscription agreements some-

Rose, 95 Wis. 145, 37 L. R. A. 162, 70 N. W. 302.

“It must appear that the minds of the parties met; that the defendants agreed to be and become stockholders in the corporation, with the privileges and responsibilities of that relation; and that the corporation accepted them as such. The former could not be put in that position against their will—without their consent—by the unauthorized and unratified act of a third person; for in such case there would exist no contract relation, no mutuality of agreement, but simply a mistake or a wrong which the defendants might ratify and condone, or repudiate and reject.” *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, motion for reargument denied, 31 N. E. 344.

In an action to recover a balance of four thousand dollars on an alleged oral subscription of five thousand dollars on which one thousand dollars had been paid, an affidavit of defense alleging that the defendant's agreement was to invest one thousand dollars in the stock, and that he never agreed to subscribe for a larger amount of stock, is sufficient. *Philadelphia Medical Pub. Co. v. Wolfenden*, 239 Pa. 262, 86 Atl. 849.

Whether or not a person orally subscribed for stock is a question of fact for the jury. *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3. And the verdict of a jury that he did so, based on conflicting evidence, will not be disturbed on appeal. *Tabler v. Anglo-American Ass'n*, 17 Ky L. Rep. 815, 32 S. W. 602.

³⁷ See *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577, and cases cited in the notes following.

³⁸ *Midland Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.

³⁹ In *Feitel v. Dreyfous*, 117 La. 756, 42 So. 259, a printed form of application for shares sent to a prospective subscriber, and which was filled in and returned to the promoters by him, was held to be a mere offer by him to subscribe, so that the person making it had no cause of action against the promoters where they failed to allot him any shares.

times expressly provide that the corporation or its board of directors may reject any or all subscriptions.⁴⁰

The subscription, to be valid, must be a contract between parties competent to contract. So it has been held that where an offer to subscribe is made on the theory that there is an existing corporation capable of contracting, there can be no valid acceptance of the offer so as to make a contract binding unless it has such existence and capacity and that, for this reason, where the statute makes payment of a certain tax a condition precedent to the legal existence of the corporation, and to the exercise by it of any corporate power whatever, its attempted acceptance of an offer to subscribe before such tax is paid is a nullity giving rise to no contractual obligation. Nor will the fact that the tax is subsequently paid render the contract valid in the absence of an estoppel or ratification on the part of the subscriber. In other words, if the subscription contract is "invalid when made by reason of the want of competent parties to make it, it cannot become valid or binding by the mere subsequent creation of a party which, when created, would be competent to contract."⁴¹

The corporation to whose stock the subscription is made must also be one which is authorized to issue stock and to receive subscriptions for the same.⁴²

The contract cannot be made by one person alone,⁴³ and before a promise can become a binding contract it must be made to and accepted by the party for whose benefit it was meant.⁴⁴

⁴⁰ Notwithstanding such a provision a subscriber becomes a stockholder on the formation of the company, unless the board of directors, by affirmative action, rejects his subscription. *Mackey Baking Co. v. Mackey*, 19 Pa. Dist. 401.

⁴¹ *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665.

⁴² *Minneapolis Harvester Works v. Libby*, 24 Minn. 327.

Power on the part of the corporation to issue stock to the subscribers in compliance with their contracts of subscription is an implied condition precedent to liability on their part on their subscriptions. See § 589, *infra*.

⁴³ *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49. See also *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665.

For this reason a paper signed by several persons whereby they agree to take a specified number of shares of the stock of a railroad company, provided a charter giving it certain privileges can be obtained, is not a subscription which can be enforced by the company when incorporated. *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

⁴⁴ *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

In *Philadelphia Medical Pub. Co. v. Wolfenden*, 248 Pa. 450, 94 Atl. 138, it was held that a transaction between the defendant and a third person, acting as an individual and for himself alone, whereby the defendant agreed that, if such person would turn over a publication owned by him to a corporation not yet incorporated, the de-

An offer made to one corporation cannot be accepted by another corporation so as to create a binding contract.⁴⁵

The offer evidenced by the subscription must be accepted by the corporation as made, without substantial change,⁴⁶ and it cannot be enlarged by the corporation without the consent of the subscriber.⁴⁷

§ 522. — Subscriptions after formation of corporation. In the case of subscriptions after a corporation has been formed and is in existence, there is no difficulty in the formation of the contract. There must simply be both an offer and an acceptance, as in the case of any other contract. When a corporation solicits subscriptions to its stock, intending merely to solicit the submission of subscriptions, a subscription is like an offer in the formation of any other contract. Until it is accepted by the corporation, or an authorized agent of the corporation, there is no contract, and neither party is bound.⁴⁸ And

fendant would invest a certain sum in the enterprise for which he was to receive a certain number of shares of stock, was not a subscription to the stock of the corporation which the latter could enforce after its incorporation, but that if any binding engagement resulted it was with such third person individually.

⁴⁵ *State v. Garroutte*, 67 Mo. 445.

A person who subscribes to stock in one corporation cannot be compelled to accept stock in another corporation in lieu thereof. See § 572, *infra*.

⁴⁶ *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 73 N. E. 674, rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203.

The corporation can accept the subscription only upon the terms agreed upon by the subscriber and the person taking the subscription. *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798.

It must be accepted unequivocally, unconditionally and without variance of any sort. *Midland Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.

⁴⁷ *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 73 N. E. 674,

rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203.

⁴⁸ *United States*. See *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933.

Indiana. *Junction R. Co. v. Reeve*, 15 Ind. 236.

Iowa. See *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780.

Maine. *Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me. 374; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

Maryland. See *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665.

North Carolina. *Cozart v. Herndon*, 114 N. C. 252, 19 S. E. 158.

Pennsylvania. See *Pittsburgh & C. R. Co. v. Plummer*, 37 Pa. St. 413.

Virginia. *Stuart v. Valley R. Co.*, 32 Gratt. 146.

Wisconsin. *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885; *Badger Paper Co. v. Rose*, 95 Wis. 145, 37 L. R. A. 162, 70 N. W. 302.

Where a subscription provides that it shall be payable in land and that it shall be void unless the company takes the land at the price specified, it is a mere offer which must be accepted by the company in order to make it bind-

the corporation may decline to accept it on the terms offered.⁴⁹ As soon, however, as the corporation accepts it, there is from that moment a binding contract, on the part of the subscriber, in most jurisdictions⁵⁰ to pay the amount of the subscription and assume the other liabilities of a stockholder, and upon the part of the corporation to issue a proper certificate of stock, and to admit him to all the rights and privileges of a stockholder, in accordance with the express and implied terms of the contract. In other words, the subscriber becomes, by virtue of the subscription and its acceptance, a stockholder, with all the rights, and subject to all the liabilities, common-law and statutory, which belong or attach to stockholders.⁵¹

ing on the subscriber. *Junction R. Co. v. Reeve*, 15 Ind. 236.

The acceptance must be made through the board of directors or the company's duly authorized agent. Consent of several directors acting as individuals, and not shown to constitute a quorum of the board, is not sufficient. *Junction R. Co. v. Reeve*, 15 Ind. 236.

⁴⁹ *Melvin v. Hoitt*, 52 N. H. 61.

⁵⁰ See § 523, *infra*.

⁵¹ **Kentucky.** *Instone v. Frankfort Bridge Co.*, 2 Bibb 576, 5 Am. Dec. 638.

Maryland. *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

New Hampshire. *Melvin v. Hoitt*, 52 N. H. 61.

New York. *Richmondville Union Seminary v. McDonald*, 34 N. Y. 379; *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 513.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *Mobile & O. R. Co. v. Yandal*, 5 Sneed 294.

His subscription makes him a stockholder. *Beals v. Buffalo Expanded Metal Const. Co.*, 49 N. Y. App. Div. 589, 63 N. Y. Supp. 635.

Where the directors receive a subscription for unissued original stock

and issue a certificate therefor, the subscriber thereupon becomes a stockholder and entitled to the rights of a stockholder. *Curry v. Scott*, 54 Pa. St. 270.

On acceptance by a subscriber of an offer by the corporation to sell its unissued stock at a stipulated price, there is a binding contract which gives him the rights of a stockholder. An acceptance of the acceptance is not necessary. *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408.

A subscription to an increase in the stock of an existing corporation creates a valid and binding obligation which can be enforced in court. *Cope v. Pitzer*, — Tex. Civ. App. —, 166 S. W. 447.

There may be a valid and binding subscription to an increase of stock before the certificate of increase is filed with the secretary of state, especially where such certificate is filed before the action to recover the amount subscribed is begun. *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

Ratification of the contract by the subscriber after such filing is not necessary. *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

But in the case of subscriptions to increased stock the subscriber does

A solicitation of subscriptions by a corporation may be intended, not merely as an invitation to submit subscriptions for acceptance by the corporation, but as an offer of stock by the corporation to any person who may subscribe in accordance with the terms of the offer. In such a case, a subscription in accordance with the terms of the offer is an acceptance of the offer, and creates a binding contract, from which neither party can withdraw without the consent of the other. Such is the case, for example, when a corporation opens subscription books, and puts them in the hands of an agent to receive subscriptions, and a person enters his name therein as a subscriber for a certain number of shares. This makes a binding contract of subscription.⁵² Such an offer may be withdrawn by the corporation at any time before it is accepted,⁵³ and an acceptance thereof does not become effective until it is communicated to the corporation.⁵⁴

A subscription for stock need not be accepted by the corporation in any particular way, unless this is required by the charter or statute, or expressly or impliedly by the subscription itself, but may be inferred by the conduct of the corporation in entering it in its books,

not become a stockholder until he has paid for the stock. *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947; *Philadelphia & Gulf Steamship Co. v. Clark*, 59 Pa. Super. Ct. 415.

See § 521, *supra*.

⁵² *Greer v. Chartiers Ry. Co.*, 96 Pa. St. 391, 42 Am. Rep. 548. Compare *Pittsburgh & C. R. Co. v. Plummer*, 37 Pa. St. 413.

A subscription in the regular subscription book of the company after it is formed and fully organized constitutes a valid contract on the part of the company to issue the stock to the subscriber, and, on his part, to pay for it. *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439.

Signatures in a subscription book circulated by one of the directors without authority, and which differs from the form of subscription adopted by the corporation, and contains provisions not found in the latter, do not create contracts binding on the corporation, and it may refuse to receive the subscribers as members. *Melvin v. Hoitt*, 52 N. H. 61.

In *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871, delivery to the secretary of the company of a written agreement whereby each of the signers subscribed for the number of shares set opposite his name, was held to be an acceptance of the offer of the directors to issue a certain amount of stock to subscribers therefor, on certain terms.

⁵³ *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016.

⁵⁴ A subscription by a city to the stock of a railroad company does not become a completed contract binding on the city by the passage of an ordinance by the council making effective an affirmative vote cast at an election, held to determine whether the subscription should be made, and directing the mayor to subscribe to the stock for the city, but only when the subscription is in fact made by the mayor. *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016.

retaining it, demanding payment, or otherwise acting upon it.⁵⁵ Generally, notice of acceptance is unnecessary unless such notice is required by the express or implied terms of the subscription.⁵⁶ But the subscription may, from its nature or the circumstances under which it is made, require notice of acceptance.⁵⁷

Acceptance of the offer in the presence of the subscriber dispenses with the necessity for any further notice.⁵⁸

Notice to an agent who is authorized to subscribe on behalf of his principal is sufficient notice to the latter.⁵⁹

The burden of showing an acceptance by the corporation is on it.⁶⁰

In England, a formal written application for shares is made by persons desiring to take shares in a joint stock company, and it is well settled that the application is a mere offer, which must be accepted before either the applicant or the company is bound. Until the company accepts the offer and allots the shares to the applicant, and gives him notice of the acceptance and allotment, there is no contract,

⁵⁵ *Richmondville Union Seminary v. McDonald*, 34 N. Y. 379. See also *Corwith v. Culver*, 69 Ill. 502.

As by entering his name on the books of the company as a stockholder and naming him in the publications as one. *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179.

Acceptance of a payment made on a conditional subscription shows a sufficient concurrence in the conditions to create mutuality. *Nichols v. Burlington & L. County Plank Road Co.*, 4 Greene (Iowa) 42.

In *Corwith v. Culver*, 69 Ill. 502, a subscription paper was signed by the defendant, who was the president of the company, and others. At a subsequent meeting of the stockholders, in which the defendant participated, it was recognized and treated as a completed contract, and it was also produced at other meetings. It was held that, under the circumstances, the fact that the paper remained in the hands of the defendant did not militate against the idea that it had been delivered to the company so as to make it his valid subscription.

⁵⁶ *Brownlee v. Ohio, I. & I. R. Co.*,

18 Ind. 68; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337. See also *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179. And see § 532, *infra*.

⁵⁷ *Cozart v. Herndon*, 114 N. C. 252, 19 S. E. 158. And see *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016.

Notice of acceptance appears to be necessary in the case of subscriptions by municipal or quasi municipal corporations. *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933.

See also § 534, *infra*.

⁵⁸ Where the agent of a municipal corporation who is authorized to make a subscription in its behalf is present at the meeting of the board of directors at which the subscription is accepted, no further notice of acceptance is required. *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933.

⁵⁹ *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933.

⁶⁰ *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780.

and neither party is bound.⁶¹ An uncommunicated acceptance is not enough. The shares must be allotted by the directors, and notice thereof given to the applicant, or put in a way to be communicated to him as contemplated by the application.⁶²

The power of the directors in this regard cannot be delegated by them to the officers of the company.⁶³

Unless some other notice or method of communication is required by the applicant, notice may be communicated by mail, and in such a case the acceptance and notice take effect and the contract is made at the moment a letter of acceptance is deposited in the mail, properly addressed and stamped, although it may be delayed in reaching the applicant, or may never reach him, the post office being the agent of the applicant to communicate the acceptance.⁶⁴

One who acts as a director, and as such joins in confirming an allotment of shares to himself and in passing a resolution that the shares so allotted be paid in full forthwith, cannot question the validity of the allotment on the ground that he was not legally chosen a director.⁶⁵

The confirmation by a duly constituted board of directors of an allotment previously made by a board consisting of less than the required number is equivalent to an original allotment.⁶⁶

§ 523. — Subscriptions before formation of corporation. There has been some difficulty in settling the principles governing subscriptions to the stock of a corporation before its formation; but it is now well settled that when persons sign an agreement to form a corporation, and to take stock therein, intending a contract with the corpora-

⁶¹ *In re Brewery Assets Corporation*, [1894] 3 Ch. 272; *Harris' Case*, 7 Ch. App. 587; *In re Peruvian Ry Co.*, 4 Ch. App. 322; *Pellatt's Case*, 2 Ch. App. 527; *In re Portuguese Consol. Copper Mines*, 42 Ch. Div. 160; *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216; *Hebb's Case*, L. R. 4 Eq. 9; *Ramsgate Victoria Hotel Co. v. Montefiore*, L. R. 1 Exch. 109; *York Tramways Co. v. Willows*, 8 Q. B. D. 685; *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. Rep. 434.

⁶² *Harris' Case*, 7 Ch. App. 587; *In re Peruvian Ry. Co.*, 4 Ch. App. 322;

Pellatt's Case, 2 Ch. App. 527; *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216; *Adams' Case*, L. R. 13 Eq. 474; *Hebb's Case*, L. R. 4 Eq. 9; *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. Rep. 434.

⁶³ *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. Rep. 434.

⁶⁴ *Harris' Case*, 7 Ch. App. 587; *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216.

⁶⁵ *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

⁶⁶ *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

tion,⁶⁷ the subscription of each of the parties is a continuing offer to the proposed corporation, and becomes a binding contract as soon as the corporation is formed and expressly or impliedly accepts the same. The fact that the corporation is not in existence at the time the offer is first made by signing the agreement, does not prevent the formation of the contract by its acceptance of the offer when formed.⁶⁸

⁶⁷ See § 532, *infra*.

⁶⁸ **United States.** *McNaught v. Fisher*, 96 Fed. 168.

Alabama. *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977, 144 Ala. 666, 39 So. 562; *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

Arkansas. *Snodgrass v. E. A. Zander & Co.*, 106 Ark. 462, 154 S. W. 212; *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057.

California. *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126. See also *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Ferrochem Co. of Pennsylvania v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

Connecticut. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

District of Columbia. *Glenn v. Busey*, 5 Mackey 233.

Georgia. *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406.

Illinois. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, *aff'g* '41 Ill. App. 268; *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Johnston v. Ewing Female University*, 35 Ill. 518; *Tonica & P. R. Co. v. McNeely*, 21 Ill. 71; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54. See also *Whitsitt v. Pre-emption Presbyterian Church*, 110 Ill. 125; *Griswold v. Peoria University*, 26 Ill. 41, 79 Am. Dec. 361.

Indiana. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51.

Kansas. *McCormick v. Great Bend Gas & Fuel Co.*, 48 Kan. 614, 29 Pac. 1147; *United States Wind-Engine & Pump Co. v. Davis*, 2 Kan. App. 611, 42 Pac. 590.

Kentucky. *Bullock v. Falmouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129; *Twin Creek & C. Turnpike Road Co. v. Lancaster*, 79 Ky. 552; *Instone v. Frankfort Bridge Co.*, 2 Bibb 576, 5 Am. Dec. 638; *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. 43.

Maine. *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888; *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

Maryland. *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. 311.

Michigan. *Curry Hotel Co. v. Mullins*, 93 Mich. 318, 53 N. W. 360; *International Fair & Exposition Ass'n v. Walker*, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Minnesota. *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026; *Red Wing Hotel Co. v.*

Nor is it material to the right of the corporation to enforce the con-

Friedrich, 26 Minn. 112, 1 N. W. 827.

Missouri. *State v. Reynolds*, — Mo. —, 186 S. W. 1057, sustaining, on certiorari, the judgment in *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409; *Shelby County R. Co. v. Crow*, 137 Mo. App. 461, 119 S. W. 435; *Newland Hotel Co. v. Wright*, 73 Mo. App. 240. See also *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439.

Montana. *Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335; *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

Nebraska. *Nebraska Chicory Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245.

New Hampshire. *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548; *Melvin v. Hoitt*, 52 N. H. 61. See also *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

New York. *Dayton v. Borst*, 31 N. Y. 435; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Sanders v. Barnaby*, 166 App. Div. 274, 151 N. Y. Supp. 580; *Lowville & B. River R. Co. v. Elliott*, 115 App. Div. 884, 101 N. Y. Supp. 328, aff'd 196 N. Y. 545, 89 N. E. 1104; *Woods Motor Vehicle Co. v. Brady*, 90 App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 Misc. 79, 78 N. Y. Supp. 203, rev'd on other grounds 181 N. Y. 145, 73 N. E. 674; *Raegener v. Brockway*, 58 App. Div. 166, 68 N. Y. Supp. 712, aff'd 171 N. Y. 629, 63 N. E. 1121; *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334, 51 N. Y. Supp. 969; *Dorris v. French*, 4 Hun 292; *American Silk Works v. Salomon*, 4 Hun 135; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157. See also *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457.

North Dakota. *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

Oklahoma. *Rev. Laws 1910*, § 1234;

Cummings v. State, — Okla. —, 149 Pac. 864.

Oregon. *Nickum v. Burckhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788; *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164.

Pennsylvania. *Shober's Adm'rs v. Lancaster County Park Ass'n*, 68 Pa. St. 429; *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96; *Mackey Baking Co. v. Mackey*, 19 Pa. Dist. 401; *Steamship Co. v. Murphy*, 6 Phila. 224. See also *Edinboro' Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Texas. *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134; *Galveston Hotel Co. v. Bolton*, 46 Tex. 633; *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247; *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145; *McCord v. Southwestern Sundries Co.*, — Tex. Civ. App. —, 158 S. W. 226; *Bivins v. Panhandle Packing Co.*, — Tex. Civ. App. —, 140 S. W. 523.

Utah. *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

West Virginia. *Kimmins v. Wilson*, 8 W. Va. 584.

"It is well settled that, if two or more persons mutually agree to organize a corporation, and each subscribes for stock therein to be paid for after its incorporation, such agreement is valid, and may be enforced by any of the parties thereto or by the corporation after its formation. In such case the corporation represents and acts for the parties to the agreement, as their agent." Dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Ap-

tract that it is not expressly named therein as being the promisee.⁶⁹

peals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case.

Though at common law the subscription is not valid and binding before the complete formation of the corporation because there is no party with whom the subscriber can contract, yet, if after the corporation is formed, it accepts the subscription and recognizes the subscriber as a stockholder, and the subscriber recognizes himself as a stockholder, and ratifies and confirms his subscription by making payments thereon, he becomes a stockholder, and is liable on his subscription. *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294, aff'g 22 Hun (N. Y.) 359.

"Until the proposed corporation is formed, the promise of the subscriber is in the nature of an open offer to the corporation, which may or may not be accepted." *Deschamps v. Loisselle*, 50 Mont. 565, 148 Pac. 335.

"The subscription generally becomes binding and enforceable when the consideration therefor has been supplied by the promise of other subscribers to take and pay for stock to the amount named in the subscription and a charter has been obtained to carry on the business mentioned in the subscription." *Midland Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.

The persons authorized by law to obtain the charter represent in the initial steps the yet unborn corporation, and whatever they lawfully do in the premises inures to the benefit of the corporation when it attains to complete legal existence, and it may then enforce contracts made in its behalf by its promoters. *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128.

It cannot be contended that a subscription by signing the agreement of incorporation prior to incorporation is

invalid for want of another party to be contracted with, where the statute authorizes preliminary subscriptions in that manner. *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

See *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911, followed in *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929, where it is held that the subscription is enforceable by the corporation when it is accepted by the organization of the corporation, whether it is to be regarded as a continuing offer to the corporation, or as a contract among the subscribers for its benefit.

"The law which requires the filing of articles contemplates that there will be valid and binding subscriptions of stock before filing." *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

Under the statute "subscriptions of a certain amount of stock are necessary for the organization of the contemplated corporation, and for that reason and purpose are valid before the corporation is organized, and may be collected by it after organization." *Anderson v. Newcastle & R. R. Co.*, 12 Ind. 376, 74 Am. Dec. 218.

Where the statute requires the certificate of incorporation to be signed by all of those who are to hold stock in the proposed corporation as originally organized, the original force and effect of that instrument is, at least, to express a contract by its signers to take the amount of stock which it declares them to hold. The statute implies the acceptance immediately upon the filing of the papers necessary to constitute the corporation, and the contract thereupon becomes an executed one. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

⁶⁹ *Marysville Elec. Light & Power*

“In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber ‘to and with each other,’ is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced, between each subscriber * * * and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associates.”⁷⁰

But in order to make such a subscription valid and enforceable by the corporation when formed, there must be an undertaking on the part of two or more persons to themselves form a corporation to which each agrees to contribute the amount of his subscription, and only after its formation by such persons, or by some one authorized to act for them in that regard, can their subscriptions be enforced by the corporation,⁷¹ unless the subscription is ratified after the cor-

Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126; Gill’s Adm’r v. Kentucky & C. Gold & Silver Min. Co., 7 Bush (Ky.) 635.

This is true where from its terms it is clear that the contract was entered into with the corporation and that the money was to be paid to it. City Hotel in Worcester v. Dickinson, 6 Gray (Mass.) 586.

⁷⁰ Wells, J., in Athol Music Hall Co. v. Carey, 116 Mass. 471, quoted in Marysville Elec. Light & Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126, and Glenn v. Busey 5 Mackey (D. C.) 233.

⁷¹ Dissenting opinion in Avon Springs Sanitarium Co. v. Weed, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Appeals

(189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case. Sanders v. Barnaby, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580. See also Yonkers Gazette Co. v. Taylor, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

Such a subscription cannot be enforced by the corporation where there was no agreement to incorporate and no parties between whom mutuality of agreement existed. Sanders v. Barnaby, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580.

So a contract providing that the defendant thereby subscribes for a certain number of shares in a company and agrees to pay for the same as soon as the company is incorporated and the stock is delivered to

poration is formed.⁷² The right to enforce such subscriptions has also been sustained on the ground that the subscribers are the promisees and the corporation is the payee, and that it is one of those cases in which a promise made to one person for the benefit of a third may be enforced by the latter.⁷³

In those jurisdictions where the subscription is not regarded as a contract between the subscribers,⁷⁴ it cannot constitute a binding contract before the corporation is formed, for, in the first place, two parties are necessary to a contract, and, in the second place, until the corporation is formed, and expressly or impliedly accepts the subscription, there is no consideration or mutuality.⁷⁵ And it follows

him, is not enforceable by the company after its incorporation, where the defendant did not agree to form the corporation nor authorize any one to form it for him or in his behalf, no party of the second part is named in the contract, and it does not appear that any person other than the defendant was a party to it. Dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case, and followed in *Avon Springs Sanitarium Co. v. Kellogg*, 125 N. Y. App. Div. 51, 109 N. Y. Supp. 153, aff'd sub nom. *Rankin v. Bush*, 194 N. Y. 567, 88 N. E. 1129.

⁷² Even though the subscriber is not bound by his subscription when it is made, if the corporation is thereafter duly organized and he then accepts scrip for the stock for which he subscribed and gives his check therefor, such check is supported by a sufficient consideration. *Avon Springs Sanitarium Co. v. Kellogg*, 125 N. Y. App. Div. 51, 109 N. Y. Supp. 153, aff'd sub nom. *Rankin v. Bush*, 194 N. Y. 567, 88 N. E. 1129.

⁷³ *Glenn v. Bussey*, 5 Mackey (D. C.) 233. See also *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac.

126; *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463; *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911, followed in *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929.

Oklahoma Rev. Laws 1910, § 1234, provides that the subscription is to be held for the benefit of the corporation when formed, and may be collected by it. *Cummings v. State*, — Okla. —, 149 Pac. 864.

But see *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219, and *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 73 N. E. 674, rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203.

And see § 532, *infra*.

⁷⁴ See § 532, *infra*.

⁷⁵ **Alabama.** *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977; *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

Kentucky. *Harvey v. Bonta*, 30 Ky. L. Rep. 1226, 100 S. W. 846.

Maine. *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888; *Starrett v. Rockland, Fire & Marine Ins. Co.*, 65 Me. 374.

that, where this rule obtains, such a subscription may be revoked by the subscriber at any time before the corporation is formed and accepts the same.⁷⁶

But in some jurisdictions, as we shall see, an agreement by several persons to subscribe to the stock of a corporation to be formed by them is held to be a contract between the subscribers themselves, as well as a continuing offer to the corporation,⁷⁷ and where this rule obtains, a subscriber cannot withdraw his subscription even before the corporation is formed without the consent of the other subscribers.⁷⁸

Notice of the acceptance by a corporation of a subscription made before its organization is not necessary.⁷⁹ While the offer may be expressly accepted as by issuing certificates of stock to the subscriber,⁸⁰ no formal acceptance is necessary. An acceptance may be inferred from the conduct of the corporation in retaining the subscription paper in its possession, and expending money or incurring debts on the faith of it,⁸¹ or in recognizing the subscriber as a share-

Massachusetts. *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465.

Pennsylvania. *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269, 13 Atl. 747; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49; *Mackey Baking Co. v. Mackey*, 19 Pa. Dist. 401.

"Such an agreement is not valid and binding when made, as there is then in existence no party, representing the company, who is capable of contracting." *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969, quoted with approval in *Lowville & B. River R. Co. v. Elliott*, 115 N. Y. App. Div. 884, 101 N. Y. Supp. 328, aff'd 196 N. Y. 545, 89 N. E. 1104.

An insurance company which has been incorporated may accept a subscription though it has not yet received the license to do business required by Comp. Laws 1909, § 3756, since otherwise it could not obtain the paid up stock necessary to enable it to procure such license. *King v.*

Howeth & Co., 42 Okla. 178, 140 Pac. 1182.

The corporation must be organized within a reasonable time, or subscribers will be released. See § 646, *infra*.

⁷⁶ See § 532, *infra*.

⁷⁷ See § 563, *infra*.

⁷⁸ See § 563, *infra*.

⁷⁹ *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

⁸⁰ *Nebraska Chicory Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245.

⁸¹ *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268; *Bivins v. Panhandle Packing Co.*, — Tex. Civ. App. —, 140 S. W. 523. See also *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798; *McCormick v. Great Bend Gas & Fuel Co.*, 48 Kan. 614, 29 Pac. 1147; *Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319. And see § 522, *supra*.

"If it has been accepted and acted

holder,⁸² or in calling for the payment of the subscription,⁸³ or in suing him for the amount of his subscription.⁸⁴ And the law may imply an acceptance by the doing of those acts which are necessary to complete the incorporation.⁸⁵

§ 524. — Formation of a different corporation. Since there must be mutual assent to constitute a binding contract of subscription, an offer to one person or corporation cannot be accepted by another. And it necessarily follows that a person who subscribes for stock in a corporation to be formed, and who does not consent to any change in

upon by the subscribers or the person or persons authorized to form the corporation, the law implies an acceptance by the corporation." *Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335.

Where the subscription is necessary to the validity of the organization, and the corporate officers make use of it as a basis for securing a loan which would not otherwise have been made, an acceptance will be conclusively implied. *Rutenbeck v. Hohn*, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698.

Where an arrangement whereby promoters are to receive stock for property and services has been carried out, it is not necessary to show formal action on the part of the corporation making them stockholders. *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

Whether or not there was such an implied acceptance is ordinarily a question of fact. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

⁸² *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587, 113 N. W. 245.

⁸³ *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

In such case the acceptance relates back to the formation of the company. *Mackey Baking Co. v. Mackey*, 19 Pa. Dist. 401.

⁸⁴ *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

⁸⁵ Where the statute requires the certificate of incorporation to be signed by all of those who are to hold stock in it as originally organized, the statute itself supplies the acceptance immediately upon the filing of the papers necessary to constitute the corporation, and the contract thereupon becomes an executed one and the relationship of stockholders immediately arises. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

Upon the formation of the corporation the subscribers become stockholders, because the subscriptions are for the benefit of the corporation and its acceptance of them will be presumed unless they were previously withdrawn. *Mackey Baking Co. v. Mackey*, 19 Pa. Dist. 401.

"By the act of incorporation, without more, the original subscribers become members of the corporation, entitled to all the rights and privileges of membership * * *." *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947. And see to the same effect, *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465.

At the moment when the conditions required by law as preliminary to the granting of a charter are complied with, the subscribers become stockholders. *Cartwright v. Dickinson*, 88 Tenn. 476, 70 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

the subscription, is not liable if the corporation which is afterwards formed, and which seeks to enforce the subscription, is a different corporation from that contemplated by the subscription. In such a case, no contract at all is formed.⁸⁶ The subscriber is entitled to stand upon the contract he has made, and cannot be compelled to accept a different one regardless of whether it is more or less favorable to him.⁸⁷

For this reason, where a number of persons sign a paper agreeing to take stock in a corporation to be formed under a general law, and some of the parties, on refusal of a certificate of incorporation by the attorney general under the general law, procure from the legislature a special act of incorporation, the corporation cannot enforce the subscriptions against the parties not consenting, since it is not the corporation contemplated by them. And it makes no difference that the corporation is created for the same purposes as were contemplated.⁸⁸ The principle also applies where the corporation, although formed under the law under which it was intended to be formed, is formed for other purposes or with other powers than those contemplated by the subscribers, or, in other words, where there is a material change in its character or purpose.⁸⁹

⁸⁶ **Alabama.** *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

California. *Marysville Elec. Light & Power Co. v. Johnson*, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016, citing *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396.

Illinois. *Thrasher v. Pike County R. Co.*, 25 Ill. 393.

Kentucky. *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423; *Knottsville Roller Mill Co. v. Mattingly*, 18 Ky. L. Rep. 246, 35 S. W. 1114.

Maine. *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480; *Richmond Factory Ass'n v. Clarke*, 61 Me. 351; *Machias Hotel Co. v. Coyle*, 35 Me. 405, 58 Am. Dec. 712.

Massachusetts. *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116.

New York. *Dorris v. Sweeney*, 60 N. Y. 463.

Texas. *Baker v. Ft. Worth Board*

of Trade, 8 Tex. Civ. App. 560, 28 S. W. 403.

Virginia. *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557, 16 S. E. 877.

West Virginia. *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

⁸⁷ *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736.

⁸⁸ *Richmond Factory Ass'n v. Clarke*, 61 Me. 351.

⁸⁹ **Alabama.** *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

Arkansas. *El Dorado Farmers' Union Warehouse Co. v. Eubanks*, 94 Ark. 354, 126 S. W. 1075.

California. *Marysville Elec. Light & Power Co. v. Johnson*, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016; *Hanford Mercantile Store v. Sowlevere*, 11 Cal. App. 261, 104 Pac. 708.

Georgia. *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406; *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78; *Midland*

The subscriber consents to the performance of all things reasonably necessary and incident to the accomplishment of the avowed purpose,⁹⁰

Hotel Co. v. Alexander, 14 Ga. App. 8, 80 S. E. 24; **Midland City Hotel Co. v. Gibson**, 11 Ga. App. 829, 76 S. E. 600. See also **Bing v. Bank of Kingston**, 5 Ga. App. 578, 63 S. E. 652.

Indiana. See **Burke v. Mead**, 159 Ind. 252, 64 N. E. 880.

Iowa. **Union Agricultural & Stock Ass'n v. Neill**, 31 Iowa 95.

Kentucky. **Owensboro Seating & Cabinet Co. v. Miller**, 130 Ky. 310, 113 S. W. 423.

New York. **Woods Motor Vehicle Co. v. Brady**, 181 N. Y. 145, 73 N. E. 674, rev'g 90 App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 Misc. 79, 78 N. Y. Supp. 203; **Dorris v. Sweeney**, 60 N. Y. 463. See also **Lowville & B. River R. Co. v. Elliott**, 115 App. Div. 884, 101 N. Y. Supp. 328, aff'd 196 N. Y. 545, 89 N. E. 1104.

Texas. **Baker v. Ft. Worth Board of Trade**, 8 Tex. Civ. App. 560, 28 S. W. 403.

Virginia. **Norwich Lock Mfg. Co. v. Hockaday**, 89 Va. 557, 16 S. E. 877.

West Virginia. **Clarksburg Board of Trade Land Co. v. Davis**, — W. Va. —, 86 S. E. 929; **West End Real Estate Co. v. Nash**, 51 W. Va. 341, 41 S. E. 182.

Wisconsin. **Smith v. Burns Boiler & Manufacturing Co.**, 132 Wis. 177, 111 N. W. 1123.

England. In re **Russian (Vyksounsky) Iron Works Co. (Stewart's Case)**, L. R. 1 Ch. App. 574; **Webster's Case**, L. R. 2 Eq. 241; **Downes v. Ship**, L. R. 3 H. L. 343, aff'g 2 De G. J. & S. 544. See also **Oakes v. Turquand**, L. R. 2 H. L. 325.

A subscriber is released, where the purpose stated in the subscription was to erect a hotel on certain described property in a certain city, while the

charter authorized the corporation to conduct the business of a hotel company anywhere. **Midland City Hotel Co. v. Gibson**, 11 Ga. App. 829, 76 S. E. 600, followed in **Midland Hotel Co. v. Alexander**, 14 Ga. App. 8, 80 S. E. 24.

A promise to no particular party to subscribe for a certain number of shares for a particular purpose cannot be enforced by a corporation formed for a different purpose, nor can the legislature confer the right to enforce such promise upon it. **Pittsburgh & S. R. Co. v. Gazzam**, 32 Pa. St. 340.

A subscriber is not relieved by a mere difference in the language of the prospectus and the memorandum of association, but the test is whether the obligations incurred under the two documents were substantially different. **Downes v. Ship**, L. R. 3 H. L. 343, aff'g 2 De G. J. & S. 544.

A subscriber to stock in a company to be organized for the purpose of building a railroad is not released because the certificate of incorporation is for the purpose of "building, maintaining and operating a railroad." **Lowville & B. River R. Co. v. Elliott**, 115 N. Y. App. Div. 884, 101 N. Y. Supp. 328, aff'd 196 N. Y. 545, 89 N. E. 1104.

See also **Nixon v. Brownlow**, 3 H. & N. 686, where it was held that the company established was in effect the one contemplated by the subscribers' agreement; and **Norman v. Mitchell**, 5 De G. M. & G. 648, where it was held that a charter was not inconsistent with the subscription contract.

⁹⁰ **El Dorado Farmers' Union Warehouse Co. v. Eubanks**, 94 Ark. 354, 126 S. W. 1075; **Comanche Cotton Oil Co. v. Browne**, 99 Tex. 660, 92 S. W.

and is not released because the charter mentions objects not specifically included in the contract, provided they fall reasonably within the objects thereby sought to be obtained,⁹¹ nor because incidental powers are obtained which are not usually employed in an enterprise of the character described, where the object expressed in the charter is substantially the same as that referred to in the subscription,⁹² nor because the charter does not contain all the specific provisions as to the management of the corporation which are found in the subscription list.⁹³ In other words, "if the powers as expressed in the charter are proper and convenient means directly tending to the accomplishment of the main purpose as set out in the subscription agreement," there is no variance.⁹⁴

"What is and what is not too remote from the main purpose must be determined by the particular facts of each case."⁹⁵

The abbreviation, "etc.," following the enumerated purposes in the contract will either be disregarded as surplusage or construed to

450, rev'g — Tex. Civ. App. —, 90 S. W. 528. See also *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

⁹¹ See *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929.

Where the purpose as expressed in the subscription is the erection and operation of a cottonseed oil mill, the subscriber is not released because the charter gives as an additional purpose, "to erect, own and operate whatever cotton gins may be necessary and proper as feeders for said oil mill," since the corporation would have had incidental power to erect and operate such gins as were reasonably necessary to the operation of its cottonseed oil mill, even if it had not been expressly conferred. *Comanche Cotton Oil Co. v. Browne*, 99 Tex. 660, 92 S. W. 450, rev'g — Tex. Civ. App. —, 90 S. W. 528.

⁹² *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 828, 78 S. E. 600.

⁹³ Such as the qualifications of directors with regard to residence, the method of filling vacancies, and the

like. *Petrie v. Coulter*, 10 Okla. 257, 61 Pac. 1058.

⁹⁴ *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406. And see to the same effect, *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

This is merely an application of the rule that the grant of an express power carries with it the right to do any act which may be found reasonably necessary to effect the power expressly granted. *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406.

A subscriber to stock "for the purpose of organizing the Sparta Cotton Mill" is not released because the charter, in addition to stating the purpose of the corporation as the manufacture and sale of cotton goods, gives it power "to conduct such branch establishments and business as are found to be useful to the main enterprise." *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406.

⁹⁵ *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406.

mean other things of like character or those within the rule of *ejusdem generis*.⁹⁶

Usually a nonconsenting subscriber is released, where other separate and distinct purposes are added to those originally contemplated.⁹⁷

⁹⁶ A subscription to stock in a corporation to be formed for the purpose of "acquiring and carrying on a general producing and merchandising business, etc.," cannot be enforced by a corporation whose articles include in addition to such purpose dealing in real property, and in bonds and mortgages, and acquiring and managing storage warehouses, in the absence of any evidence showing what other lines of business were intended to be included or might by custom or otherwise be correlated to the business named in the subscription. *Hanford Mercantile Store v. Sowlevere*, 11 Cal. App. 261, 104 Pac. 708.

⁹⁷ *Hanford Mercantile Store v. Sowlevere*, 11 Cal. App. 261, 104 Pac. 708; *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557, 16 S. E. 877; In re *Russian (Vyksounsky) Iron Works Co. (Stewart's Case)*, L. R. 1 Ch. App. 574; *Webster's Case*, L. R. 2 Eq. 241; *Downes v. Ship*, L. R. 3 H. L. 343, aff'g 2 De G. J. & S. 544.

"A subscriber will not, without his consent, be compelled to pay money toward the formation of a corporation for an additional and distinct purpose." *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406.

A corporation formed for the purpose of "producing electricity and power" cannot enforce a preliminary subscription for stock in a corporation to be formed for the purpose of "furnishing the incandescent system of electric lighting." *Marysville Elec. Light & Power Co. v. Johnson*, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

Where subscriptions were obtained in connection with a prospectus which

stated that the purpose of the corporation was to acquire all patents and rights to certain specified metal-turning machines, but the purposes stated in the certificate of incorporation were "to make, contract for the manufacture or purchase of, buy, use, sell, lease, rent, or mortgage all mechanical or other apparatus, machinery, and implements for metal-turning machines, or any other article or articles connected therewith or incident thereto, or any or all of them, and in general to do a manufacturing business" it was held that nonconsenting subscribers were released. *Stern v. McKee*, 70 N. Y. App. Div. 142, 75 N. Y. Supp. 157.

A nonconsenting subscriber is discharged where the object of the corporation as stated in the subscription agreement is "dealing in automobiles and motor vehicles," while the object stated in the certificate of incorporation is "the manufacturing, leasing, purchasing and selling of all kinds of automobiles, motor vehicles and other vehicles." *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 73 N. E. 674, rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203.

Where the purpose as stated in the prospectus is to build a hotel, while the articles of incorporation state that the purpose is "to construct and operate a hotel and restaurant," the subscriber is discharged. *Ginter v. Blain*, 21 Ohio Cir. Ct. (N. S.) 366.

One who subscribes to stock in a corporation to be formed for the purpose of erecting and operating a cotton warehouse at or near a certain city cannot be held where the charter specifies the purposes as "The pur-

It has been held that the mere fact that the charter gives the right to engage in other businesses than those contemplated will not release the subscriber, where no attempt has been made to exercise any such power,⁹⁸ while on the other hand there is authority to the effect that the subscriber will be released if the charter authorizes a fundamental departure from the purposes as expressed in the subscription, though there has been in fact no attempt to depart from it.⁹⁹

The subscriber is released where the corporation is formed under the laws of a different state than the one contemplated,¹ at least where the stock is thereby rendered less valuable and desirable than it otherwise would have been,² or where it is formed for a longer

chase, operation and maintenance of cotton compresses, gins, grain elevators, wharves and public warehouses for the storage of any and all kinds of produce and commodities and the purchase and sale of same, and the carrying on of a general warehouse business." *El Dorado Farmers' Union Warehouse Co. v. Eubanks*, 94 Ark. 354, 126 S. W. 1075.

In *Dorris v. Sweeney*, 60 N. Y. 463, it was held that there was no liability on a subscription for stock in a corporation for the purpose of purchasing a patent for the purpose of preserving fruit and other products out of season, erecting a building, and stocking it with fruits to be preserved, where the corporation was formed under the general law authorizing the formation of manufacturing companies, and for the purpose, as stated in its articles of association, of manufacturing preserved fruits, canning fruits and other products, and preserving and keeping fruits and other articles from decay.

Where the purpose is changed from that "of purchasing, improving, and disposing of several valuable tracts of land" in a specified city to that of purchasing, holding, improving and disposing of real estate, securities and personal property generally, issuing and disposing of bonds, etc., nonconsenting subscribers are released. *West*

End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182.

⁹⁸ *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481. It is to be noted that in the above case the court holds that the words claimed to permit the carrying on of additional businesses were evidently intended to cover such business as might be incidental and necessary to the main business, and the doing of which might necessarily grow out of it.

⁹⁹ *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600. In this case the court says it may be that if the charter states the business named in the subscription as a particular business to be carried on, the subscriber will not be released, though the charter grants authority to enter into other businesses not strictly within the usual scheme of the enterprise stated, if no attempt has been made to exercise such power.

¹ *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116; *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 180 S. W. 899. See also *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

² *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

period than that contemplated,³ or with a greater⁴ or less⁵ amount of capital stock than is specified in the contract, or where the capital stock is increased at the organization meeting,⁶ or where the subscription is for stock in an unincorporated joint stock company, and the association is incorporated.⁷

The subscriber is not released by changes which his contract with

To hold him liable under such circumstances "would be to hold him to something to which he did not agree, and there would be no meeting of the minds and no contract." *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681.

³ *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738. But see *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

A subscriber is released where the amount of the capital is greater and the object and scope of the enterprise are different. *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557, 16 S. E. 877; *Baker v. Ft. Worth Board of Trade*, 8 Tex. Civ. App. 560, 28 S. W. 403.

⁴ Thirty thousand dollars instead of twenty-five thousand dollars. *Middlecoff Hotel Co. v. Yeomans*, 89 Ill. App. 170.

One hundred and fifty thousand dollars instead of fifty thousand dollars. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316. See *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

He is released where the corporation has the right to fix the amount of its stock by by-laws, and is organized with a capital stock of thirty-five thousand dollars instead of thirty thousand dollars, as had been specified. *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736.

⁵ *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

Ten thousand dollars instead of fifteen thousand dollars. *Bohn v. Bur-*

ton-Lingo Co., — Tex. Civ. App. —, 175 S. W. 173.

This also applies where it is formed with a less amount of paid up capital. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 180 S. W. 899.

See also *Nixon v. Brownlow*, 3 H. & N. 686, where a reduction in the amount of the capital was held not to have released the subscriber, in view of the provisions of the subscription agreement.

⁶ The subscriber cannot be held personally liable on his subscription in such case. *Katama Land Co. v. Jernegan*, 126 Mass. 155.

The stock of a proposed corporation was oversubscribed, and at the organization meeting a committee was appointed to report the names of subscribers to the amount as originally fixed. Their report did not include the name of the defendant. The meeting then voted to increase the stock and to admit all subscribers to the company. It was held that the defendant could not be held liable on his original contract of subscription for subsequent assessments, though he had paid assessments with knowledge of the facts. The court refused to decide whether such payments constituted a new contract, since only the original agreement was declared on. *Katama Land Co. v. Jernegan*, 126 Mass. 155.

⁷ *Knottsville Roller Mill Co. v. Mattingly*, 18 Ky. L. Rep. 246, 35 S. W. 1114; *Machias Hotel Co. v. Coyle*, 35 Me. 405, 58 Am. Dec. 712.

the promoters authorizes them to make,⁸ nor because of immaterial changes made in the articles after his subscription and before their acknowledgment, as for example, where provisions are inserted which the law would otherwise imply.⁹

A mere change in the name of the proposed corporation will generally be regarded as immaterial, if there is no change in its character or objects, and will not discharge the subscriber,¹⁰ unless he shows facts making it material.¹¹ And especially is this true where the subscription contract specifically provides that the name may be changed.¹² But in order to authorize a recovery on the subscription contract by a corporation bearing a different name, it must appear from the contract or otherwise that the two names refer to the same corporation, and that the subscription was intended to be to the stock of the corporation actually formed.¹³

§ 525. — Waiver, estoppel and laches as affecting difference in formation. The objection that the corporation as formed is materially different from the corporation contemplated in the contract may be waived, or the subscriber may be estopped to set it up.¹⁴ And

⁸ *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306.

⁹ *Union Agricultural & Stock Ass'n v. Neill*, 31 Iowa 95.

¹⁰ *Alabama*. *Sample v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

California. *Mahan v. Wood*, 44 Cal. 462.

Kansas. See *McCormick v. Great Bend Gas & Fuel Co.*, 48 Kan. 614, 29 Pac. 1147.

New York. *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334, 51 N. Y. Supp. 969.

Washington. *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523.

As, for example, a change from "Independent Packet Co." to "Planters' and Merchants' Independent Packet Co.," Planters' & Merchants' Independent Packet Co. v. Webb, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977; or from "The Co-operative Furniture Manufacturing Company" to "Co-operative Furniture & Coffin Manufac-

turing Company," *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173; or the addition of the words "of St. Louis." *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

The minutes of the meetings of the subscribers, if identified or shown to be correct, or authoritatively made, are admissible for the purpose of showing that there was no material departure from the original charter and purposes. *Sample v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

¹¹ It is incumbent upon him to plead and prove such facts. *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

¹² *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929.

¹³ *Harrison Nat. Bank of Cadiz v. Votaw*, 51 Kan. 362, 32 Pac. 1111.

¹⁴ *California*. *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 583, 59 Pac. 136.

generally it is not available to a subscriber who has participated as such in the organization of the corporation,¹⁵ or has held himself

Kentucky. See *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

Oregon. See *Nickum v. Burekhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, — Tex. Civ. App. —, 180 S. W. 936; *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 180 S. W. 899; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

West Virginia. *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

Wisconsin. *Smith v. Burns Boiler & Manufacturing Co.*, 132 Wis. 177, 111 N. W. 1123.

¹⁵ *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

One who participates in the organization of a corporation cannot escape liability on his subscription on the ground that the purposes stated in the articles of incorporation differ from those stated in the original agreement for organization, or in the subscription. *Nickum v. Burekhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788.

A subscriber who, by proxy, participates in the organization of the corporation, and makes payments on his subscription after its organization, is estopped to deny his liability on the ground that the corporation was formed with a less amount of capital than that contemplated in the subscription contract. *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439.

A stockholder who appoints a representative to act for him at a meet-

ing at which it is determined to incorporate under the laws of a particular state with a specified amount of paid up capital, and who deals with the corporation after its organization, cannot escape liability on his subscription on the ground that it was organized under the laws of a different state and with a less amount of paid up capital than that specified in the subscription contract. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 180 S. W. 899.

Where mention was made to a subscriber to capital stock that on a specified date a meeting of the subscribers would be held to execute the corporate charter, and she replied that she could not attend, but that whatever the other subscribers should do would be satisfactory to her, it was held that this meant merely that anything the other subscribers did in fulfillment of the contract she had entered into would be satisfactory and that she was not thereby barred from objecting to the adoption of a charter materially extending the powers of the corporation beyond those provided for by the subscription contract. *Comanche Cotton Oil Co. v. Browne*, — Tex. Civ. App. —, 90 S. W. 528.

In *Smith v. Burns Boiler & Manufacturing Co.*, 132 Wis. 177, 111 N. W. 1123, it was held that a subscriber did not waive the right to withdraw because of the changed purposes of the corporation by attending and participating in the organization meeting, where he did nothing evidencing a purpose to do so, and did not vote on a motion to adopt the articles as filed, but attempted to speak against it. In this case it was also held that the fact that the notice of the meeting designated the corporation as the

out and acted as a stockholder, and has taken part in the affairs of the corporation,¹⁶ or has paid calls or assessments on his stock,¹⁷ or has sold his stock or exchanged it for stock in another corporation.¹⁸

The right to repudiate the contract may also be lost by laches, or

“Burns Boiler & Manufacturing Company” instead of the “Burns Boiler Works,” which it had previously been called by the subscribers, was not such a departure as to suggest that those attending the meeting would thereby become bound as stockholders in a corporation with purposes different from those contemplated.

The burden is upon the corporation to show participation, in a suit against it to cancel the subscription. *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

¹⁶ *Lyell Ave. Lumber Co. v. Light-house*, 137 N. Y. App. Div. 422, 121 N. Y. Supp. 802.

Where a subscriber votes at meetings or otherwise acts as a stockholder after organization, he cannot escape liability on his subscription by setting up that the corporation was formed for a different purpose or for a longer period than was provided for in his subscription. *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

A person who subscribes for stock in a corporation to be formed, and who afterwards pays part of his subscription, votes at elections, and receives dividends, is estopped, in a suit to recover the balance of his subscription, to set up that the corporation as organized is of a different nature from the one contemplated when he subscribed. *Barlow v. Wren*, 1 Walk. (Pa.) 297.

A subscriber who is present at the directors' meeting at which the subscription agreement is accepted, accepts his stock, and pays a part of his subscription, thereby admits that the corporation formed was the one con-

templated in his agreement and cannot escape liability on the ground that it was not formed by the persons who signed the subscription agreement, but by one of such persons and four others who were not such signers. *Ferrochem Co. of Pennsylvania v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

¹⁷ *California*. *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 583, 59 Pac. 136.

Georgia. *Midland City Hotel Co. v. Palace Market Co.*, 17 Ga. App. 704, 87 S. E. 1100.

Missouri. *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439.

Pennsylvania. *Barlow v. Wren*, 1 Walk. 297.

Virginia. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

West Virginia. *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

¹⁸ *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

The corporation is not precluded from claiming that an exchange of the stock constituted a waiver because such exchange was induced by false representations, where the persons making them were not its agents. *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

An additional reason for denying the right to rescind under such circumstances is that the status quo cannot be restored. *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

in other words, by a failure to repudiate it promptly on discovering the changes.¹⁹

A mere refusal to pay calls will not amount to a repudiation within the meaning of this rule.²⁰ Knowledge is essential as a basis for assent to the change, and it will not be held that one has waived a violation of his right when he has no knowledge that it has been violated.²¹ Nor will a failure promptly to repudiate the contract after the granting of the charter prevent the interposition of this defense as against the corporation, where the subscriber has no actual knowledge of the change.²² But it has been held that actual knowledge is not necessary where the subscriber votes in right of his subscription at the organization meeting, since he thereby admits that he is still a corporator, and hence is subject to the rule that corporators must be held cognizant of the terms of the charter.²³ And it has also been held that where the rights of creditors are involved knowledge may be conclusively imputed to him because of his failure to exercise due diligence in ascertaining the facts as to the changes,²⁴

¹⁹ *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306.

Subscribers who accept certificates of stock, make partial payment, and retain the stock for six years without objection, cannot escape liability to creditors on the ground of variance. *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 583, 59 Pac. 136.

²⁰ *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306.

²¹ *Midland Hotel Co. v. Alexander*, 14 Ga. App. 8, 80 S. E. 24; *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929; *In re Russian (Vyksounsky) Iron Works Co. (Stewart's Case)*, L. R. 1 Ch. App. 574. See also *Smith v. Burns Boiler & Manufacturing Co.*, 132 Wis. 177, 111 N. W. 1123.

The fact that the subscriber acknowledges the certificate of incorporation before a justice of the peace will not constitute a new contract or estop him from relying on the defense that the amount of the corporate stock has been increased, where he was ignorant of the change.

Hughes v. Antietam Mfg. Co., 34 Md. 316.

His attendance at a meeting called for the purpose of correcting a variance between the prospectus and the memorandum of association will not be deemed an acquiescence in other variances of which he has no knowledge. *In re Russian (Vyksounsky) Iron Works Co. (Stewart's Case)*, L. R. 1 Ch. App. 574.

²² *Baker v. Ft. Worth Board of Trade*, 8 Tex. Civ. App. 560, 28 S. W. 403.

²³ Especially is this true where the certificate of incorporation is read at the meeting. *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

²⁴ Although the subscriber has no actual knowledge of material alterations in the charter, he will be presumed, as a matter of law, to have assented to or acquiesced in them, where, after the lapse of considerable time from the granting of the charter, he pays an assessment and accepts a stock certificate; and if, after his

and also that where the charter has been filed for record pursuant to law, he is bound to take notice of its provisions in any subsequent dealings he may have with the company.²⁵

One is not estopped to deny liability on the ground that the corporation was formed with a larger capital than that specified in his subscription contract by the fact that he was a member of the first board of directors, where he resigned before the amount of capital was fixed, nor by reason of the fact that he attended a stockholders' meeting before that time.²⁶

§ 526. Consideration and mutuality—In general. In the absence of provision to the contrary in the charter of a corporation or the general law, a subscription to its capital stock is not binding unless there is a consideration. In this respect, it is like any other contract.²⁷ Obviously there must be mutuality of obligation, as in other

subscription, the corporation incurs debts equal to or greater than the amount of the subscription and these debts are unpaid, a recovery may be had for the unpaid balance of the subscription, regardless of whether the corporation is solvent or insolvent. *Midland City Hotel Co. v. Palace Market Co.*, 17 Ga. App. 704, 87 S. E. 1100.

A subscriber cannot escape liability as to creditors after the company becomes insolvent, where he has failed to exercise proper diligence in examining the charter. *Oakes v. Turquand*, L. R. 2 H. L. 325. But see *In re Russian (Vyksounsky) Iron Works Co. (Stewart's Case)*, L. R. 1 Ch. App. 574; *Webster's Case*, L. R. 2 Eq. 241.

The subscriber must claim his exemption from liability within a reasonable time after the memorandum of association has been issued, or he will be debarred by his laches from doing so; and this is especially true as against other stockholders or creditors. *Downs v. Ship*, L. R. 3 H. L. 343, aff'g 2 De G. J. & S. 544.

But this rule of reasonable time will not apply where the contest is between the subscriber and the person who prepared the prospectus and afterwards issued the memorandum of

association. *Downs v. Ship*, L. R. 3 H. L. 343, aff'g 2 De G. J. & S. 544.

²⁵ Under such circumstances he is estopped to deny knowledge of its provisions, however much they may differ from the contract of subscription. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

²⁶ *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736.

²⁷ **Alabama.** *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325, 343.

Maryland. *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 595, 89 Am. Dec. 760.

Massachusetts. *Essex Turnpike Corporation v. Collins*, 8 Mass. 292.

Michigan. *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23.

Minnesota. *New York & M. Gold Min. Co. v. Martin*, 13 Minn. 417.

New York. *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. 317.

Ohio. *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517. See also *Leshner v. Karshner*, 47 Ohio St. 302, 24 N. E. 882.

Pennsylvania. *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

bilateral contracts. If for any reason the corporation is not bound, the subscriber is not bound, and vice versa.²⁸ It has been held, there-

Texas. *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

An agreement to take and pay for a certain number of shares of stock in a corporation is not enforceable, where the corporation does not make any promise and has not done or become liable to do any act or thing. *New York & M. Gold Min. Co. v. Martin*, 13 Minn. 417.

A provision in an agreement to take and pay for stock that a certain number of shares shall be paid to trustees to be held by them for the benefit of and subject to the direction of the company does not constitute a legal consideration therefor. *New York & M. Gold Min. Co. v. Martin*, 13 Minn. 417.

“In the case of mutual promises, where the promise of one party is the consideration of that of the other, they must be concurrent and obligatory upon each at the same time, in order to render either binding.” Hence where the subscription is made upon condition, the fact that the company subsequently performs the conditions does not of itself constitute a sufficient consideration, if it does not appear that at the time of the execution of the agreement it agreed to perform them as the consideration for the contract. *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. (N. Y.) 317.

An agreement to convey real estate to a promoter in payment of subscription to stock in a mining company having a partially developed claim is supported by a consideration. *Coles v. Kennedy*, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088.

²⁸**Alabama.** *White v. Kahn*, 103 Ala. 308, 15 So. 595.

Georgia. *Allen & Co. v. Hastings*

Industrial Co., 2 Ga. App. 291, 58 S. E. 504.

Indiana. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Maryland. *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 595, 89 Am. Dec. 760.

Massachusetts. *Essex Turnpike Corporation v. Collins*, 8 Mass. 292.

Michigan. *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23.

Minnesota. *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *New York & M. Gold Min. Co. v. Martin*, 13 Minn. 417.

New York. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336, dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case; *Sanders v. Barnaby*, 166 App. Div. 274, 151 N. Y. Supp. 580; *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. 317.

Ohio. *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517.

“A stock subscription is a transaction between the subscriber and the company, and the obligation of one can only be sustained by the corresponding obligation of the other. If both are not bound, neither is bound, and the transaction is a nullity.” *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315.

“There must be mutuality. The stockholder must be in a position to enforce his rights, and compel the corporation to recognize him as a stockholder. The corporation must be able to enforce the subscription agreement.” *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust*

fore, that where an oral subscription for stock is not binding upon the corporation, and does not make the subscriber a stockholder, because a statute requires subscriptions to be in writing, a note given in payment of such a subscription is void for want of consideration.²⁹ And, similarly, where the subscription contract is within the statute of frauds and is not enforceable against the corporation because not signed by it, the corporation cannot enforce it.³⁰ And where a subscription is not binding upon the corporation until a specified amount of capital has been subscribed, it is not binding upon the subscriber until that time.³¹ Nor is the subscriber bound where the corporation has no capacity to issue the stock subscribed for, as in the case of subscriptions to stock issued in excess of the amount allowed by law.³²

Co., 13 Colo. 587, 22 Pac. 954, quoted in *Lilylands Canal & Reservoir Co. v. Wood*, 56 Colo. 130, 136 Pac. 1026.

Though the subscription is made upon other conditions than those named in the articles of incorporation, the acceptance by the company of a payment made by the subscriber shows a sufficient concurrence in such conditions to create mutuality. *Nichols v. Burlington & L. County Plank Road Co.*, 4 Greene (Iowa) 42.

A provision in the contract that, until the organization of the corporation, the subscription is subject to the acceptance or rejection of the commissioners, does not render it unenforceable for want of mutuality, after the organization of the corporation, where it was never rejected and no act was done disaffirming it. *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

In *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336, 354, Judge Selden said: "The rules of the common law, in regard to consideration and mutuality, do not apply to the case. Those rules may, I think, be regarded as superseded by the statute, which not only expressly authorizes subscriptions to be made in anticipation of the existence of the corporation, but impliedly, at least, recognizes their validity. Section 4 of the act by which

the plaintiffs are incorporated provides, among other things, as follows: 'And the said commissioner shall, at the time of any subscription, require the payment to them, by the person or persons subscribing, of five dollars towards and upon every hundred dollars so subscribed, and unless the same shall be paid the subscription shall be invalid.' This plainly implies that if the required payment is made the subscription shall be valid. But even without this clause it would, I think, be held that a statute which authorizes subscriptions in view of a subsequent incorporation, and regulates the manner in which they shall be made, must necessarily have the effect to give validity to such subscriptions, if made in accordance with the requirements of the act."

²⁹ *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517.

³⁰ *Co-operative Tel. Co. v. Katus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

³¹ *Allen & Co. v. Hastings Industrial Co.*, 2 Ga. App. 291, 58 S. E. 504.

³² *Seoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Where a corporation is not bound by a subscription because of want of authority on the part of the person who accepted the same, the subscriber is not bound.³³

A subscription for stock in a telephone company, or a note given in payment therefor, is void for want of consideration, where the business of the company is an infringement.³⁴

If a subscription has been accepted by the corporation, or an offer of shares by the corporation has been accepted by subscribing, and statutory or charter requirements have been complied with, there is a sufficient consideration for the promises of both parties; the subscriber's promise to pay his subscription being supported by the corporation's obligation to recognize him as a stockholder, and pay him his proportion of any dividends, etc., or by its agreement to construct works or carry out the undertaking, or by the payment of money, or incurring of obligations, etc., and the promises on the part of the corporation being supported by the subscriber's promise, express or implied, to pay his subscription.³⁵

For a discussion of the effect of an unauthorized increase of stock, see § 524, *supra*.

³³ *Essex Turnpike Corporation v. Collins*, 8 Mass. 292.

³⁴ *Clemshire v. Boone County Bank*, 53 Ark. 512, 14 S. W. 901.

³⁵ *United States*. See *Greene v. Signa Iron Co.*, 88 Fed. 203.

Alabama. *Selma & T. R. Co. v. Tip-ton*, 5 Ala. 787, 39 Am. Dec. 344.

Connecticut. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

Illinois. *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Griswold v. Peoria University*, 26 Ill. 41, 79 Am. Dec. 361. See also *Tonica & P. R. Co. v. McNeely*, 21 Ill. 71.

Indiana. *Bish v. Bradford*, 17 Ind. 490; *Johnson v. Wabash & Mt. V. Plank Road Co.*, 16 Ind. 389.

Iowa. See *Fordyce v. Humphrey*, 152 Iowa 76, 131 N. W. 686; *First Nat. Bank of Cedar Rapids v. Hurford*, 29 Iowa 579.

Kentucky. *Bullock v. Falmouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129; *Instone v. Frankfort Bridge Co.*, 2 Bibb 576, 5 Am. Dec. 638.

Maine. *York & C. R. Co. v. Pratt*, 40 Me. 447; *Kennebec & P. R. Co. v. Palmer*, 34 Me. 366; *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

Maryland. *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 595, 89 Am. Dec. 760.

Massachusetts. *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *Society of Middlesex Husbandmen & Manufacturers v. Davis*, 3 Mete. 133.

Minnesota. *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112, 1 N. W. 827; *Minneapolis & St. L. R. Co. v. Bassett*, 20 Minn. 535, 18 Am. Rep. 376.

Mississippi. *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347; *Hayne v. Beauchamp*, 5 Smedes & M. 515.

New Hampshire. *Osborn v. Crosby*, 63 N. H. 583, 3 Atl. 429.

New York. *Whittlesey v. Frautz*, 74 N. Y. 456; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Buffalo & N. Y. City R. Co. v. Dudley*,

In those states where a subscription by a number of persons to stock in a corporation to be thereafter formed by them is regarded as a contract between the subscribers,³⁶ their mutual promises are

14 N. Y. 336; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Ft. Edward & Ft. M. Plank Road Co. v. Payne*, 17 Barb. 567; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238, 7 Am. Dec. 459; *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 513.

Ohio. *Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20.

Pennsylvania. *Rhey v. Ebensburg & S. Plank Road Co.*, 27 Pa. St. 261.

Texas. *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134; *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145. See also *Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319.

West Virginia. *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929; *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911.

Wisconsin. *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255.

The consideration upon which the subscription rests "is the right secured by it of membership in the corporation, and the interests accruing from membership." *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325, 343.

"The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, or in the nature of a mere open proposition, yet having been accepted and acted on by the

party authorized so to do, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation." *Athol Music Hall Co. v. Carey*, 116 Mass. 471, quoted with approval in *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

Since the consideration may consist of a detriment to the promisee as well as of a benefit to the promisor, if the corporation expends money in the promotion of the corporate enterprise on the faith of the subscription, this is a sufficient consideration to support the subscriber's promise to pay. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

When work has been done, or debts incurred, or expenditures made on the faith of the subscription, it becomes a binding obligation. *Boushall v. Stronach*, — N. C. —, 90 S. E. 198.

In the case of preferred stock authorized and subscribed for after the corporation is fully organized, the implied promise on the part of the corporation to issue the stock is the consideration for the subscriber's promise to pay for it. *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439.

A note given for the subscription price of stock is supported by a sufficient consideration where the corporation accepted the subscriber's application for shares, and he would have been entitled to receive the stock if he had paid the note at maturity. *Brainerd v. Kydd*, 26 Cal. App. 655, 148 Pac. 221.

³⁶ See § 532, *infra*.

regarded as a sufficient consideration to support the subscription of each of them.³⁷

§ 527. — Subscriptions under seal. Since, at common law, a promise or undertaking under seal requires no consideration to support it, a subscription under seal is binding, where the corporation is in existence, although it has not been accepted, and there is no consideration, in all states in which the common-law doctrine still obtains.³⁸ In most states, however, the doctrine that an agreement under seal is binding without any consideration has been abolished by statute, or is not recognized.

37 California. Marysville Elec. Light & Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

District of Columbia. Glenn v. Busey, 5 Mackey 233.

Kentucky. Bullock v. Falmouth & C. H. Turnpike Co., 85 Ky. 184, 3 S. W. 129; Twin Creek & C. Turnpike Road Co. v. Lancaster, 79 Ky. 552.

Missouri. State v. Reynolds, — Mo. —, 186 S. W. 1057, sustaining, on certiorari, the judgment in De Giverville Land Co. v. Thompson, 190 Mo. App. 682, 176 S. W. 409; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435. See also Business Men's Ass'n v. Williams, 137 Mo. App. 575, 119 S. W. 439.

Nebraska. Nebraska Chicory Co. v. Lednický, 79 Neb. 587, 113 N. W. 245.

New York. Hamilton & D. Plank Road Co. v. Rice, 7 Barb. 157.

North Carolina. Boushall v. Stornach, — N. C. —, 90 S. E. 198.

Pennsylvania. McCully v. Pittsburgh & C. R. Co., 32 Pa. St. 25; Steamship Co. v. Murphy, 6 Phila. 224.

Texas. McCord v. Southwestern Sundries Co., — Tex. Civ. App. —, 158 S. W. 226. See also Belton Compress Co. v. Saunders, 70 Tex. 699, 6 S. W. 134; Panhandle Packing Co. v. Stringfellow, — Tex. Civ. App. —, 180 S. W. 145.

West Virginia. Kimmins v. Wilson, 8 W. Va. 584. See also Windsor Hotel Co. v. Schenk, — W. Va. —, 84 S. E. 911.

The mutual agreement or undertaking of all of the subscribers may constitute the consideration for the agreement or undertaking of each. Galveston Hotel Co. v. Bolton, 46 Tex. 633.

The corresponding promises of the other signers and the common object sought to be accomplished by all the parties to the contract constitute a sufficient consideration for the promise of each of them. Marysville Elec. Light & Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

An agreement by subscribers to pay a specified sum on each share in excess of its par value, to be credited to surplus, is supported by a sufficient consideration, each subscriber being interested in the success of the corporation and it appearing that each was required to and did subscribe to said surplus fund in the same proportion. Johns v. Clothier, 78 Wash. 602, 139 Pac. 755.

³⁸ See Hudson Real Estate Co. v. Tower, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465.

And see § 565, *infra*.

§ 528. — **Failure of consideration.** A failure of consideration is a good defense to an action on a subscription for corporate stock³⁹ and entitles the subscriber to rescind and recover back what he has paid.⁴⁰ So where a note is given for stock in a corporation then being organized by the payee, in reliance upon a promise by the latter to place in the treasury of the corporation a certain sum of money and to furnish a bond of indemnity guaranteeing the legality of certain patents under which it is to operate, a failure either to deposit the money or to furnish the bond is a good defense to an action on the note, where the stock is thereby rendered worthless and the maker, because of such failure, has refused to accept the shares for which he subscribed.⁴¹ And there is also a failure of consideration where it is shown that it is not in the power of the corporation to deliver legal stock to the subscriber in accordance with its contract,⁴² or where the subscription is conditional and the condition is not performed,⁴³ or where there is a breach by the corporation of special terms or collateral undertakings which form substantially the whole consideration for the subscription.⁴⁴

But there is not a failure of consideration merely because the enterprise has not proved as profitable as was expected,⁴⁵ or because the stock is of less value than the subscriber expected it to be,⁴⁶ or because the corporation is found not to own certain property which it was

³⁹ *Montgomery Southern R. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Huson Ice & Coal Co. v. Thornton*, 143 Ga. 297, 84 S. E. 969; *State Bank of Indiana v. Mentzer*, 125 Iowa 101, 100 N. W. 69; *Gelpeke, Winslow & Co. v. Blake*, 19 Iowa 263; *McElhinney v. Harte*, 98 Neb. 229, 152 N. W. 367.

⁴⁰ *Commonwealth Bonding & Casualty Ins. Co. v. Curry*, — Tex. Civ. App. —, 183 S. W. 1.

As where an agreement to employ the subscriber is a material part of the consideration for the subscription, and he is discharged without cause. *Brown v. National Elec. Works*, 168 Cal. 336, 143 Pac. 606.

⁴¹ *McElhinney v. Harte*, 98 Neb. 229, 152 N. W. 367.

⁴² *Merrill v. Gamble*, 46 Iowa 615.

⁴³ *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

Under such circumstances a note and mortgage and a lease given to the corporation in payment for the stock will be canceled on the ground that the consideration therefor has failed. *Merchants' & Planters' Ins. Co. v. Reeder*, — Okla. —, 153 Pac. 111.

Where a provision that the subscription shall not be binding until a specified amount of stock has been subscribed for is not complied with, the consideration for notes given for the subscription fails and they are not enforceable. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72.

⁴⁴ See § 601, *infra*.

⁴⁵ *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

⁴⁶ *White v. Butler University*, 78 Ind. 585.

represented to own,⁴⁷ or because it fails to perform its promise to procure and put into the business a certain sum as working capital,⁴⁸ or because the corporation has become bankrupt.⁴⁹

In considering whether there has been a failure of consideration, the distinction between the motive of the subscriber in entering into the contract and the consideration for such contract must not be lost sight of. So there is not a failure of consideration merely because he has not received an incidental benefit which he expected to receive from the completion of the corporate enterprise, since the consideration for his subscription is rather the shares of stock for which he subscribed.⁵⁰ Nor may a person who has signed a written subscription show a consideration adverse to that expressed in the contract, and that the same has failed.⁵¹

§ 529. Incomplete subscriptions. Strictly speaking, an incomplete subscription is no subscription at all. In order that there may be a binding subscription, the parties must, as in the case of other contracts, have reached a complete agreement. If anything remains to be agreed upon or done, there is no contract.⁵²

⁴⁷ Oregon Cent. R. Co. v. Scoggins, 3 Ore. 161.

⁴⁸ Goff v. Hawkeye Pump & Windmill Co., 62 Iowa 691, 18 N. W. 307.

⁴⁹ Galbraith v. McDonald, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

⁵⁰ The fact that a railroad is not located where a subscriber to the stock of the railroad company is assured that it will be, does not constitute a failure of the consideration of his subscription. To contend that it does is confounding the motive actuating the subscriber with the consideration. His motive may have been to secure a road where he supposed the one in question was to be located, but the consideration of his subscription is the stock to which payment of the amount subscribed will entitle him. Miller v. Wild Cat Gravel Road Co., 52 Ind. 51.

For the same reason there is not a failure of consideration because the road has not been built and therefore his property has not been enhanced

in value as he expected it would be. Bish v. Bradford, 17 Ind. 490.

That a railroad has never been completed, but has been sold under a mortgage foreclosure, will not defeat recovery on stock subscriptions on the ground of failure of consideration. Smith v. Gower, 2 Duv. (Ky.) 17.

⁵¹ Gelpcke, Winslow & Co. v. Blake, 19 Iowa 263.

⁵² Alabama. White v. Kahn, 103 Ala. 308, 15 So. 595.

Kentucky. Mercer County Court v. Kentucky River Nav. Co., 8 Bush 300.

Maine. Oldtown & L. R. Co. v. Veazie, 39 Me. 571.

Massachusetts. First Universalist Soc. in Newburyport v. Currier, 3 Mete. 417.

Michigan. Plank's Tavern Co. v. Burkhard, 87 Mich. 182, 49 N. W. 562.

England. Ridgway v. Wharton, 6 H. L. Cas. 268; Winn v. Bull, 7 Ch. Div. 29.

An incomplete subscription cannot

It follows that a person who, prior to the formation of a corporation, signs an informal subscription paper, with the understanding that it is not final, but merely to see what can be done towards the enterprise, and that a formal subscription paper will be presented later, and who refuses to sign the latter paper when presented, is not liable as a subscriber on the formation of the company.⁵³

It also follows that, to render one liable as a subscriber for stock in a corporation by reason of his having signed a subscription paper or articles of association, the paper must be complete. "A signature to an incomplete paper," said Judge Johnson in a New York case, "wanting in any substantial particular, when no delegation of authority is conferred to supply the defect, does not bind the signer, without further assent on his part, to the completion of the instrument."⁵⁴

Articles of association, in which blanks are left for the names of directors, or for any other statements required by the statute, are not complete, and a person who has signed the same in such condition is not liable thereon as a subscriber when the blanks are afterwards filled in without his consent.⁵⁵ It has been held, however, that, when persons sign a subscription book or list for the purpose of influencing other persons to subscribe, with the number of shares to be taken left blank, so that they may afterwards withdraw their subscriptions, the agents of the corporation may fill in the blank, and render their subscriptions binding.⁵⁶ And also that, on an issue as to whether the amount of stock required to bind the subscribers on their contracts has been taken, a person who according to the subscription list subscribed for one share, will not be permitted to testify that he signed

be enforced. *Coppage v. Hutton*, 124 Ind. 401, 7 L. R. A. 591, 24 N. E. 112.

So a subscription by signing the articles or statutory preliminary agreement for the formation of a corporation is incomplete and not binding on the subscriber, where he fails to acknowledge it as required by the statute. *Coppage v. Hutton*, 124 Ind. 401, 7 L. R. A. 591, 24 N. E. 112; *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911; *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

⁵³ *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562. And see *White v. Kahn*, 103 Ala. 308, 15 So. 595.

⁵⁴ *Dutchess & Columbia County R. Co. v. Mabbett*, 58 N. Y. 397.

⁵⁵ *Dutchess & Columbia County R. Co. v. Mabbett*, 58 N. Y. 397. See also *McClelland v. Whiteley*, 15 Fed. 322; *Consols Ins. Ass'n v. Newall*, 3 F. & F. 130.

⁵⁶ As against corporate creditors they are estopped to deny the authority of such agents to do so. *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175.

the list in blank with the understanding with the promoter that he was only to take a quarter of a share.⁵⁷

§ 530. Subscription distinguished from agreement to subscribe in the future. There is undoubtedly a distinction between a subscription to the stock of a corporation to be formed, which, when the corporation is formed and accepts the same, will make the subscriber a stockholder, without any further act on his part, and a mere agreement to subscribe when the corporation shall be formed, although it may sometimes be difficult to ascertain the intention of the parties, and determine whether a particular agreement is the one or the other.⁵⁸ And a similar distinction exists between a present subscription to stock in a corporation already organized and an agreement to subscribe to its stock at some future time.⁵⁹

In the case of a present subscription to the stock of a corporation thereafter to be formed, the agreement is to form a corporation, and subscribe to its stock. The agreement is unconditional and absolute—to form the corporation and take the stock—and, when acted upon by the corporation, is binding and enforceable by it, since that is all that is needful to make the contract of force.⁶⁰ The distinguishing

⁵⁷ Such evidence would vary the terms of the written contract. *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

⁵⁸ *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580, dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, 62, adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case; *Woods Motor Vehicle Co. v. Brady*, 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203, rev'd on other grounds 181 N. Y. 145, 74 N. E. 674; *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969. See also *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Mercer County Court v. Kentucky River Nav. Co.*, 8 Bush (Ky.) 300; *Lowville & B. River R. Co. v. Elliott*, 115 N. Y. App. Div. 884,

101 N. Y. Supp. 328, aff'd 196 N. Y. 545, 89 N. E. 1104; *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947.

In *Niekum v. Burekhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788, it is said that this distinction is not thought to be sound, citing *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578; *Athol Music Hall Co. v. Curry*, 116 Mass. 471.

⁵⁹ *Webb v. Moeller*, 87 Conn. 138, 87 Atl. 277; *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420.

"A mere agreement to subscribe is not enforceable as a subscription." *Van Schaick v. Mackin*, 129 N. Y. App. Div. 335, 113 N. Y. Supp. 408.

⁶⁰ *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580, dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58,

feature of such a contract is that it contemplates no further act on the part of the subscriber after the organization of the corporation in order to complete the subscription.⁶¹ To make it valid and enforceable by the corporation there must be an undertaking on the part of two or more parties to themselves form a corporation to which each agrees to contribute the amount of his subscription.⁶² Similarly, a subscription for an issue of stock of a corporation already organized, when accepted, makes the subscriber a stockholder and liable to calls for the full amount subscribed,⁶³ without any further act of subscription on his part.⁶⁴

A contract to subscribe in the future, on the other hand, does not make one a stockholder immediately upon its acceptance, but is executory in character, and looks to the future for its consummation by a subscription then to be made.⁶⁵ If the corporation is not yet

adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case; *Woods Motor Vehicle Co. v. Brady*, 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203, rev'd on other grounds 181 N. Y. 145, 74 N. E. 674; *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969. See also *Lowville & B. River R. Co. v. Elliott*, 115 N. Y. App. Div. 884, 101 N. Y. Supp. 328, aff'd 196 N. Y. 545, 89 N. E. 1104; *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947.

As to the right of the corporation, when formed, to enforce such contracts, see § 523, supra.

⁶¹ *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580, dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case; *Woods Motor Vehicle Co. v. Brady*, 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203, rev'd on other grounds 181 N. Y. 145, 73 N. E. 674; *Yonkers Ga-*

zette Co. v. Taylor, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

⁶² *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580, dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case, followed in *Avon Springs Sanitarium Co. v. Kellogg*, 125 N. Y. App. Div. 51, 109 N. Y. Supp. 153, aff'd sub nom. *Rankin v. Bush*, 194 N. Y. 567, 88 N. E. 1129. See also *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

⁶³ *Webb v. Moeller*, 87 Conn. 138, 87 Atl. 277.

⁶⁴ *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

⁶⁵ *Webb v. Moeller*, 87 Conn. 138, 87 Atl. 277; *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420. See also *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947.

organized, the agreement is to subscribe for shares when it is organized, and does not make the person entering into it a stockholder upon the formation of the company, but something more remains to be done before he can acquire that status; i. e., the actual subscription.⁶⁶ In other words, there is no contract of subscription making the party a stockholder or entitling the corporation to maintain an action against him as a subscriber, until he has carried out the agreement by formally becoming a subscriber on the books of the corporation, or otherwise.⁶⁷ The only remedy of the corporation, in case of the party's refusal to subscribe in accordance with the agreement, is an action against him for damages for breach of the agreement, and the measure of damages is not necessarily the par value of the stock agreed to be taken, but the actual loss sustained by the corporation, which is ordinarily the difference between the par value and the actual value of the stock.⁶⁸ And if the agreement is merely a contract between those who sign it, the corporation when formed has no right of action thereon, unless the contract can be regarded as one made for its benefit, and the statute permits a person for whose benefit a contract is made to sue on it although he is not a party thereto.⁶⁹

It has been held that an agreement to subscribe for stock of an existing corporation in the future is void as providing for securing the capital stock of the corporation in a way not authorized by the statute, and hence that the corporation cannot recover damages for its breach.⁷⁰

The question whether a particular agreement belongs to one class or the other is largely a matter of construction, and depends on the terms of the contract.⁷¹

⁶⁶ *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580, dissenting opinion in *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58, adopted by the Court of Appeals (189 N. Y. 557, 82 N. E. 1123) in reversing the judgment in that case; *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

⁶⁷ *Thrasher v. Pike County R. Co.*, 25 Ill. 393.

"When the corporation is formed, such agreement is to take shares, which involves a subsequent act—that of formally subscribing to the stock."

Yonkers Gazette Co. v. Taylor, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

⁶⁸ *Thrasher v. Pike County R. Co.*, 25 Ill. 393. See also *Quick v. Lemon*, 105 Ill. 578; *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947.

⁶⁹ See § 532, *infra*.

⁷⁰ *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420.

⁷¹ An agreement between a subscriber to the capital stock of a cor-

The distinction does not rest wholly upon the use of the present, as distinguished from the future, tense.⁷²

It has been held that an agreement to subscribe for a certain amount of stock when books shall be open for subscriptions is not a subscription but a mere executory agreement to subscribe.⁷³ And the same has been held to be true of an instrument reciting: "The undersigned propose to subscribe for the number of shares of \$50 each to the capital stock of the Mt. Sterling Coalroad Company, when the charter shall have been obtained and the company organized, provided that the company receives our subscriptions, payable" in certain

poration and the corporation, modifying a proviso in his subscription by changing the amount to be subscribed by others as a condition precedent, is valid, and does not convert his original subscription into an agreement to subscribe. *Emmitt v. Springfield, J. & P. R. Co.*, 31 Ohio St. 23.

In *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932, it was held that a contention that a provision in the subscription agreement that the first instalment was to be paid "on signing of the contract, after charter has been obtained about July 15, 1905," showed that the parties contemplated the signing of a contract other than the subscription agreement sued on and hence could not be held liable on such agreement, was "so obviously without merit as to require no discussion."

An agreement to take stock in a company provided a charter giving it certain privileges could be obtained has been said to be "no more than a naked expression of the subscriber's intention to purchase certain shares in the capital stock of a company which it was expected would be incorporated by the legislature." *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

In *Philadelphia Medical Pub. Co. v. Wolfenden*, 248 Pa. 450, 94 Atl. 138, an agreement by the defendant with a third person that if the latter would

turn over a publication owned by him to a corporation, yet to be incorporated, the defendant would invest a certain sum in the enterprise, for which he was to receive a certain number of shares of stock, was held not be a stock subscription enforceable by the corporation, especially where the application for the charter did not name the defendant as one of the subscribers.

A direction by one person to another to sign the former's name for a specified number of shares "when they were ready to organize the company," does not authorize a subscription before that time. *Harvey v. Bonta*, 30 Ky. L. Rep. 1226, 100 S. W. 846.

⁷² The fact that the contract provides that a person "will subscribe and pay for" a certain amount of stock does not prevent it from being a present subscription. *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580.

⁷³ *Stowe v. Flagg*, 72 Ill. 397, 402.

It was so held of an agreement that "We, the undersigned, agree to subscribe to the stock of the Pike County Railroad, the sums set against our names, when the books may be opened for subscription." *Thrasher v. Pike County R. Co.*, 25 Ill. 393. See also *Charlotte & S. C. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245.

specified instalments.⁷⁴ And also of an agreement made with a broker employed by a corporation to market an additional issue of stock to take all of such issue for which the broker could not obtain other subscribers.⁷⁵

On the other hand, an agreement providing "the undersigned hereby subscribe" is a subscription.⁷⁶

An agreement which recited a plan to form a corporation for a particular purpose, followed by "We, the undersigned, hereby subscribe for the number of shares set opposite our names," was also held to be a subscription, and not a mere agreement to subscribe.⁷⁷ And the same has been held to be true of an agreement to subscribe a specified sum to the capital stock of a turnpike road company, and to pay the same as soon as the company shall be organized, and the construction of its road commenced;⁷⁸ and of an agreement reciting that certain persons are forming a corporation for a specified purpose followed by "In pursuance of the above, we, the undersigned, * * * agree to subscribe," for the number of shares set opposite their names, and containing an express promise to pay for the shares so subscribed;⁷⁹ and of an agreement "to take twenty shares of the Baltimore & Eastern Shore Railroad Stock when completed to Vienna."⁸⁰

An agreement between individuals that certain of them shall subscribe for stock in an existing corporation does not inure to the benefit

⁷⁴ *Mt. Sterling Coalroad Co. v. Little*, 14 Bush (Ky.) 429. But see *Bullock v. Falmouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129.

⁷⁵ *Webb v. Moeller*, 87 Conn. 138, 87 Atl. 277.

⁷⁶ *Lowville & B. River R. Co. v. Elliott*, 115 N. Y. App. Div. 884, 101 N. Y. Supp. 328, *aff'd* 196 N. Y. 545, 89 N. E. 1104.

⁷⁷ *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

The same rule applies to an agreement that "We, the undersigned, agree to take the number of shares set opposite our names and to pay for same at the rate of \$100.00 each in instalments as called for by the directors hereafter to be elected." *Stone v. Monticello Const. Co.*, 135 Ky. 659,

40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

⁷⁸ *Bullock v. Falmouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129. See also *North Missouri R. Co. v. Miller*, 31 Mo. 19; *Mobile & Ohio R. Co. v. Tandal*, 5 Sneed (Tenn.) 294. And see the cases cited under § 520, *supra*.

And of an agreement to subscribe a specified sum, and to pay the same in instalments, and that the subscription may be subject to a call of ten per cent. as soon as the company is organized. *Twin Creek & C. Turnpike Road Co. v. Lancaster*, 79 Ky. 552.

⁷⁹ *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96.

⁸⁰ *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

of the corporation and it cannot compel them to subscribe, but the benefit of it and any right of action for damages for its breach belongs solely to the individuals with whom it was made.⁸¹

§ 531. Subscription distinguished from agreement that another shall subscribe. A contract by which one person promises that another person shall subscribe for stock in a corporation is not in any sense a contract of subscription by the promisor, so as to render him liable for the full amount of the promised subscription if the other refuses to subscribe. And it is immaterial that he expressly promises to be personally responsible for such subscription. Such a contract, if, indeed, it is not void for impossibility of performance and want of consideration,⁸² is a contract for which the remedy of the corporation, in case the promised subscription is not procured, is an action for damages, the measure of damages being not the full amount of the promised subscription, but the actual loss,—the difference between the amount of the subscription and the value of the stock.⁸³

§ 532. Subscription paper as contract between subscribers. According to some authorities an agreement by a number of persons to take shares in a corporation, to be subsequently formed by them, constitutes a contract between the subscribers,⁸⁴ in which their

⁸¹ *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788.

⁸² It would seem that the promise in such a case is impossible of performance, since the other person cannot be made to subscribe, and is therefore no consideration for the contract on the part of the corporation; and if the corporation is not bound, the promisor is not bound. See *Clark, Contracts*, p. 182; *Ward v. Hollins*, 14 Md. 158; *Stevens v. Coon*, 1 Pinney (Wis.) 356; *Harvy v. Gibbons*, 2 Lev. 161.

⁸³ *Rhey v. Ebensburg & S. Plank Road Co.*, 27 Pa. St. 261.

⁸⁴ *Chicago Bldg. & Mfg. Co. v. Lyon*, 10 Okla. 704, 64 Pac. 6; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Steamship Co. v. Murphy*, 6 Phila. (Pa.) 224. See also *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126;

International Fair & Exposition Ass'n v. Walker, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; *Peninsular Ry. Co. v. Duncan*, 28 Mich. 130, 139; *Wind-sor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911.

The subscriptions are mutual promises by the subscribers to each other to pay the amounts subscribed. *Glenn v. Busey*, 5 Mackey (D. C.) 233.

The subscription contract is a mutual agreement by which each subscriber pledges himself to the others to pay a certain sum of money in order to perfect the organization and complete the enterprise, the mutual promises being the consideration one for the other. *Bullock v. Falmouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129; *Twin Creek & C. Turnpike Road Co. v. Lancaster*, 79 Ky. 552.

“The contract is made by the sub-

mutual promises are the consideration the one for the other,⁸⁵ and which is binding and irrevocable from the date of the subscription unless canceled by consent of all the subscribers before acceptance by the corporation.⁸⁶ So it has been held by a number of courts that such a subscription is twofold in character, it being a contract between the subscribers themselves to become stockholders in the proposed corporation immediately on its formation and without any further act on their part, and also a continuing offer or proposition to the corporation to take and pay for the amount of stock subscribed, upon the terms proposed, which, upon acceptance by it on its formation, becomes as to each subscriber a contract between him and the corporation.⁸⁷ And it has also been held that the subscription is a trilateral contract, being an undertaking not only between the corporation and the individual stockholder, but an undertaking between the corporation, the individual subscriber and all the other subscribers to the stock as well.⁸⁸

scribers with each other, the consideration of which is the right to a given number of shares upon the incorporation of the company." *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665.

The obligation of the subscriber to pay for his stock and his right to demand the stock from the corporation when it is organized, create a mutuality of contract binding as between the cosubscribers, which cannot be discharged by the act of one of them without the consent of the others. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

⁸⁵ See § 526, *supra*.

⁸⁶ See § 563, *infra*.

⁸⁷ *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026; *Nebraska Chicory Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245; *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228. See also *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164; *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134; *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145; *Steely v. Texas Improvement Co.*,

55 Tex. Civ. App. 463, 119 S. W. 319; *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

"The contract of the several subscribers is twofold in character. It is, in a sense, a contract between the several subscribers which cannot be withdrawn or revoked as to any one without the acquiescence of all. It is also a continuing offer or proposition to the corporation to take and pay for the amount of stocks subscribed, upon the terms proposed." *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

⁸⁸ *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409; *Shelby County R. Co. v. Crow*, 137 Mo. App. 461, 119 S. W. 435; *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431; *Philadelphia & D. C. R. Co. v. Conway*, 177 Pa. St. 364, 35 Atl. 716; *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489; *Keystone Wrapping Mach. Co. v. Bromeier*, 42 Pa. Super. Ct. 384; *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa.

Other courts, however, hold that such a subscription does not constitute a contract between the subscriber, but merely constitutes so many separate continuing offers to the proposed corporation, which must be expressly or impliedly accepted by the corporation before any contract can result.⁸⁹ And this has been held to be true, even when the promise and agreement of the subscribers is in terms "to and with each other," as is sometimes the case. It is said in a leading Massachusetts case: "The promise of each subscriber 'to and with each other' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and

Super. Ct. 78; *Altoona Sanitary Milk Co. v. Armstrong*, 38 Pa. Super. Ct. 350; *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96; *Braddock Elec. R. Co. v. Bily*, 11 Pa. Super. Ct. 144. See also *Clapp v. Gilt Edge Consol. Mines Co.*, 33 S. D. 123, 144 N. W. 721.

"The contract is polypartite, so to speak. It is not only a contract between the subscriber and the corporation, but it is, in a sense which creates an estoppel against the subscriber, a contract between him and each of the other subscribers." *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

⁸⁹ *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977; *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406; *Vermilion Sugar Co. v. Vallee*, 134 La. 661, Ann. Cas. 1916 A 695, 64 So. 670. See also *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888; *Athol Music Hall v. Carey*, 116 Mass. 471, 473.

"A preliminary agreement to form

a corporation and to take stock in it is not a contract by the subscribers with each other, enforceable by one or more of them against the other. Such an agreement can be enforced by the corporation only, and this is true whether the agreement is expressly authorized by statute or not." *Deschamps v. Loisel*, 50 Mont. 565, 148 Pac. 335.

In *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888, it is said that while there are authorities to the effect that the subscriptions create binding and enforceable contracts between the subscribers themselves and are therefore irrevocable except with the consent of all the subscribers, "reason and the weight of authority are opposed to such a view," and that "such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon." These observations were quoted with approval by the Alabama Supreme Court in *Planters' & Merchants' Independent Packet Co. v.*

the practical necessity of the case; to wit, as a contract with the common representative of the several associates." ⁹⁰

Of course the subscription may be so worded as to create a binding contract between the subscribers, even in those states where the ordinary contract of subscription does not have that effect. ⁹¹

If the contract is merely one between the individuals signing the subscription paper to take stock in a corporation to be formed, as distinguished from a continuing offer by each subscriber to the proposed corporation, the corporation when formed cannot enforce it at common law, nor in any event, unless it was made for its benefit and the law in the particular jurisdiction allows a person for whose benefit a contract is made to sue thereon, although not a party to the contract. ⁹²

Webb, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

⁹⁰ Athol Music Hall Co. v. Carey, 116 Mass. 471, 473.

⁹¹ Planters' & Merchants' Independent Packet Co. v. Webb, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977; Bryant's Pond Steam Mill Co. v. Felt, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888. And see Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834; Phillips Limerick Academy v. Davis, 11 Mass. 113, 6 Am. Dec. 162; Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145, 73 N. E. 674, rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203; Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219.

⁹² Where a number of persons signed a subscription paper reciting: "We the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad, to the amount set opposite our names respectively, on condition said road be located and built through or north of the village of Unionville," etc., it was held that this was not a contract of subscription between the signers of the instrument and the railroad company, but an agreement between the signers

only, to which the company was not in any sense a party, and that the company, therefore, could not maintain an action thereon. Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145, 73 N. E. 674, rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203; Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219, 222.

If a number of persons sign a subscription paper merely agreeing to pay a certain sum each for erecting an academy, without agreeing to pay the same to any particular person, and without provision for the formation of a corporation to receive the amount of the subscriptions and erect the academy, the promises are void, both for want of consideration, and for want of a promisee; and an action to recover the subscriptions cannot be maintained on the agreement by a corporation subsequently created by the legislature for the purpose of erecting the academy. The fact that the act of incorporation authorizes the corporation to receive and hold all moneys subscribed in trust for the academy is immaterial, for the legislature cannot create a promise on the part of the subscribers without their assent. Phillips Limerick Academy v. Davis, 11 Mass. 113, 6 Am. Dec. 162.

In the case of subscriptions for shares in an existing corporation, the contract is not between the subscribers, except as it is shown that the subscriptions were mutual considerations for each other, but is rather between each individual subscriber and the corporation.⁹³

§ 533. Agreements to pay to agent or trustee for proposed corporation. Instead of subscribing directly for stock in a proposed corporation, so as to create a contract between the subscribers and the corporation when formed, a number of persons may enter into a mutual agreement to form a corporation and take stock therein, and to pay the amounts which they agree to subscribe to a certain person as agent or trustee. Such an agreement is a valid contract between the parties, being a case of mutual promises, and their liability to pay is not affected by the fact that they have not subscribed articles of incorporation in compliance with the statute under which the corporation is formed, or by the fact that it has not yet been formed, unless this is required by the contract.⁹⁴ Under such a contract as this, the agent or trustee, as the trustee of an express trust, may maintain an action against the subscribers on their several promises, and collect the money for the use of the corporation.⁹⁵ And when the

⁹³ *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947; *Philadelphia & Gulf Steamship Co. v. Clark*, 57 Pa. Super. Ct. 415.

⁹⁴ *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308; *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123. See also *Carr v. Bartlett*, 72 Me. 120.

A subscription may lawfully be evidenced by notes payable to a third person in the nature of a trustee. *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652. See also *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

The liability of the subscribers, under such circumstances, is based on their express promise to pay to the agent, and it is immaterial whether they thereby became members of the corporation or not. *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308; *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.

A syndicate agreement entered into for the purpose of underwriting a bond issue of a proposed corporation, under which subscribers are to receive bonds and stock in proportion to the amount paid, and certain persons designated as syndicate managers are to receive and manage the funds subscribed, is a joint adventure, and its consideration is the mutual promises of the contracting parties. The fact that the syndicate managers have the right to terminate the agreement at any time earlier than the time fixed for its termination by its terms does not render the agreement void for want of mutuality where that right is given for the benefit of the underwriters and its exercise could not profit the managers themselves. *White v. McCullagh*, 74 W. Va. 160, 81 S. E. 720. See generally Chap. 15.

⁹⁵ *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308; *West v. Crawford*, 80 Cal. 19, 21 Pac.

trustees have collected the money, the corporation, for whose use the money has been received, may maintain an action against them to recover it.⁹⁶

The person so designated as payee is the agent or trustee of the subscribers prior to the organization of the corporation, but after the corporation is formed, he becomes its agent or trustee, and not the agent or trustee of the subscribers. And since he has no interest coupled with the agency, the corporation may remove him at any time, and appoint another in his place, or itself assume the custody and disposition of the money.⁹⁷

Generally the corporation itself cannot enforce such subscriptions unless it appears that the right to do so has in some way been transferred to it.⁹⁸ But it has been held that it may do so without any assignment of the subscriptions to it by the trustee or agent, where it appears that they were made solely for its benefit, and this though the corporation was not named in the subscription contracts, since it is the real party in interest.⁹⁹

Subscriptions may be made payable to a person or corporation who is to do certain work for the benefit of the proposed corporation, with a provision that the payee shall apply amounts paid thereon to the payment of the contract price, and that any unpaid subscriptions remaining after he has been fully paid shall inure to the benefit of, or be assigned by him to, the corporation when it is formed. Under

1123; *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652; *White v. McCullagh*, 74 W. Va. 160, 81 S. E. 720. See also *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801; *Carr v. Bartlett*, 72 Me. 120.

Persons designated as syndicate managers who are authorized to receive and manage funds subscribed to a joint adventure to form a syndicate for the purpose of underwriting the bonds of a proposed corporation, each subscriber to receive stock in addition to his proportionate share of the bonds, have such an interest in the funds as entitles them to sue defaulting subscribers for their unpaid subscriptions. Nor are they deprived of the right to sue by the fact that the agreement gives them the right to sell the interest of defaulting subscribers. *White v. McCullagh*, 74 W. Va. 160,

81 S. E. 720. See generally Chap. 15.

⁹⁶ *San Joaquin Land & Water Co. v. West*, 94 Cal. 399, 29 Pac. 785.

⁹⁷ *San Joaquin Land & Water Co. v. West*, 94 Cal. 399, 29 Pac. 785.

⁹⁸ Where the promise is to pay to a committee, in order that the corporation may maintain an action thereon, its complaint must show that the right of action has in some way accrued to it, either by a subsequent agreement dispensing with the committee and substituting the corporation as payee, or by a transfer of the committee's rights to it. *Loutsenhizer v. Farmers' & Merchants' Milling Co.*, 5 Colo. App. 479, 39 Pac. 66.

⁹⁹ Its right to do so is not affected by the fact that the trustee might also sue. *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308.

such' circumstances it has been held that the person to whom the subscriptions are made payable may collect them;¹ and that if the agreement places the title and the right to collect the subscriptions in the contractor and provides for an assignment of the remaining subscriptions by him to the corporation, then the corporation cannot collect them until such an assignment is made.² But if the contract amounts merely to a pledge of the subscriptions to the contractor as collateral security, and is merely tantamount to a limited guaranty that the contract price will be paid, he cannot recover any balance remaining due from a subscriber after he has been paid in full, and in an action by him against the subscriber the burden is on the contractor to show that he has not been so paid.³ And under the terms of the contract the liability of the subscriber to the contractor may cease on the formation of the corporation and it may then become liable to the contractor to the extent of the unpaid subscriptions, and the subscribers liable to it, in which case the corporation alone can enforce the subscriptions.⁴

§ 534. Form of subscription and formalities in subscribing—In general. Unless the charter of a corporation, or the general law under which it is organized, requires that subscriptions shall be in some particular form, or that they shall be made with certain formalities, no other form or formality is necessary to a valid subscription than is required for any other simple contract.⁵

¹ Chicago Bldg. & Mfg. Co. v. Beaven, 149 Ky. 267, 148 S. W. 37; Chicago Bldg. & Mfg. Co. v. Peterson, 133 Ky. 596, 118 S. W. 384; Ada Dairy Ass'n v. Mears, 123 Mich. 470, 82 N. W. 258. See also Hastings Industrial Co. v. Copeland, 114 Ark. 415, 169 S. W. 1185; McDonald v. Markesan Canning Co., 142 Wis. 251, 125 N. W. 444.

² This rule was applied to a contract for the erection of a factory which contemplated the formation of a corporation to take it over when completed, and provided that the contractor was to receive and apply on the contract price any payments of the amounts subscribed, that the subscribers were to remain a voluntary association until the contractor had been paid in full, and that any sub-

scriptions then remaining unpaid in whole or part should then be assigned by him to the corporation. Dotson v. Savannah Pure Food Canning Co., 140 Ga. 161, 78 S. E. 801.

³ Chicago Bldg. & Mfg. Co. v. Stoker, 98 Ark. 471, 136 S. W. 183.

⁴ Norcross Butter & Cheese Mfg. Co. v. Summerour, 114 Ga. 156, 39 S. E. 870; Chicago Bldg. & Mfg. Co. v. Talbot Creamery & Manufacturing Co., 106 Ga. 84, 31 S. E. 809.

⁵ **United States.** Dupee v. Chicago Horse Shoe Co., 117 Fed. 40, certiorari denied 188 U. S. 740, 47 L. Ed. 677 (mem. dec.). See also Hawley v. Upton, 102 U. S. 314, 26 L. Ed. 179.

Alabama. Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 So. 562.

“Subscribe” has been defined as equivalent to “agree to pay.”⁷

As in other cases, the question is one of intention,⁸ and any agree-

California. Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; Walter v. Merced Academy Ass’n, 126 Cal. 582, 59 Pac. 136; Ventura & O. Val. Ry. Co. v. Collins (Cal.), 46 Pac. 287. See also Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

Georgia. Rogers v. Burr, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Illinois. Wemple v. St. Louis, J. & S. R. Co., 120 Ill. 196, 11 N. E. 906; Corwith v. Culver, 69 Ill. 502.

Indiana. Brownlee v. Ohio, I. & I. R. Co., 18 Ind. 68. See also Butler University v. Scoonover, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

Iowa. Nulton v. Clayton, 54 Iowa 425, 37 Am. Rep. 213, 6 N. W. 685.

Kentucky. Gill v. Kentucky & C. Gold & Silver Min. Co., 7 Bush 635; Fry v. Lexington & B. S. R. Co., 2 Metc. 314; Somerset Nat. Banking Co.’s Receiver v. Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

Louisiana. Belknap v. Adams, 49 La. Ann. 1350, 22 So. 382.

Maine. Barron v. Burrill, 86 Me. 66, 29 Atl. 939.

Maryland. Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; Musgrave v. Morrison, 54 Md. 161; Wellersburg & W. N. Plank Road Co. v. Young, 12 Md. 476.

Massachusetts. Bridgeport Window Hardware Co. v. Osborne, 222 Mass. 517, 111 N. E. 364.

Minnesota. Galbraith v. McDonald, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

Missouri. DeGiverville Land Co. v. Thompson, 190 Mo. App. 682, 176 S. W. 409, decision affirmed on certiorari,

State v. Reynolds, — Mo. —, 186 S. W. 1057; Griswold v. Seligman, 72 Mo. 110.

Nebraska. Nebraska Chicory Co. v. Lednicky, 79 Neb. 587, 113 N. W. 245; York Park Bldg. Ass’n v. Barnes, 39 Neb. 834, 58 N. W. 440.

Nevada. Ross v. Bank of Gold Hill, 20 Nev. 191, 19 Pac. 243.

New Hampshire. Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; Anderson v. Scott, 70 N. H. 534, 49 Atl. 568.

New Jersey. See Clevenger v. Moore, 71 N. J. L. 148, 58 Atl. 88.

New York. Phoenix Warehousing Co. v. Badger, 67 N. Y. 294, 6 Hun 293; Rensselaer & W. Plank Road Co. v. Barton, 16 N. Y. 460, note. See also Dayton v. Borst, 31 N. Y. 435.

Ohio. Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225.

Washington. Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489.

Subscriptions are not invalid because the subscribers, in signing, use initials for their Christian names. State v. Beek, 81 Ind. 500.

⁷ Rutenbeck v. Hohn, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698. For other definitions see State v. Hazard, 168 Ind. 163, 80 N. E. 149.

⁸ **United States.** Dupee v. Chicago Horse Shoe Co., 117 Fed. 40, certiorari denied 188 U. S. 740, 47 L. Ed. 677 (mem. dec.).

Alabama. Planters’ & Merchants’ Independent Packet Co. v. Webb, 144 Ala. 666, 39 So. 562.

Georgia. Rogers v. Burr, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Kentucky. Somerset Nat. Banking Co.’s Receiver v. Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

ment which evidences an intention on the part of the person making it to become a stockholder in the corporation is sufficient.⁹

It is well settled that the fact that a subscription paper is informal does not render the subscriptions invalid, if the intention of the parties can be ascertained. "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for or engages to take any portion of the stock of such company, thereby assumes to pay for the same according to the conditions of the charter."¹⁰ "It is only necessary that the writing should indicate an intention to become a stockholder, and the number of shares that are taken by the subscriber."¹¹ "It matters not how informal the writing may be, if the intent of the parties can be collected from it."¹²

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Missouri. *DeGiverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409, decision affirmed on certiorari, *State v. Reynolds*, — Mo. —, 186 S. W. 1057.

Nebraska. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587, 113 N. W. 245.

New Hampshire. *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

⁹ **Alabama.** *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

California. *Ventura & O. Val. Ry. Co. v. Collins (Cal.)*, 46 Pac. 287; *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

Georgia. *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Illinois. *Wempler v. St. Louis, J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906.

Indiana. See *Butler University v. Seoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

Kentucky. *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Minnesota. *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

Missouri. *DeGiverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409.

Nebraska. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587, 113 N. W. 245.

Oregon. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

Washington. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

¹⁰ *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 460, note. See *Snodgrass v. E. A. Zander & Co.*, 106 Ark. 462, 154 S. W. 212.

Some courts, as we shall see in another section, hold that there can be no action on a subscription unless there is an express promise to pay. See § 569, *infra*.

¹¹ *Gill's Adm'x v. Kentucky & C. Gold & Silver Min. Co.*, 7 Bush (Ky.) 635; *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. (Ky.) 314.

¹² *Nulton v. Clayton*, 54 Iowa 425, 37 Am. Rep. 213, 6 N. W. 685.

Courts incline to hold that the contract of subscription subsists without reference to formality, where the intention to become a subscriber is

But there must be legal and competent proof to establish the legal existence of a binding contract for the stock of the corporation.¹³

All of the subscriptions need not be drawn in the same form nor need they be all entered in the same book.¹⁴ Nor need all the subscribers sign the same subscription paper.¹⁵

A signature to the articles of incorporation required by statute, with the number of shares placed opposite to the signature, may be a sufficient subscription to bind both the corporation and the subscriber, provided it was intended and accepted as such.¹⁶ And the same may be true of a similar signature to a prospectus, which states the terms and conditions on which the stock is to be issued,¹⁷ or of a signature to articles or a certificate of incorporation which, in conformity to a statutory requirement, specifies the names of the subscribers and the number of shares held by each.¹⁸

A contract for services to be paid for in stock may also amount to a subscription for such stock,¹⁹ as may a receipt for a certificate of

manifested. *Kesner v. World's Fair Hippodrome, Amusement, Ballet, Pantomime & Fireworks Co.*, 62 Ill. App. 89.

¹³ *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. (D. C.) 262.

¹⁴ *Anderson v. Scott*, 70 N. H. 534, 49 Atl. 568.

¹⁵ The subscriptions are not invalidated because there are several subscription papers, each of which is signed by different subscribers. *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157. See also *Davis v. Campbell*, 93 Iowa 524, 61 N. W. 1053.

¹⁶ *Dupee v. Chicago Horse Shoe Co.*, 117 Fed. 40, certiorari denied 188 U. S. 740, 47 L. Ed. 677 (mem. dec.); *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457.

As a general rule "one who subscribes in the articles of association for shares of stock of a corporation is bound by his subscription." *Campbell v. Raven*, 176 Mich. 208, 142 N. W. 355.

Though the articles of association were not intended by the statute to be articles of subscription to stock, the

articles of subscription and association may be combined, and where they are so, and the articles of association contain an express or implied promise to pay the sums annexed to the names of the subscribers, suits may be maintained upon them. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430. See also *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

Whether a person so signing intended to subscribe for the stock is a question for the jury. *Dupee v. Chicago Horse Shoe Co.*, 117 Fed. 40, certiorari denied 188 U. S. 740, 47 L. Ed. 677 (mem. dec.).

¹⁷ *Fox v. Produce Cold Storage Exchange*, 192 Ill. App. 301.

¹⁸ *Dayton v. Borst*, 31 N. Y. 435; *Rathbone v. Ayre*, 121 N. Y. App. Div. 355, 105 N. Y. Supp. 1041, rev'd on other grounds 196 N. Y. 503, 80 N. E. 1111.

¹⁹ A contract for engineers' services in the construction of a railroad providing that they shall be paid for by the issuance of a certain amount of stock constitutes a subscription to that amount of stock. *Shipman v.*

stock which has been written in the margin of a subscription book.²⁰

"Subscription to the stock is presumed by any agreement or action by which the stock is acquired from the company."²¹ The acceptance of a stock certificate is a waiver of any informality in the contract short of an absolute defect of jurisdiction.²² And "a subscription to any legal and valid instrument, by which a party engages to become a member of the company when organized, and to pay a given sum which is to be a part of the capital stock, followed up by an acceptance of a certificate for the stock, will make such subscriber a member of the corporation."²³

A contract of subscription by a municipal or quasi-municipal corporation is complete, and binds the parties according to its terms, if the body or agency having authority to make it passes an ordinance or resolution to the effect that it does thereby, in the name and on behalf of the municipality, subscribe a specified amount of stock, and presents a copy of such ordinance or resolution to the company for acceptance as a subscription, and the company accepts it and notifies the municipality of that fact.²⁴ And where a statute authorizes a town to subscribe to the stock of a railroad company and to issue bonds in payment therefor on a vote of the people, and makes it the imperative duty of the proper town officers to subscribe for the stock and issue and deliver the stock upon a vote in favor of such subscription, such a vote is a sufficient subscription to sustain mandamus proceedings to compel the issuance of the bonds though there has been no formal subscription on the books of the company.²⁵

§ 535. — Definiteness and certainty; misnomer. The contract, of course, must be sufficiently definite and certain to enable a court to enforce it.²⁶ An indefinite subscription for stock in a corporation to

Portland Const. Co., 64 Ore. 1, 128 Pac. 989.

²⁰ Lohman v. New York & E. R. Co.,

2 Sandf. (N. Y.) 39.

²¹ Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac. 989; McAllister v. American Hospital Ass'n, 62 Ore. 530, 125 Pac. 286.

²² Hamilton & D. Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157.

²³ Hamilton & D. Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157.

²⁴ Bates County v. Winters, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933; Moultrie County v. Rock-

ingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; Nugent v. Supervisors, 19 Wall. (U. S.) 241, 22 L. Ed. 83.

²⁵ Illinois Midland R. Co. v. Barnett, 85 Ill. 313.

²⁶ In Auburn Opera-House & Pavilion Ass'n v. Hill, 113 Cal. 382, 45 Pac. 695, (Cal.), 32 Pac. 587, a subscription contained in a prospectus signed by the defendant was held not open to the objection that it was too indefinite and uncertain to constitute a contract.

In Steely v. Texas Improvement Co.,

be formed, for example, which does not specify the amount of stock of the corporation, or what proportion the subscriber is to take, or when or by whom the company is to be organized, cannot be enforced.²⁷

It is a general rule that the subscription must be for a definite number of shares,²⁸ and must show the amount which the defendant agrees to pay therefor.²⁹ An agreement to take a specified number of dollars worth of stock, "or such portion thereof as may be necessary to provide the said corporation with working funds and capital as a going concern," is sufficiently definite to be enforced.³⁰

55 Tex. Civ. App. 463, 119 S. W. 319, it was held that there was not such incompleteness or uncertainty in the terms of the subscription agreement as would render it void ab initio.

A condition that the subscriber was to pay his subscription in hauling material was held not to be void for indefiniteness. *Hastings Industrial Co. v. Copeland*, 114 Ark. 415, 169 S. W. 1185.

See also *Columbus Institute of Milwaukee v. Conohan*, — Wis. —, 159 N. W. 720.

²⁷ *Loutsenhizer v. Farmers' & Merchants' Milling Co.*, 5 Colo. App. 479, 39 Pac. 66; *Nemaha Coal & Mining Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *United States Wind-Engine & Pump Co. v. Davis*, 2 Kan. App. 611, 42 Pac. 590. See also *Harrison Nat. Bank of Cadiz v. Votaw*, 51 Kan. 362, 32 Pac. 1111.

In *Rutenbeck v. Hohn*, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698, it was held that a subscription agreement was not void for uncertainty though it did not name any payee nor refer to any corporation to be formed, where it was shown without any dispute that it was made and subscribed as a preliminary step to the organization of a corporation which was in fact thereafter organized upon the strength of such agreement, making the several subscribers stockholders to the extent of the obligation thereby assumed.

²⁸ *Wheeler v. Ocker & Ford Mfg. Co.*, 162 Mich. 204, 127 N. W. 332.

²⁹ Where the number of shares subscribed for is specified, but neither the amount of the subscription nor the par value of the shares is stated, and there are no means of ascertaining the amount which the subscriber has agreed to pay, the subscription cannot be enforced. *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 73 N. E. 674, rev'g 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, aff'g 39 N. Y. Misc. 79, 78 N. Y. Supp. 203.

An agreement whereby the subscriber subscribes for fifty shares of stock, "at the price of eighteen and seventy-five 100 per share," sufficiently indicates that he subscribed for fifty shares at the rate of \$18.75 per share, making the aggregate amount of his subscription \$937.50. *Keystone Wrapping Mach. Co. v. Bromeier*, 42 Pa. Super. Ct. 384.

³⁰ "How much will be necessary for the purpose indicated is a matter of fact which should not be difficult of ascertainment. Prima facie it is the amount the parties fixed on in their agreement in fixing the amount of capital stock to be issued. Defendant cannot be called upon to pay more than that; he may be able to show that he should not be called upon to pay so much." *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580.

Uncertainty as to immaterial matters will not vitiate the subscription.³¹ And there is no fatal ambiguity or uncertainty if both parties understand the words used to mean the same thing.³²

Where a subscription paper is incomplete, any omissions may be explained by parol evidence.³³

A writing reciting an association for the purpose of organizing a corporation, and "the number of shares held by each" of the persons signing the same, imports and is sufficient as a subscription by each signer for the number of shares set opposite his name.³⁴

Subscriptions are not rendered invalid because there is no dollar mark before the figures representing the sums agreed to be paid,³⁵ or the number of shares is not expressly stated, where the intention in this respect otherwise appears.³⁶

Misnomer of a corporation in a subscription for its stock does not render the subscription invalid, if the intention of the parties is shown.³⁷

§ 536. — Form or formalities required by charter or statute.

Sometimes the charter of a corporation or the general law under which it is formed expressly requires that subscriptions to its capital stock shall be in a certain form, or made with certain formalities, and where such is the case, it is generally held that a subscription not in the prescribed form, or not entered into with the prescribed formalities, is invalid, and not enforceable either by the subscriber or

³¹ *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29.

³² A subscription is not fatally ambiguous or uncertain for failing to specify whether the stock subscribed for is common or preferred, if it is understood by both parties that it is the latter. *Columbus Institute of Milwaukee v. Conohan*, — Wis. —, 159 N. W. 720.

³³ See § 569, *infra*.

³⁴ *Nulton v. Clayton*, 54 Iowa 425, 37 Am. Rep. 213, 6 N. W. 685. See also *Snodgrass v. E. A. Zander & Co.*, 106 Ark. 462, 154 S. W. 212.

³⁵ Where it appears from the contract that the subscription is in money, the figures must be taken, *prima facie*, to represent dollars. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248,

33 Am. St. Rep. 234, 29 N. E. 1044, *aff'g* 41 Ill. App. 268.

³⁶ A subscription of one thousand dollars in a corporation to be formed is not void for failure to designate the number of shares, where the shares of stock are fixed at one hundred dollars. *Haskell v. Sells*, 14 Mo. App. 91; *Columbus Land Co. v. McNally*, 172 Pa. St. 158, 33 Atl. 339.

³⁷ *Oler v. Baltimore & R. R. Co.*, 41 Md. 583; *Hager's-Town Turnpike Road Co. v. Creeger*, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495; *Milford & C. Turnpike Co. v. Brush*, 10 Ohio 111, 36 Am. Dec. 78. And see § 534, *supra*.

"Any misnomer, or apparent variance, may be reconciled and explained, in pleading, by averment, and avoided in effect by proof." *Peake v. Wabash R. Co.*, 18 Ill. 88.

by the corporation,³⁸ in the absence of elements of estoppel,³⁹ or unless the provisions can be regarded as merely directory.⁴⁰

“No person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop both parties, but no contract or subscription can be valid if not conforming to the statute.”⁴¹

The fact that a subscription in the form prescribed by the charter or statute contains additional stipulations not inconsistent with the charter or statute, and which are valid at common law, does not invalidate the subscription.⁴²

38 Alabama. *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

Indiana. *Coppage v. Hutton*, 124 Ind. 401, 7 L. R. A. 591, 24 N. E. 112; *Reed v. Richmond St. R. Co.*, 50 Ind. 342.

Michigan. *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315.

New Jersey. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

New York. *Troy & B. R. Co. v. Warren*, 18 Barb. 310.

Ohio. *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517.

Pennsylvania. See *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943.

Utah. *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

England. *New Brunswick & C. Railway & Land Co. v. Muggeridge*, 4 H. & N. 160, 28 L. J. Exch. 193, 157 Eng. Reprint 798, aff'd 4 H. & N. 580, 28 L. J. Exch. 365, 5 Jur. (N. S.) 1131, 7 Wkly. Rep. 495, 157 Eng. Reprint 968.

Where the statute requires the associates to “severally” subscribe the articles, a subscription by an heir in the name of the “estate,” without signing the names of the individual heirs, is not binding on the heirs. *Troy & B. R. Co. v. Warren*, 18 Barb. (N. Y.) 310.

In *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315, under a statute providing that all persons subscribing the articles of association, “and all other persons who shall, from time to time thereafter, subscribe to or become the holders of the capital stock of said corporation, in the manner to be provided by its by-laws,” should be a body corporate, it was held that a subscription after incorporation could only be made in the manner provided by the by-laws of the corporation, and that a subscription made before any by-laws were adopted on the subject was a nullity.

Statutory provisions relative to the manner in which subscriptions may be made by county courts must be substantially complied with. *Mercer County Court v. Kentucky River Nav. Co.*, 8 Bush (Ky.) 300.

³⁹ See § 716, *infra*.

⁴⁰ See § 542, *infra*.

⁴¹ *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315, 318, followed in *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053.

⁴² Where the charter provides that the corporation shall have all powers incident to corporations at common law. *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407.

A subscriber, by acting as a stockholder, may be estopped to set up informalities in his subscription.⁴³

§ 537. — Necessity for writing—Statute of frauds. No writing at all is necessary to a valid subscription to the stock of a corporation unless it is expressly or impliedly required by the charter or the general law under which the corporation is formed. In the absence of such a requirement, a valid subscription may be made either orally or in writing, or partly orally and partly in writing,⁴⁴ or it may be implied from conduct.⁴⁵

“While the strict definition of the word ‘subscribe’ or ‘subscription’ involves the idea of a written signature, yet by common usage it is often employed to include an agreement, written or oral, to give or pay some amount to a designated purpose, more usually, per-

⁴³ See § 716, *infra*.

⁴⁴ **United States.** *In re Grand Rapids Furniture Co.*, 209 Fed. 483.

California. *Vermont Marble Co. v. Deeleez Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 59 Pac. 136.

District of Columbia. *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. 262.

Georgia. *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Iowa. *Rutenbeck v. Hohn*, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698; *Des Moines Sav. Bank v. Colfax Hotel Co.*, 88 Iowa 4, 55 N. W. 67; *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780.

Kentucky. *Kentucky Mut. Inv. Co.'s Assignee v. Schaefer*, 120 Ky. 227, 85 S. W. 1098; *Bullock v. Fal-mouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129; *Somerset Nat. Bank-ing Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125; *Tabler v. Anglo-American Ass'n*, 17 Ky. L. Rep. 815, 32 S. W. 602. See also *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Louisiana. See *Jackson Fire & Ma-rine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

Maine. *Barron v. Burrill*, 86 Me. 66, 29 Atl. 939.

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Minnesota. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

Missouri. *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

Nebraska. *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440.

New Hampshire. *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

Pennsylvania. *Shellenberger v. Pat-terson*, 168 Pa. St. 30, 31 Atl. 943.

South Dakota. *Clapp v. Gilt Edge Consol. Mines Co.*, 33 S. D. 123, 144 N. W. 721.

Texas. See *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145.

Virginia. *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868.

England. *Cookney's Case*, 3 De G. & J. 170.

The contrary was intimated, but without any citation of authority, in *Ingersoll & T. Gravel Road Co. v. Mc-Carthy*, 16 U. C. Q. B. 162.

⁴⁵ See § 546, *infra*.

haps, to some purpose for the promotion of which numerous persons are uniting their means and their efforts.”⁴⁶

A subscription in writing, however, may be expressly or impliedly required by the charter or general law, and in such a case, an oral subscription cannot be enforced,⁴⁷ unless there is an estoppel.⁴⁸ So a written subscription has been held necessary where the statute or charter provides for the opening of subscription books by commissioners or the incorporators.⁴⁹

A subscription for stock in a corporation is not within the statute of frauds, as an agreement for the sale of goods, wares, or merchandises,⁵⁰ or for the sale of personal property.⁵¹

⁴⁶ *Rutenbeck v. Hohn*, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698. See also *State v. Hazzard*, 168 Ind. 163, 80 N. E. 149, where various definitions of the words “subscribe” and “subscriber” will be found.

⁴⁷ *Indiana*. *McClasky v. Grand Rapids & I. R. Co.*, 16 Ind. 96.

New Jersey. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, aff’d 29 N. J. Eq. 651.

Ohio. *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517.

Oregon. *Coyote Gold & Silver Min. Co. v. Ruble*, 8 Ore. 284.

Pennsylvania. *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146. See also *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943.

Texas. *Galveston Hotel Co. v. Bolton*, 46 Tex. 633.

West Virginia. *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

England. *New Brunswick & C. Railway & Land Co. v. Muggeridge*, 4 H. & N. 160.

The articles may provide that subscriptions must be in writing in order to bind the subscribers. *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780.

⁴⁸ See § 716, *infra*.

⁴⁹ *Vreeland v. New Jersey Stone*

Co., 29 N. J. Eq. 188, aff’d 29 N. J. Eq. 651.

In *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517, where the general law authorizing the formation of corporations provided for the opening of books by commissioners to receive subscriptions to stock prior to organization, and for organization and the election of directors after the amount of stock specified in the certificate of association should be subscribed, it was held that a verbal subscription was invalid, that it did not give the subscriber any rights as against the corporation when formed, and that there was no consideration, therefore, for a note given by him to the corporation in payment of the subscription.

⁵⁰ *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438; *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

The statute of frauds does not apply where there is a subscription to, as distinguished from a sale of, stock. *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053.

In *Weston v. Dahl*, 162 Wis. 32, 155 N. W. 949, it was held that oral promises to take stock were not subscriptions and could not be enforced under the statute of frauds.

⁵¹ *Clapp v. Gilt Edge Consol. Mines Co.*, 33 S. D. 123, 144 N. W. 721.

A contract to subscribe for shares is within the statute as an agreement not to be performed within a year from the making thereof, if by its terms it is not to be performed within a year. But it is otherwise if it may be performed within a year, although it is not in fact performed within that time. An agreement to subscribe for stock when the books of the corporation shall be opened for subscription is not within the statute of frauds as an agreement not to be performed within a year, where the books may be opened within a year.⁵² The same is true of a contract of subscription to the stock of a turnpike company, to be performed when the construction of its road is commenced, where it may be commenced within a year.⁵³ Nor is an oral subscription within this provision of the statute where the title to the stock passes to the subscriber immediately, though payment is not to be made nor a certificate issued within the year.⁵⁴ But a subscription to stock of a telephone company which contains as an essential part of the contract an agreement to rent a telephone for three years at an agreed price is within the statute, and is unenforceable if not signed by the company.⁵⁵

§ 538. — Requirement of formal articles of association. In order that subscriptions may be binding, the subscribers need not sign the formal articles of association or certificate of incorporation, unless there is some express requirement to this effect in the charter or general law.⁵⁶

Sometimes the general law authorizing the formation of a corporation requires that the subscribers to its stock, in organizing the corporation, shall subscribe formal articles of association, setting forth the amount of the capital stock, the number of shares subscribed by each, and various other matters. And it has been held in some states under such a statute that a person who subscribes for stock, either

⁵² *Gadsden v. Lance*, 1 McMull. Eq. (S. C.) 87, 37 Am. Dec. 548.

⁵³ *Bullock v. Falmouth & C. H. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129.

⁵⁴ *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868.

⁵⁵ *Co-operative Tel. Co. v. Katus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

⁵⁶ *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; *Penin-*

sular Ry. Co. v. Duncan, 28 Mich. 130; *Woods Motor Vehicle Co. v. Brady*, 90 N. Y. App. Div. 610, 85 N. Y. Supp. 1151, *aff'g* 39 N. Y. Misc. 79, 78 N. Y. Supp. 203, *rev'd* on other grounds 181 N. Y. 145, 74 N. E. 674; *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157; *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577. See also *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

orally or by signing a preliminary subscription paper, but who does not sign the formal articles of association as provided by the statute, does not become a stockholder and cannot be held liable on his subscription.⁵⁷

In some states, such statutes have been construed differently, and subscriptions otherwise than by signing the formal articles of association have been sustained.⁵⁸

⁵⁷ *Reed v. Richmond St. R. Co.*, 50 Ind. 342; *Dutchess & C. County R. Co. v. Mabbett*, 58 N. Y. 397; *Poughkeepsie & S. P. Plank Road Co. v. Griffin*, 24 N. Y. 150, rev'g 21 Barb. (N. Y.) 454. See also *Coppage v. Hutton*, 124 Ind. 401, 7 L. R. A. 591, 24 N. E. 112; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48; *Bucher v. Dillsburg & M. R. Co.*, 76 Pa. St. 306. Compare *Ft. Edward & Ft. M. Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 567; *Buffalo & J. R. Co. v. Clark*, 22 Hun (N. Y.) 359.

This was held to be true of subscriptions to the stock of railroad companies formed under the New York Act of 1848. *Troy & B. R. Co. v. Warren*, 18 Barb. (N. Y.) 310; *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297.

Where a general law authorizing the formation of plank road and turnpike companies required subscription books to be opened, notice thereof given, subscriptions received, election of directors, etc., and then declared that the subscribers should "thereupon severally subscribe articles of association," in which should be set forth the name of the company, and certain other particulars, and further declared that each subscriber to the articles of association should subscribe his name, residence, and the number of shares taken by him, that the articles should be filed in the office of the secretary of state, and that "thereupon the persons who have so subscribed, and all persons who shall,

from time to time, become stockholders in such company, shall be a body corporate," etc., it was held that persons who merely signed a preliminary subscription paper, and did not subscribe the articles of association, did not become stockholders, and were not liable on the subscriptions. *Poughkeepsie & S. P. Plank Road Co. v. Griffin*, 24 N. Y. 150.

In Indiana this rule has been held not to apply to subscribers for stock in an existing corporation. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁵⁸ *Peninsular R. Co. v. Duncan*, 28 Mich. 130; *Greenbrier Industrial Exposition v. Rhodes*, 37 W. Va. 738, 17 S. E. 305. See also *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

In California it is "not necessary to the validity of the corporation, or to the subscribers becoming stockholders, that they should all sign the articles of incorporation. Those who sign articles of incorporation act as the agents of the others." *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

In an Indiana case it was held that, while one who subscribes for stock in a corporation, by signing preliminary articles, may perhaps refuse to sign the subsequent formal articles of association required by statute, yet where the required number of persons sign the formal articles, and they are duly

Defects in the articles will not necessarily render the subscription invalid.⁵⁹

Where the statute requires the articles of incorporation to state the amount subscribed and by whom, it has been held that the corporation can hold as subscribers as of the date of the filing of the articles only those named in the articles as subscribers, and to the amounts therein mentioned as having been subscribed by each of them.⁶⁰

recorded, the corporation thus created may recover from a subscriber of the preliminary articles only. *Johnson v. Wabash & Mt. V. Plank Road Co.*, 16 Ind. 389.

⁵⁹ *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185.

⁶⁰ *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126; *Monterey & S. Val. R. Co. v. Hildreth*, 53 Cal. 123.

So one whose name appears in the articles as having subscribed to forty shares cannot be held liable for assessments on a larger number of shares, though prior to the filing of the articles he signed a subscription contract for two hundred and fifty shares. *Monterey & S. Val. R. Co. v. Hildreth*, 53 Cal. 123.

In the above case the court held that the result would be the same whether it held that the misstatement in the articles rendered the attempt to incorporate abortive, or that the corporation, when it came into existence, was estopped to claim that any person other than those named in the articles became a member, or that any person named therein was a subscriber for a larger sum than that mentioned in the articles. It refused to decide whether one who had in fact subscribed, but whose name was not mentioned in the articles, could have the articles declared void, or could claim the right to be admitted as a member.

See also *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308, where it was held that the fact

that the subscriber's name did not appear as a stockholder in the articles of incorporation did not preclude a recovery on his express promise to pay a certain sum to a trustee when a certain amount was subscribed, regardless of whether a corporation was created or whether he became a member of it.

In an early Missouri case this rule was applied in the case of preliminary subscriptions to the stock of railroad corporations, it being held that, under Rev. St. 1909, § 3048, and earlier similar statutes, in order to create the relation of shareholder in such a corporation, it is essential that the subscriber shall actually sign the articles of association, if his subscription is made before incorporation, or the stock book if it is made after incorporation. *Sedalia, W. & S. Ry. Co. v. Wilkerson*, 83 Mo. 235. This holding was criticised by the Court of Appeals in *Shelby County R. Co. v. Crow*, 137 Mo. App. 461, 119 S. W. 435, but was followed on the ground that that court was bound by the decision of the supreme court. And it was also criticised in *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439, where, however, the subscriber was held bound under the doctrine of estoppel.

In *Louisiana Purchase Exposition Co. v. Schnurmacher*, 160 Mo. App. 611, 140 S. W. 1198, 151 Mo. App. 601, 132 S. W. 326, and *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409, the Court of Appeals held that the rule laid down in the *Wilker-*

§ 539. — Signing subscription book or list. A person is not liable as a subscriber by reason of his signing a subscription paper or of an oral agreement, where he has not signed or authorized another to sign the subscription book, if subscription in this mode is required by statute.⁶¹

But signing a subscription list, book or paper is not necessary unless it is required by statute.⁶² Nor does the mere fact that a

son case, *supra*, did not apply to subscriptions to the stock of manufacturing and business corporations, and the like, and that it was not essential to the validity of subscriptions to the stock of such corporations that the subscriber shall actually subscribe and acknowledge the articles of agreement or that he shall be mentioned therein as one of the incorporators, provided some one authorized to do so represents him in forming the corporation.

In *State v. Reynolds*, — Mo. —, 186 S. W. 1057, the Supreme Court, on certiorari, sustained the judgment of the Court of Appeals in the case last cited. In the course of the opinion the court quotes with approval a statement in *Shelby County R. Co. v. Crow*, *supra*, of the general rule that preliminary subscriptions are in the nature of continuing offers which become binding contracts when the corporation is organized and accepts them, and holds that it is the rule applicable to the facts of the case at bar. Referring to the *Wilkerson* case, it is said: "The authorities refer to lead to the conclusion that, at all events, the decision in the *Wilkerson* case, in so far as it conflicts with this holding, should be overruled. At least its application should be restricted to the particular facts in judgment in that case."

⁶¹ *McClelland v. Whiteley*, 15 Fed. 322; *Woodruff v. McDonald*, 33 Ark. 97; *Northern Cent. M. R. Co. v. Eslow*, 40 Mich. 222; *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23; *Shurtz v. Schoolcraft & Three Rivers R. Co.*,

9 Mich. 269; *Charlotte & S. C. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245. But see *Mexican Gulf R. Co. v. Viavant*, 6 Rob. (La.) 305. See also *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294, aff'g 22 Hun (N. Y.) 359; *Troy & B. R. Co. v. Warren*, 18 Barb. (N. Y.) 310; *Troy & B. R. Co. v. Tibbitts*, 18 Barb. (N. Y.) 297.

As to substantial compliance with the charter or statute in this respect, see *infra*, this section.

⁶² *California*. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

Illinois. *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313.

Indiana. See *Butler University v. Seconover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

Kentucky. *Kentucky Mut. Inv. Co.'s Assignee v. Schaefer*, 120 Ky. 227, 85 S. W. 1098.

Mississippi. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

Nebraska. *Nebraska Chicory Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245.

New Hampshire. *Anderson v. Scott*, 70 N. H. 534, 49 Atl. 568.

Oregon. *Nickum v. Burekhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788.

Virginia. *Stuart v. Valley R. Co.*, 32 Gratt. 146.

"An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock." *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933. See *Moultrie County v. Rockingham Ten-Cent*

statute authorizes subscription books to be opened prevent subscriptions in other modes,⁶³ although there is authority to the effect that a written subscription is required under such circumstances.⁶⁴

The fact that the statute requires persons wishing to become members to subscribe for shares upon the stock books does not prevent one from becoming a stockholder by purchasing shares from the company and receiving a certificate for the same.⁶⁵

If a statute requiring a municipality to subscribe for stock in a corporation provides that the subscription shall be made on the books of the company, the company must tender its books and request the subscription before it is entitled to mandamus to compel the municipality to make it.⁶⁶

§ 540. — Acknowledgment of articles or agreement. If the statute requires the formal agreement or articles of association to be acknowledged as well as signed, acknowledgment is essential. Where a general law provided that an agreement for the formation of a corporation thereunder should be acknowledged by the several incorporators before a justice, and there was no such acknowledgment, although a certificate of incorporation was issued, it was held that no corporate existence was acquired as to persons who signed the preliminary agreement as subscribers for stock, but did not acknowledge the same, and that they were not liable on their subscriptions.⁶⁷

Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 22 L. Ed. 83.

Where the corporation accepts subscriptions made in a small blank book, there is no necessity for transferring them to the stock book. Such acceptance would seem to make such book the stock book. *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68.

⁶³ *Nebraska*. *Nebraska Chicory Co. v. Lednicky*, 79 Neb. 587, 113 N. W. 245.

New York. *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157. See also *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294, aff'g 22 Hun 359.

Ohio. *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328.

Oregon. *Nickum v. Burekhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788. See also *Balfour v.*

Baker City Gas Co., 27 Ore. 300, 41 Pac. 164.

South Carolina. *North Eastern R. Co. v. Rodrigues*, 10 Rich. 278.

Virginia. *Stuart v. Valley R. Co.*, 32 Gratt. 146.

See § 542, *infra*.

In *Clark County Court v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon. (Ky.) 143, a provision for the insertion of subscriptions in a book provided for that purpose was held to apply to individual subscriptions and not to invalidate a subscription by a county court made by an order of the court.

⁶⁴ See § 537, *supra*.

⁶⁵ *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274.

⁶⁶ *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354.

⁶⁷ *Coppage v. Hutton*, 124 Ind. 401,

§ 541. — Substantial compliance with charter or statute. If there has been a substantial compliance with the requirements of the statute in subscribing for stock in a corporation, it is sufficient, and the subscriptions will not be rendered invalid because the statute was not strictly and literally complied with. A requirement that the subscribers shall sign formal articles of association, stating particular facts, is substantially complied with where each subscriber signs a separate paper, if the papers are all alike, and comply with the statute in the statement of facts.⁶⁸

Where a pocket memorandum book was opened for subscriptions and subscriptions entered therein before organization of the corporation, and the directors of the corporation, after its organization, adopted the book and accepted the subscriptions therein, with the assent of the subscribers, it was held that there was a substantial and sufficient compliance with a statutory requirement that the directors should, after the organization of the corporation, open books for subscriptions.⁶⁹

Where subscriptions to the capital stock of a bridge company were made on a loose sheet of paper, which was put in a bound book used as a record of the company, and the contents of the paper, with the names of the subscribers and amounts subscribed, were entered in the book by the commissioners appointed to open books of subscription, it was held that there was a substantial and sufficient compliance with a statute requiring the opening of subscription books.⁷⁰ And signature of a subscription paper has been held to be sufficient though the statute provides for subscription books.⁷¹

§ 542. — Provisions merely directory. In order that subscriptions may be invalid because of failure to comply with provisions of the law under which the corporation is organized, the provisions must

7 L. R. A. 591, 24 N. E. 112; Greenbrier Industrial Exposition v. Squires, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305. But see Windsor Hotel Co. v. Schenk, — W. Va. —, 84 S. E. 911, where these cases are explained and distinguished.

The Indiana statute making it necessary for subscribers to sign and acknowledge the articles of association does not apply to subscriptions

to the stock of existing corporations. Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁶⁸ Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451.

⁶⁹ Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294, aff'g 22 Hun (N. Y.) 359.

⁷⁰ Woodruff v. McDonald, 33 Ark. 97.

⁷¹ Hamilton & D. Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157.

be mandatory, and not merely directory to the officers of the corporation. Where a general law authorizing the formation of railroad companies provided that, if the full amount of the capital stock should not be taken, the directors of the corporation, after the filing of the articles of association, might open subscription books and receive subscriptions for the stock not taken, it was held that the provision as to the mode of receiving the subscriptions was merely directory, and did not prevent the directors from receiving subscriptions in other modes than by signing on the books.⁷²

A statute providing for the form of subscriptions to capital stock may be construed as not mandatory.⁷³ And it has been held that informal preliminary subscriptions are binding and enforceable by the corporation when formed, notwithstanding a statutory mode of subscription is provided, where there is nothing in the statute indicating an intent to make such method exclusive.⁷⁴

§ 543. Subscriptions implied from conduct. Where subscriptions are not required to be entered into in any particular form, no formal ⁷⁵

⁷² *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294. And see § 529, *supra*.

⁷³ *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

⁷⁴ In *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911, it is held that an informal preliminary subscription to the stock of a corporation to be formed by the subscribers is valid and enforceable when accepted by the organization of the corporation, at least if it is not previously revoked. In the course of its opinion the court says: "In a few instances, such contracts have been held invalid, upon the theory of an implied repeal of all common law applicable to stock subscriptions, by the enactment of a comprehensive statutory system of organization, which is deemed to have taken the place of the common law and to be exclusive. But in those instances in which it has been so held, language was found in the statute indicating intent to make the statutory method exclusive, * * *. Among the decisions regarded as so holding is *Green-*

brier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305. In the opinion in that case, there are general expressions which may be regarded as importing invalidity of all subscriptions made in any manner different from that prescribed by the statute. This view, however, is not consistent with the decision in *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 21 S. E. 1015, 52 Am. St. Rep. 884, which obviously treats the informal subscription as being merely voidable, not absolutely void. *Rodes* did not ratify and confirm his subscription after the organization of the company, but *Squires* did. The former was released and the latter held upon his subscription. * * * Each of the subscriptions was made in a special manner. It was a technical one in the articles of incorporation, and the act of subscription was incomplete, the law requiring an acknowledgment by each subscriber, which, in those instances, was omitted."

⁷⁵ *United States*. In *re Grand Rapids Furniture Co.*, 209 Fed. 483;

or actual⁷⁶ subscription is necessary, and a subscription may be implied from conduct,⁷⁷ or, in other words, "there may be a virtual subscription, deducible from the acts and conduct of the party."⁷⁸ Thus, a person who accepts a certificate of stock from a corporation⁷⁹

In re L. M. Alleman Hardware Co., 172 Fed. 611, rev'd on other grounds 181 Fed. 810.

California. Hughes Manufacturing & Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

District of Columbia. National Exp. & Transp. Co. v. Morris, 15 App. Cas. 262.

Illinois. Illinois Midland R. Co. v. Barnett, 85 Ill. 313. See also Parkhurst v. Mexican Southeastern R. Co., 102 Ill. App. 507.

Massachusetts. Bridgeport Window Hardware Co. v. Osborne, 222 Mass. 517, 111 N. E. 364.

New Jersey. Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

⁷⁶ Pacific Nat. Bank v. Eaton, 141 U. S. 227, 35 L. Ed. 702; Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; Walter v. Merced Academy Ass'n, 126 Cal. 582, 583, 59 Pac. 136; Cantor v. Baltimore Overall Mfg. Co., 121 Md. 65, 87 Atl. 1115; Davies v. Ball, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

⁷⁷ Bray's Adm'r v. Seligman's Adm'r, 75 Mo. 31; Fisher v. Seligman, 75 Mo. 13; Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17; Ross v. Bank of Gold Hill, 20 Nev. 191, 19 Pac. 243; Thompson v. Reno Sav. Bank, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121; Utah Hotel Co. v. Madsen, 43 Utah 285, 134 Pac. 577. See also Musgrave v. Morrison, 54 Md. 161.

Subscription is presumed from any act by which the stock is acquired from the company. Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac.

989; McAllister v. American Hospital Ass'n, 62 Ore. 530, 125 Pac. 286.

See also the cases cited in the following notes.

⁷⁸ Pacific Nat. Bank v. Eaton, 141 U. S. 227, 35 L. Ed. 702; Cantor v. Baltimore Overall Mfg. Co., 121 Md. 65, 87 Atl. 1115. See also § 716.

⁷⁹ **United States.** Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; In re Grand Rapids Furniture Co., 209 Fed. 483; French v. Busch, 189 Fed. 480; Bagnell v. Ives, 184 Fed. 466; In re L. M. Alleman Hardware Co., 172 Fed. 611, rev'd on other grounds 181 Fed. 810; In re Duryea Power Co., 159 Fed. 783. See also Harrison v. Remington Paper Co., 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

California. Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; Walter v. Merced Academy Ass'n, 126 Cal. 582, 583, 59 Pac. 136.

Illinois. See Parkhurst v. Mexican Southeastern R. Co., 102 Ill. App. 507.

Iowa. Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782; Jackson v. Traer, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764. See also Rutenbeck v. Hohn, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698.

Kansas. See Tschumi v. Hills, 6 Kan. App. 549, 51 Pac. 619.

Kentucky. Kentucky Mut. Inv. Co.'s Assignee v. Schaefer, 120 Ky. 227, 85 S. W. 1098; Williams v. Chamberlain, 29 Ky. L. Rep. 606, 94 S. W. 29.

Louisiana. Jackson Fire & Marine

or who acts as a stockholder by participating in stockholders' meetings, making payments, or otherwise,⁸⁰ thereby becomes a stockholder, and

Ins. Co. v. Walle, 105 La. 89, 29 So. 503; **Belknap v. Adams**, 49 La. Ann. 1353, 22 So. 382.

Massachusetts. **Bridgeport Window Hardware Co. v. Osborne**, 222 Mass. 517, 111 N. E. 364.

Michigan. **Union City Lumber Co. v. Traverse City, L. & M. R. Co.**, 170 Mich. 205, 136 N. W. 463.

Minnesota. **Randall Printing Co. v. Sanitas Mineral Water Co.**, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

Missouri. **Shickle v. Watts**, 94 Mo. 410, 7 S. W. 274; **Bray's Adm'r v. Seligman's Adm'r**, 75 Mo. 31; **Fisher v. Seligman**, 75 Mo. 13; **Griswold v. Seligman**, 72 Mo. 110. See also **Chouteau, Harrison & Valle v. Dean**, 7 Mo. App. 210.

Nevada. **Ross v. Bank of Gold Hill**, 20 Nev. 191, 19 Pac. 243.

New Hampshire. **Anderson v. Scott**, 70 N. H. 350, 47 Atl. 607.

New Jersey. **Holcombe v. Trenton White City Co.**, 80 N. J. Eq. 122, 82 Atl. 618.

New York. See **Van Cott v. Van Brunt**, 2 Abb. N. Cas. 283, rev'd on other grounds 82 N. Y. 535.

North Carolina. **Bernard v. Carr**, 167 N. C. 481, 83 S. E. 816.

Tennessee. **Sullivan v. Farnsworth**, 132 Tenn. 691, 179 S. W. 317.

Washington. **Gordon v. Cummings**, 78 Wash. 515, 139 Pac. 489. See also **Davies v. Ball**, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

See also § 716, *infra*.

⁸⁰**Indiana.** See **Overmyer v. Cannon**, 82 Ind. 457.

Louisiana. **Jackson Fire & Marine Ins. Co. v. Walle**, 105 La. 89, 29 So. 503; **Belknap v. Adams**, 49 La. Ann. 1353, 22 So. 382.

Maine. **Barron v. Burrill**, 86 Me. 66, 29 Atl. 939.

Maryland. See **Musgrave v. Morrison**, 54 Md. 161.

Massachusetts. **Bridgeport Window Hardware Co. v. Osborne**, 222 Mass. 517, 111 N. E. 364.

Minnesota. **Randall Printing Co. v. Sanitas Mineral Water Co.**, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

Missouri. **Bray's Adm'r v. Seligman's Adm'r**, 75 Mo. 31; **Fisher v. Seligman**, 75 Mo. 13; **Griswold v. Seligman**, 72 Mo. 110.

Oregon. **McAllister v. American Hospital Ass'n**, 62 Ore. 530, 125 Pac. 286.

Washington. See **Davies v. Ball**, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

As where he pays calls and acts in accordance with the idea that he is a subscriber to a certain number of shares, and the corporation recognizes him as a subscriber. **Peninsula Leasing Co. v. Cody**, 161 Mich. 604, 126 N. W. 1053.

The contract may be inferred from acquiescence and acceptance of the benefits of membership. **Clevenger v. Moore**, 71 N. J. L. 148, 58 Atl. 88.

One may be proved to be a member of a corporation by being a petitioner for the act of incorporation, or, being within the description of persons incorporated, by acting under it and assisting to carry it into execution. **Lexington & W. C. R. Co. v. Chandler**, 13 Mete. (Mass.) 311.

One who authorizes another to procure stock for him, recognizes and ratifies his act in so doing, pays a call on the stock, and afterwards assigns it, is a subscriber, though he does not subscribe the stock book. **Kruger v. Hanover Nat. Bank**, 72 Miss. 462, 16 So. 351.

Where the opening of books is

liable as such, not only to creditors, but also to the corporation, although there may have been no express contract of subscription.

But where certificates of unissued stock are delivered by the corporation to one person at the request of another there is no implied obligation on the part of the former to pay the corporation therefor.⁸¹ Nor can a person be held liable as a subscriber merely by reason of his failure to deny a statement in a newspaper that he has subscribed.⁸² Nor do acts done on the assumption that a void subscription payable in property is valid tend to establish a subscription payable in money.⁸³

It was formerly held in England that, when qualification to act as a director of a corporation is made dependent upon ownership of a certain number of shares in the corporation, a person who acts as a director impliedly subscribes for the number of shares required to qualify him, and is liable to that extent on the winding up of the company.⁸⁴ The later cases, however, hold that there is no such liability, unless qualification shares are allotted, or liability is expressly imposed by statute.⁸⁵

In this country a subscription may be implied from the fact that one accepts a certificate of stock and acts as a director.⁸⁶

ordered on the minutes of the proceedings of the corporation, and the amount taken by each of the subscribers is there distinctly set forth, persons whose names so appear as subscribers, and who have served as directors, and have had access to the books, are bound by such record to the amount of stock there shown, though no actual subscription by them is produced. *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

See also § 716, *infra*.

⁸¹ *Sanders v. Proctor*, — N. Y. App. Div. —, 158 N. Y. Supp. 433.

⁸² *Louisiana Purchase Exposition Co. v. Emerson*, 149 Mo. App. 594, 129 S. W. 753.

⁸³ *Sturtevant Mill Co. v. Cosmic Cement & Stone Co.*, 111 Md. 667, 76 Atl. 412.

⁸⁴ *In re Empire Assur. Corporation*, 6 Ch. App. 469; *In re British Colonial & Foreign Property Ins. Corpora-*

tion, 45 L. J. Ch. 488; *In re Great Oceanic Tel. Co.*, L. R. 13 Eq. 30.

⁸⁵ *In re Percy & Kelly Nickel, Cobalt & Chrome Iron Min. Co.*, 5 Ch. Div. 705; *In re Medical Attendance Ass'n*, 55 L. T. R. (N. S.) 612. Compare *In re Portuguese Consol. Copper Mines*, [1891] 3 Ch. 28.

Where the charter of a corporation expressly provides that acting as a director shall be equivalent to a contract to pay for the number of shares necessary to qualify, one who so acts is liable upon required number of shares, although they may not have been allotted to him. *In re Anglo-Austrian Prtg. & Pub. Union*, [1892] 2 Ch. 158.

⁸⁶ *Bridgeport Window Hardware Co. v. Osborne*, 222 Mass. 517, 111 N. E. 364; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

§ 544. Effect of mistake or ignorance. As in the case of any other contract, if a contract of subscription is entered into as a result of a mutual mistake of fact, it may be rescinded by the subscriber.⁸⁷ And if a person, without negligence, enters into a contract of subscription under a mistake as to the nature of the transaction, induced by the deceit or other fault of a third person, against which ordinary diligence cannot guard, the subscription is void on the ground of mistake.⁸⁸ And the same is true where a person subscribes for shares under a mistake as to the corporation, the subscription being made to the stock of one corporation, when it is intended to subscribe for stock in another.⁸⁹

But as a rule, a mistake as to the subject-matter of a contract has no effect at all except where the mistake is (1) as to the existence of the subject-matter; (2) as to the identity of the subject-matter, where what is meant by each party answers the description of the subject-matter; (3) as to the essential nature or qualities of the subject-matter, where the mistake goes to the whole substance of the agreement, and renders the subject-matter contracted for essentially different in kind from the thing as it actually exists, and where the mistake is mutual; (4) as to quantity; and (5) as to price.⁹⁰

A mistaken impression on the part of the subscriber as to the proposed location of the corporate enterprise, produced by his own erroneous deductions from facts, will not relieve him from liability on his contract.⁹¹ Nor will a mutual mistake of the parties as to the benefits to be derived from the corporate project,⁹² or a mistaken

⁸⁷ See *Drake v. Fairmont Drain, Tile & Brick Co.*, 129 Minn. 145, 151 N. W. 914.

⁸⁸ "Nothing affords a clearer ground of equitable relief, than a case where a contract is obtained by misrepresentation of the one part, and mistake of the facts upon the other." *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305.

As to the effect of fraud generally see § 610 et seq., *infra*.

⁸⁹ See *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Humble v. Hunter*, 12 Q. B. 311.

⁹⁰ See standard works on contracts.

⁹¹ As, for example, the fact that some of the members of the county court voted in favor of a subscription to the stock of a turnpike com-

pany under a mistaken impression as to where the road was to be located. *Clarke County Court v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon. (Ky.) 143.

⁹² In a Massachusetts case, a subscriber for shares in a corporation, in an action by the corporation to recover an assessment thereon, set up as a defense that the published estimate of the powers and capacity of the corporation was erroneous, and that he would not have subscribed if he had known the facts. As there was no evidence of any intention to deceive those subscribing on the faith of the estimates, it was held that the defense could not be sustained. *Sal'em Mill-Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

estimate by the person procuring the subscription as to the probable expense of the undertaking be a ground for such relief.⁹³

The fact that the name of the corporation in the contract does not correspond exactly with the true corporate name of the company will not prevent it from recovering thereon, where it corresponds substantially and it is alleged and proved that the contract was in fact made with the plaintiff.⁹⁴

A mistake of law, or a mistake due to ignorance of the law, as a mistake as to the legal effect of the contract, is clearly no ground for relief, either at law or in equity.⁹⁵ So a subscription contract will not be canceled on the ground that it was entered into by the subscriber under the mistaken idea, due to his ignorance of the law, that he was purchasing stock in an existing corporation instead of subscribing to stock to organize a new one.⁹⁶

Ignorance of the terms or effect of the contract, due to a failure to read or understand it, will not relieve the subscriber from liability in the absence of fraud.⁹⁷ But when a person, without negligence, is induced by fraud or false representations to sign a subscription paper in ignorance of its character or contents, as in the case of a blind or ignorant and illiterate person, he is not bound by the subscription. Some of the courts regard the subscription as merely

⁹³ *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69.

⁹⁴ *Scarlett v. Academy of Music*, 46 Md. 132.

Where the charter prescribing the form of subscriptions provides that they shall be payable to "The President, Managers, and Company of the Hagerstown Turnpike Road Company," the omission of the word "President" in a subscription does not invalidate it. *Hagerstown Turnpike Road Co. v. Creeger*, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495.

⁹⁵ *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Chesapeake & O. Canal Co. v. Dulany*, 4 Cranch C. C. 85, Fed. Cas. No. 2,647; *Williams v. Thwing Elec. Co.*, 160 Ill. 526, 43 N. E. 595, aff'g 55 Ill. App. 229; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653.

A mistake as to the necessity for a

unanimous vote of the stockholders to authorize the adoption of an amendment to the articles permitting the issuance of new preferred stock is not ground for rescinding a contract to take a part of such stock when such an amendment is adopted and for recovering back money advanced by the subscriber to the corporation under an agreement that the same shall be applied on such subscription. In *re Sharood Shoe Corporation*, 192 Fed. 945.

For the effect of false representations as to matters of law, see § 620, *infra*.

⁹⁶ *Williams v. Thwing Elec. Co.*, 160 Ill. 526, 43 N. E. 595, aff'g 55 Ill. App. 229.

⁹⁷ *Chicago Bldg. & Mfg. Co. v. Peterson*, 133 Ky. 596, 118 S. W. 384. See also *Chicago Bldg. & Mfg. Co. v. Beaven*, 149 Ky. 267, 148 S. W. 37.

voidable in such a case on the ground of fraud; but the better opinion is that it is absolutely void on the ground of mistake, for there is a mistake on the part of the subscriber, as well as fraud on the part of the corporation or its agents.⁹⁸

Parol evidence is admissible to show that because of accident or mistake a written subscription fails to show the whole or true contract.⁹⁹

If particular provisions are omitted from a written subscription contract by mistake, the remedy of the subscriber is by an action to reform the writing.¹ To warrant a reformation, however, the mistake must have been that of both parties, and not of one only.² And the fact of the mistake must be clearly established by the most satisfactory proof. It is not sufficient that there may be reason to presume a mistake, but the evidence must be clear, decisive and unequivocal.³

Mistake in subscribing for a greater number of shares than was intended is no ground for relief in equity, where the subscriber has allowed the corporation to act upon the faith of the subscription.⁴

§ 545. Capacity of subscribers and effect of disability—In general.

Unless there is some provision to the contrary in the charter of a corporation, or the law under which it is organized, the capacity of a person to subscribe for stock therein, and the effect of subscriptions by persons under legal disability, are governed by substantially the same rules as any other contract. The charter or statute may expressly or impliedly impose restrictions, or it may make one liable on a subscription who would not be liable at common law; but unless it does so, the general principles governing the capacity of parties to contract are applicable,⁵ and any person capable of contracting may subscribe.⁶

⁹⁸ See *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Jackson v. Hayner*, 12 Johns. (N. Y.) 469; *Schuykill County v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441; *Foster v. Mackinnon*, 4 C. P. 704.

As to the right of a subscriber to rely upon representations in respect to the contents of a written contract of subscription, and to rescind because of their falsity, see § 625, *infra*.

⁹⁹ *Gelpeke, Winslow & Co. v. Blake*, 19 Iowa 263, 15 Iowa 387, 83 Am. Dec. 418.

¹ *Commonwealth Bonding & Cas-*

ualty Ins. Co. v. Barrington, — Tex. Civ. App. —, 180 S. W. 936.

² *Bell v. Americus, P. & L. R. R.*, 76 Ga. 754.

³ *Gelpeke, Winslow & Co. v. Blake*, 19 Iowa 263, 15 Iowa 387, 83 Am. Dec. 418.

⁴ *Diman v. Providence, W. & B. R. Co.*, 5 R. I. 130.

⁵ *Phillips v. Covington & C. Bridge Co.*, 2 Metc. (Ky.) 219; *In re Hahn's Appeal* (Pa.), 7 Atl. 482; *Newry & E. Ry. Co. v. Coombe*, 3 Exch. 565.

⁶ *Cattlemen's Trust Co. of Ft.*

The subscribers to the stock of a corporation may enter into an agreement under which neither themselves nor subsequent subscribers to the stock will be entitled to or permitted to receive more than a specified number of shares, and such an agreement will be binding upon the parties to it, though not on the corporation.⁷

§ 546. — Subscriptions by infants. In the absence of charter or statutory restrictions, there is nothing to prevent an infant from subscribing for stock in a corporation. But, as in the case of other contracts except those for necessities, he may, at his option, disaffirm and repudiate his contract when he attains his majority, or before, and if he does so, he cannot be held liable either to the corporation or to creditors,⁸ or even to an innocent purchaser of a note given by him to the corporation for the amount of his subscription.⁹

Worth v. Turner, — Tex. Civ. App. —, 182 S. W. 438.

⁷ *Hladovec v. Paul*, 222 Ill. 254, 78 N. E. 619, aff'g 124 Ill. App. 589; *Cross v. Farmers' Elevator Co. of Dawson*, 31 N. D. 116, 153 N. W. 279.

⁸ *Illinois*. *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224.

Indiana. *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

Iowa. *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa 294, 103 N. W. 961.

Kentucky. *Phillips v. Covington & C. Bridge Co.*, 2 Metc. 219.

Massachusetts. *White v. New Bedford Cotton Waste Corporation*, 178 Mass. 20, 59 N. E. 642.

New York. *Danziger v. Iron Clad Realty & Trading Co.*, 80 Misc. 510, 141 N. Y. Supp. 593.

England. *Baker's Case*, 7 Ch. App. 115; *Ebbett's Case*, 5 Ch. App. 302; *Lumsden's Case*, 4 Ch. App. 31; *Pim's Case*, 3 De G. & Sm. 11; *North Western Ry. Co. v. McMichael*, 5 Exch. 114; *Newry & E. Ry. Co. v. Coombe*, 3 Exch. 565; *Wilson's Case*, L. R. 8 Eq. 240; *Hart's Case*, L. R. 6 Eq. 512.

Canada. *Hamilton & F. Road Co. v. Townsend*, 13 Ont. App. 534.

He is not obliged to give any reason for his refusal to longer continue to carry out the agreement. *Danziger v. Iron Clad Realty & Trading Co.*, 80 N. Y. Misc. 510, 141 N. Y. Supp. 593.

Where a minor subscribed for shares in a proposed corporation, and received and paid for the same, and afterwards, before any business was entered into, the officers and stockholders formed a new corporation, and agreed to sell all the property of the original corporation to it, and wind up the affairs of the original corporation, and the new corporation, in consideration of the transfer to it, issued its shares to the stockholders of the old corporation, it was held that the minor could not rescind his subscription for the stock in the old company, and recover what he paid from the new corporation, as his contract was not with the latter. *White v. Mt. Pleasant Mills Corporation*, 172 Mass. 462, 52 N. E. 632.

As to whether subscriptions by an infant can be counted in determining the amount of stock subscribed, see § 697, *infra*.

⁹ *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa 294, 103 N. W. 961.

Such disaffirmance will also release the minor's surety when accompanied by a return or surrender of the consideration received, but not otherwise.¹⁰

His right to repudiate the contract is not affected by the fact that he is engaged in business for himself or is emancipated,¹¹ nor by the fact that the contract has been executed.¹²

On disaffirmance he may recover back the consideration paid by him.¹³

He must return the consideration received by him, or such part of it as remains in his control,¹⁴ but if he has lost or expended it, so that he cannot restore it, he is not obliged to make restitution.¹⁵ And there are holdings to the effect that while he cannot disaffirm without putting the other party in statu quo if the contract has been executed and was beneficial to him, he need not do so otherwise.¹⁶

The right of an infant to disaffirm his contract of subscription is subject to the qualification, applicable to other contracts of infants, that he cannot do so if he has ratified the same, either expressly or impliedly, since attaining his majority.¹⁷ And he does ratify it,

¹⁰ Seeley v. Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961.

¹¹ Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429.

¹² Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224.

¹³ Illinois. Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224.

Indiana. Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429.

Iowa. Seeley v. Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961.

Massachusetts. White v. New Bedford Cotton Waste Corporation, 178 Mass. 20, 59 N. E. 642.

New York. Danziger v. Iron Clad Realty & Trading Co., 80 Misc. 510, 141 N. Y. Supp. 593.

¹⁴ Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224.

In a suit to cancel a subscription and recover the money paid thereon, a provision in the decree for the cancellation of the stock certificate amounts, in effect, to the surrender of the stock by the minor and its restoration to the corporation. Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224.

¹⁵ Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796, aff'g 147 Ill. App. 224.

¹⁶ White v. New Bedford Cotton Waste Corporation, 178 Mass. 20, 59 N. E. 642.

¹⁷ Ebbett's Case, 5 Ch. App. 302; Tumsden's Case, 4 Ch. App. 31; and cases cited in the notes following.

and thus render it binding, if, after attaining his majority, he accepts the benefits of it, or acts upon it as a binding contract, as by receiving dividends, taking part in stockholders' meetings, or otherwise acting as a stockholder, or if he does not disaffirm the contract within a reasonable time.¹⁸ If he does not elect to repudiate the contract within a reasonable time after attaining his majority, and manifest his intention to do so, he will be liable for calls made while he was an infant, as well as for those made afterwards.¹⁹

§ 547. — Subscriptions by married women. At common law, the contracts of a married woman, with few exceptions, are absolutely void, and this principle applies, except in so far as it has been changed by statute, to a married woman's subscription for stock in a corporation.²⁰

In most jurisdictions the common-law doctrine as to a married woman's capacity to contract has been modified or altogether abolished, so that she may bind her separate estate by a contract of subscription, as well as by other contracts.²¹ A husband may sub-

¹⁸ *North Western Ry. Co. v. McMichael*, 5 Exch. 114; *Leeds & T. Ry. Co. v. Fearnley*, 4 Exch. 26; *Ebbett's Case*, L. R. 5 Ch. 302; *Cork & B. Ry. Co. v. Cazenove*, 10 Q. B. 935. See also *Mitchell's Case*, L. R. 9 Eq. 363.

A plea of infancy must allege repudiation by the infant within a reasonable time after he became of age. *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181.

¹⁹ *Ebbett's Case*, 5 Ch. App. 302; *Lumsden's Case*, 4 Ch. App. 31; *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181; *North Western Ry. Co. v. McMichael*, 5 Exch. 114; *Mitchell's Case*, L. R. 9 Eq. 363. Compare *Wilson's Case*, L. R. 8 Eq. 240; *Hart's Case*, L. R. 6 Eq. 512.

²⁰ *United States*. *Witters v. Sowles*, 38 Fed. 700, 32 Fed. 767.

Alabama. *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149.

Kentucky. *Phillips v. Covington & C. Bridge Co.*, 2 Mete. 219.

Pennsylvania. *In re Hahn's Appeal*

(Pa.), 7 Atl. 482; *In re Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258.

England. *Pugh & Sharman's Case*, L. R. 13 Eq. 566.

²¹ *United States*. (Under the statutes of Arkansas) *Bundy v. Coker*, 128 U. S. 185, 32 L. Ed. 397; *Witters v. Sowles*, 38 Fed. 700, 32 Fed. 767. See also *In re First Nat. Bank of St. Albans*, 49 Fed. 120.

New York. *In re Reciprocity Bank*, 22 N. Y. 9.

Pennsylvania. *In re Married Women Corporators* (Opinion of Attorney General), 18 Pa. Co. Ct. 492.

Rhode Island. See *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

Vermont. See *Porter v. Bank of Rutland*, 19 Vt. 410.

Wisconsin. See *Good Land Co. v. Cole*, 131 Wis. 467, 120 Am. St. Rep. 1056, 11 Ann. Cas. 806, 110 N. W. 895.

England. *Matthewman's Case*, L. R. 3 Eq. 781.

Canada. See *Hamilton & F. Road Co. v. Townsend*, 13 Ont. App. 534.

In England a married woman may

scribe in the name of his wife as her attorney or agent with the intention of paying for the stock himself and giving it to her.²²

In a state where the doctrine of community property prevails, it has been held that a subscription made by a married man will be presumed to have been made for the benefit of the community, and that, if this presumption is not rebutted, the community property may be subjected to its payment.²³

§ 548. — Subscriptions by or for the corporation itself, and subscriptions by other corporations. A corporation may subscribe for shares of stock in another corporation, if it is expressly authorized to do so, or if such a contract is a necessary or proper means of accomplishing the purpose for which it was created.²⁴ Ordinarily,

subscribe so as to bind her separate estate. *Butler v. Cumpston*, L. R. 7 Eq. 16; *In re Leeds Banking Co. (Mrs. Matthewman's Case)*, L. R. 3 Eq. 781. See also *Angas's Case*, 1 De G. & Sm. 560, 63 Eng. Rep. 1194; *Ness v. Angas*, 3 Exch. 805; *In re Northumberland & D. Dist. Banking Co. (Luard's Case)*, 1 De G. & J. 533, 45 Eng. Rep. 468; *Biggart v. City of Glasgow Bank*, 6 Scotch Sess. Cas. (4th Series) 470.

²² *Litchfield Bank v. Church*, 29 Conn. 137.

²³ *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

²⁴ *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605; *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657; *Rubino v. Pressed Steel Car Co. (N. J. Ch.)*, 53 Atl. 1050; *Clark v. Memphis St. Ry. Co.*, 123 Tenn. 232, 130 S. W. 751.

It may do so in the absence of any provision to the contrary in its charter, and especially where the charter gives it power to buy and sell "personal property of every description." *Quitman Oil Co. v. McRee*, — Ga. App. —, 88 S. E. 921.

In Louisville & N. R. Co. v. Literary Soc. of St. Rose, 91 Ky. 395, 15 S. W. 1065, it was held that a literary cor-

poration owning and operating a large farm, under authority conferred by its charter, had the power to subscribe for stock in a railroad company, where such a transaction added to the value of the farm, and was of great benefit to its operation, etc.

In Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268, it was held that a subscription by a hotel company to aid a corporation formed for the purpose of holding a military encampment was not ultra vires, in carrying out that enterprise, in view of the increased patronage of the hotel that would probably result from such encampment. It is to be noted, however, that this was not a subscription to the corporate stock.

In Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun (N. Y.) 371, it was held that a subscription by a corporation was valid where it was made by authority of the directors and with the consent of all the stockholders, and was subsequently ratified by the payment of calls.

"In Ohio, no fraud appearing, the representatives of a corporation may subscribe for it to the capital stock of another corporation caused by it to

however, such a transaction is not within the powers of a corporation.²⁵

be formed through them." *Kardo Co. v. Adams*, 231 Fed. 950, rev'g sub nom. *American Ball Bearing Co. v. Adams*, 222 Fed. 967.

See also *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335; *Tod v. Kentucky Union Land Co.*, 57 Fed. 47; *Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50. And see Chap. 30, infra.

²⁵ *United States*. *Converse v. Gardner Governor Co.*, 174 Fed. 30; *Vandagriff v. Rich Hill Bank*, 163 Fed. 823; *Pauly v. Coronado Beach Co.*, 56 Fed. 428.

Alabama. *McAlester Mfg. Co. v. Florence Cotton & Iron Co.*, 128 Ala. 240, 30 So. 632; *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 49 Am. St. Rep. 57, 16 So. 637; *Commercial Fire Ins. Co. v. Board of Revenue Montgomery County*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

California. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

Connecticut. *Mechanics' & Working Men's Mut. Sav. Bank & Bldg. Ass'n v. Meriden Agency Co.*, 24 Conn. 159.

Georgia. *Military Interstate Ass'n of Savannah v. Savannah, T. & I. of H. Ry.*, 105 Ga. 420, 31 S. E. 200.

Illinois. *Converse v. Emerson, Talcott & Co.*, 242 Ill. 619, 90 N. E. 269, aff'g 148 Ill. App. 604; *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605; *Martin v. Ohio Stove Co.*, 78 Ill. App. 105; *Peshtigo Co. v. Great Western Tel. Co.*, 50 Ill. App. 624.

Indiana. See *Midland Steel Co. v. Citizens' Nat. Bank*, 26 Ind. App. 71, 59 N. E. 211.

Louisiana. *New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173, 26 Am. Rep. 90.

Maine. *Franklin Co. v. Lewiston*

Institution for Savings, 68 Me. 43, 28 Am. Rep. 9.

Mississippi. *Merchants' & Planters' Packet Co. v. Strenby*, 91 Miss. 211, 124 Am. St. Rep. 651, 44 So. 791.

Nebraska. *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unoff.) 888, 93 N. W. 225.

New Jersey. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

New York. *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Berry v. Yates*, 24 Barb. 199.

Ohio. *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

Tennessee. *Clark v. Memphis St. Ry. Co.*, 123 Tenn. 232, 130 S. W. 751; *McC Campbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070; *Doak v. Stahlman* (Tenn. Ch.), 58 S. W. 741.

Washington. *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700; *Denny Hotel Co. of Seattle v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

"Independent of statute, one corporation cannot become an original subscriber for the capital stock of another." *McAlester Mfg. Co. v. Florence Cotton & Iron Co.*, 128 Ala. 240, 30 So. 632.

A trust company cannot act as the promoter of a corporation though it has power to buy and sell stock. *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359.

Such a subscription cannot be made indirectly through persons acting as its agents or tools. *Martin v. Ohio Stove Co.*, 78 Ill. App. 105.

The subscription is ultra vires though it is made in the name of a trustee for the corporation. *McC Campbell v. Fountain Head R. Co.*, 111

A statute merely authorizing a corporation to "invest" its money "in real or personal property, stocks, or choses in action," gives it the power to invest in the stock of organized corporations, but does not authorize it to subscribe for stock in a projected corporation.²⁶ Nor does power to invest its money, property or other assets in enterprises which it deems calculated to advance its interests, or to loan money to certain classes of persons, and to receive certificates of stock for such investments or loans, confer such authority on it.²⁷

In most jurisdictions, an ultra vires subscription by a corporation for stock in another corporation is absolutely void, and cannot be enforced either by or against the corporation.²⁸

In organizing a corporation, subscriptions for stock cannot be made either in the name of the corporation itself, or in the name of others as agents or trustees for the corporation.²⁹

§ 549. — Subscriptions by municipal corporations. A municipal corporation has no power to subscribe for shares in a private corporation unless there is a valid law authorizing it to do so; but the legislature may authorize a municipal corporation, or quasi corporation, like a city or county, to subscribe for stock in a railroad company or other quasi public corporation for the purpose of aiding it in the

Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070.

See also Chap. 30, *infra*. As to promotion of corporations, see Chap. 5.

²⁶ Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

²⁷ McAlester Mfg. Co. v. Florence Cotton & Iron Co., 128 Ala. 240, 30 So. 632.

²⁸ See cases in preceding notes. Compare, however, United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403.

For a full discussion of the enforceability of ultra vires contracts, see Chap. 37, *infra*.

²⁹ Johnston v. Allis, 71 Conn. 207, 41 Atl. 816; Holladay v. Elliott, 8 Ore. 84; Preston v. Grand Collier Dock Co., 11 Sim. 327.

The reason for this is that at the time of its organization the corporation can have no property other than

the subscriptions to its stock, and that before its organization it could not appoint a trustee, and that in any event the subscription was one which the corporation would have no right to make. Johnston v. Allis, 71 Conn. 207, 41 Atl. 816.

In Johnston v. Allis, *supra*, it was held that one who subscribed for stock as "trustee" for the benefit of the proposed corporation, and afterwards, as one of the officers of the corporation, signed, published, and caused to be recorded a certificate of its organization, which set forth his subscription with the others, was personally liable on the subscription, on insolvency of the corporation, both on the ground that the subscription was not binding on the corporation, and on the ground of estoppel. But see Russell v. Bristol, 49 Conn. 251, which is distinguished in Johnston v. Allis.

construction of its works,³⁰ and may validate an unauthorized subscription made by a municipality, so as to give it the same status as if originally authorized.³¹

The adoption of a constitutional provision prohibiting such subscriptions will not affect the validity of subscriptions or agreements to subscribe previously made under statutory authority.³²

If the statute imperatively requires a municipal corporation to subscribe to the stock of a corporation, mandamus may issue to compel its officers to do so.³³

§ 550. — Subscriptions by the state. The state may become a subscriber when authorized by statute to do so,³⁴ and by so doing does not impart to the corporation any of her sovereign privileges or pre-

³⁰ **United States.** *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933; *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631; *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747; *New Albany v. Burke*, 11 Wall. 96, 20 L. Ed. 155, rev'g on other grounds 4 Biss. 365, Fed. Cas. No. 11,481. See also *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83.

Arkansas. *Jacks v. Helena*, 41 Ark. 213.

Illinois. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g 66 Ill. App. 427; *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

Indiana. *Shipley v. Terre Haute*, 74 Ind. 297; *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395.

Iowa. *Wapello County v. Burlington & M. River R. Co.*, 44 Iowa 585.

Maine. *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

Tennessee. *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016; *State v. Town of Morristown*, 93 Tenn. 239, 24 S. W. 13.

A valid subscription by a city subjects it to the same liability as that

incurred by any other stockholder. *Shipley v. Terre Haute*, 74 Ind. 297.

See *McQuillin Mun. Corp.* § 393.

³¹ *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016. See also *Putnam v. New Albany*, 4 Biss. (U. S.) 365, Fed. Cas. No. 11,481, rev'd on other grounds 11 Wall. (U. S.) 96, 20 L. Ed. 155.

³² *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631.

³³ *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354.

³⁴ **Georgia.** *Robinson v. Bank of Darien*, 18 Ga. 65.

Louisiana. See *Consolidated Bank v. State*, 5 La. Ann. 44, 45.

Maryland. *Baltimore & O. R. Co. v. State*, 36 Md. 519, aff'd 22 Wall. (U. S.) 105, 22 L. Ed. 713.

North Carolina. *Attorney General v. Cape Fear Nav. Co.*, 37 N. C. 444.

Ohio. See *Miers v. Zanesville & M. Turnpike Co.*, 11 Ohio 273.

Tennessee. *State v. Jefferson Turnpike Co.*, 3 Humph. 305. See also *Bank of Tennessee v. Dibrell*, 3 Sneed 379.

The state may incorporate a bank with itself as the sole stockholder. *Curran v. Arkansas*, 15 How. (U. S.) 304, 14 L. Ed. 705.

rogatives, so far as respects the transactions of the corporation.³⁵ Some courts hold that by such a subscription the state subjects itself to the same liabilities which attach to any private stockholder.³⁶

But, on the other hand, it has been held that an action will not lie against the state to compel it to pay its subscription.³⁷ And also that the state cannot be held liable for interest on its subscription, where it has not promised to pay interest, at least until a specific demand for the payment of the principal has been made.³⁸

§ 551. — Subscriptions by officers, agents and commissioners. In the absence of express charter or statutory restrictions, the officers of a corporation may subscribe for shares therein, provided they do so fairly and without violating the rights of, or perpetrating a fraud upon, other stockholders or subscribers.³⁹ And commissioners appointed by a statute to open subscription books and receive subscriptions may become subscribers themselves.⁴⁰

The promoters of a corporation may themselves subscribe, and are personally liable on their subscriptions, though their intention is to sell the stock to others.⁴¹

An agent in whose possession a subscription book is placed by the corporation for the purpose of soliciting and receiving subscriptions may subscribe himself by entering his name therein.⁴²

Neither the officers nor agents of a corporation, however, nor the

³⁵ Robinson v. Bank of Darien, 18 Ga. 65.

See also Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.) 379, where it is held that the fact that a bank belongs to the state does not make it identical with, nor even an integral part of, the state sovereignty, nor make debts due to it debts due the state.

³⁶ Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. Ed. 705; Robinson v. Bank of Darien, 18 Ga. 65. See also Shipley v. Terre Haute, 74 Ind. 297; Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.) 379.

In Consolidated Bank v. State, 5 La. Ann. 44, 45, it was held that a provision, in an act for the issuance of state bonds as security upon which a corporation might borrow its authorized capital, that "the state shall

be acknowledged to be a stockholder to the amount of one million dollars as a bonus," did not make the state liable for contributions and losses of the corporation as ordinary stockholders were, for otherwise no advantage would be given to it, and hence no bonus.

³⁷ Miers v. Zanesville & M. Turnpike Co., 11 Ohio 273.

³⁸ Attorney General v. Cape Fear Nav. Co., 37 N. C. 444.

³⁹ Sims v. Street R. Co., 37 Ohio St. 556; Christopher v. Noxon, 4 Ont. 672.

⁴⁰ See § 562, *infra*.

⁴¹ Heiskell v. Morris, 135 Tenn. 238, 186 S. W. 99.

See also Chap. 5.

⁴² Greer v. Chartiers Ry. Co., 96 Pa. St. 391, 42 Am. Rep. 548.

commissioners appointed to receive subscriptions, will be allowed to take advantage of their position to exclude others and take a majority of the stock, for the purpose of gaining control of the corporation, or otherwise in fraud of the rights of other stockholders.⁴³

§ 552. — Citizenship and residence. In the absence of charter or statutory restrictions, a person who is otherwise capable of entering into a binding contract is not rendered incompetent to subscribe for stock in a corporation by the fact that he is a nonresident of the state, or an alien.⁴⁴ But a state has the right to debar aliens from holding stock in her corporations, or to admit them to that privilege on such terms as she may prescribe.⁴⁵ And generally the statutes require that a certain number of the corporators shall be residents of the state, and such a provision is mandatory.⁴⁶

§ 553. Subscriptions by agents, trustees or partners—In general. A person may subscribe for shares in a corporation as the agent of another, provided there is no charter or statutory provision in the way, and provided he has authority from the other to do so. And in such a case, the principal is entitled to the shares, and is liable on the subscription.⁴⁷ And this is true, though the charter provides that

⁴³ *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151; *Brower v. Passenger Ry. Co.*, 3 Phila. (Pa.) 161.

⁴⁴ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Com. v. Hemmingway*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

⁴⁵ *State v. Travelers Ins. Co.*, 70 Conn. 590, 66 Am. St. Rep. 138, 40 Atl. 465.

⁴⁶ *Sword v. Wickersham*, 29 Kan. 746; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743, 15 S. W. 1038.

As to the presumption, see § 111, *supra*.

As to de facto corporate existence in case of failure to comply with the charter or statute in this respect, see § 293, *supra*.

⁴⁷ *United States. Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933; *Bean v. American Alkali Co.*, 134 Fed. 57,

rev'g 125 Fed. 823. See also *American Alkali Co. v. Kurtz*, 138 Fed. 392, aff'g 134 Fed. 663.

Illinois. See *Marseilles Land & Water-Power Co. v. Aldrich*, 86 Ill. 504; *Tonica & P. R. Co. v. Stein*, 21 Ill. 96.

Maryland. *Musgrave v. Morrison*, 54 Md. 161.

Mississippi. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

New York. See *In re New York, L. & W. Ry. Co.*, 99 N. Y. 12, 1 N. E. 27, aff'g 35 Hun 220; *Burr v. Wilcox*, 22 N. Y. 551; *Perkins v. Savage*, 15 Wend. 412.

Pennsylvania. *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

South Carolina. *State v. Lehre*, 7 Rich. 234.

Washington. *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700.

it shall not be lawful for any person to subscribe for shares in the name of other persons.⁴⁸

To bind the principal, the contract of subscription must have been in fact made by the agent. The mere fact that one is authorized to subscribe for another does not make the other a subscriber unless the authority is exercised by subscribing.⁴⁹

Underwriters who have given a promoter authority to apply for shares in their names may revoke such authority at any time before such application is made, subject to a liability for damages for breach of their contract with him.⁵⁰

If a person assumes to act as agent for another in subscribing, when he is without authority, the person for whom he acts is clearly not bound unless ratification is shown, or unless he is estopped to deny the other's authority by having clothed him with apparent authority.⁵¹ And the same is true where an agent exceeds his authori-

England. In re Whitley Partners, Ltd., L. R. 32 Ch. Div. 337.

Canada. Davidson v. Grange, 4 Grant Ch. (U. C.) 377.

Compare Butler v. Merchants' Ins. Co., 14 Ala. 777.

If creditors of a corporation on its reorganization consent to an arrangement whereby an officer of the reorganized company subscribes for stock therein as trustee for their benefit, they are the beneficial owners of such stock, and their rights as creditors are merged in their rights and duties as such beneficial owners. Munson v. Gunder, 70 Wash. 629, 127 Pac. 193.

Whether the person so subscribing had such authority is a question of fact for the jury. Great Western Tel. Co. v. Mears, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298; Louisiana Purchase Expos. Co. v. Emerson, 149 Mo. App. 594, 129 S. W. 753.

⁴⁸ Such a provision does not preclude a person from bona fide subscribing for another under a power of attorney authorizing him to do so, but its purpose is to prevent persons from subscribing for their own benefit under the names of others. State v. Lehre, 7 Rich. (S. C.) 234, 319.

⁴⁹ Bates County v. Winters, 112 U. S. 325, 28 L. Ed. 744, 97 U. S. 83, 24 L. Ed. 933. See Grangers' Market Co. v. Vinson, 6 Ore. 172.

⁵⁰ Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306.

⁵¹ **United States.** McClelland v. Whiteley, 11 Biss. 444, 15 Fed. 322.

Florida. Brown v. Florida Southern Ry. Co., 19 Fla. 472.

Illinois. Great Western Tel. Co. v. Mears, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298.

Indiana. Drover v. Evans, 59 Ind. 454.

Kentucky. Oil City Land & Improvement Co. v. Porter, 99 Ky. 254, 35 S. W. 643.

Maine. Ticonic Water Power & Manufacturing Co. v. Lang, 63 Me. 480.

Oregon. Coyote Gold & Silver Min. Co. v. Ruble, 8 Ore. 284.

Pennsylvania. Merrick Thread Co. v. Philadelphia Shoe Mfg. Co., 115 Pa. St. 314, 8 Atl. 794; Bucher v. Dillsburg & M. R. Co., 76 Pa. St. 306.

Tennessee. Hume v. Commercial Bank, 9 Lea 728.

Vermont. State v. Smith, 48 Vt.

ty in making the subscription, as where he subscribes absolutely although authorized to make a conditional subscription only.⁵²

A person, however, for whom another has subscribed for shares without authority, may afterwards expressly or impliedly ratify the subscription, and thus render himself liable thereon, and entitled to its benefits.⁵³ And ratification will be implied from recognition of

266; *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206.

Virginia. *Chapman v. Virginia Real Estate Inv. Co.*, 96 Va. 177, 31 S. E. 74.

Washington. *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175.

England. *Pim's Case*, 3 De G. & Sm. 11.

Canada. *Ingersoll & T. Gravel Road Co. v. McCarthy*, 16 U. C. Q. B. 162.

Agreements made by persons contemplating becoming stockholders in a corporation to be subsequently formed, which are not intended to be subscriptions to stock therein, and do not expressly authorize the entry of their names as subscribers, do not give authority to the secretary of the company, when formed, to enter their names as stockholders. *Coyote Gold & Silver Min. Co. v. Ruble*, 8 Ore. 284.

If a person signs a subscription book for stock in a proposed corporation for the purpose of inducing others to subscribe, leaving the amount of his own subscription blank, he impliedly authorizes those empowered to take subscriptions to fill up the blanks. As against other subscribers and creditors, he will be estopped to deny such authority. *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

Where a certified copy of an order of town trustees authorizing the chairman of the board to subscribe in behalf of the town is entered in the subscription book, the trustees cannot set up as a defense to an action on a subscription so made by him that he exceeded his authority in making such subscription, or that such copy of the

order was incorrect in the absence of a showing that the company had knowledge of those facts when the subscription was made. *Shelbyville v. Shelbyville & E. Turnpike Co.*, 1 Mete. (Ky.) 54.

In Troy & B. R. Co. v. Warren, 18 Barb. (N. Y.) 310, where one of several heirs subscribed in the name of "Estate of Nathan Warren," it was held that, conceding that the heirs might jointly subscribe under any name they chose, neither such individual heir nor his coheirs were liable in the absence of any proof that they ever adopted such subscription under the name so used.

⁵² *Drover v. Evans*, 59 Ind. 454.

⁵³ **United States.** *McClelland v. Whiteley*, 11 Biss. 444, 15 Fed. 322.

Connecticut. *Russell v. Bristol*, 49 Conn. 251.

Illinois. *Boggs v. Olcott*, 40 Ill. 303; *Great Western Tel. Co. v. Mears*, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298.

Indiana. *Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547.

Kentucky. *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 35 S. W. 643.

Maine. *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

Maryland. *Musgrave v. Morrison*, 54 Md. 161.

Mississippi. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351; *Mississippi & T. R. Co. v. Harris*, 36 Miss. 17.

Nevada. See *Thompson v. Reno*

the contract as binding, as where the person for whom it was made is elected and acts as a director or other officer, when he is not eligible unless he is a stockholder, or if he pays assessments, receives dividends, or attends stockholders' meetings, etc.⁵⁴

A failure to repudiate the subscription may also amount to a ratification,⁵⁵ and it is at least evidence of ratification to be considered by

Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

Pennsylvania. *McHose & Co. v. Wheeler*, 45 Pa. St. 32; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

Texas. *Evans v. Texas Printing & Lithographing Co.*, 4 Tex. Civ. App. 326, 23 S. W. 476.

Vermont. *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206.

England. In re *Hemp, Yarn & Cordage Co. (Hindley's Case)*, [1896] 2 Ch. 121.

The relation of principal and agent is necessarily implied by the term ratification, and there can be no ratification where that relation does not exist, as, for example, where a person soliciting subscriptions copies names into his subscription book on his own account and not with a view of binding the persons whose names are so copied. *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340.

The fact that a father who signs his son's name to a subscription list intends thereby to make a gift of the stock to the son will not affect the son's liability on the subscription contract if he is a party to it. *Evans v. Texas Printing & Lithographing Co.*, 4 Tex. Civ. App. 326, 23 S. W. 476.

⁵⁴ **Illinois.** *Boggs v. Oleott*, 40 Ill. 303; *Great Western Tel. Co. v. Mears*, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298.

Maine. *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

Maryland. *Musgrave v. Morrison*, 54 Md. 161.

Mississippi. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

England. In re *Hemp, Yarn & Cordage Co. (Hindley's Case)*, [1896] 2 Ch. 121.

As where he authorizes another to represent him at the organization meeting, and after the organization gives notes for the amount of the subscription, one of which he subsequently pays. *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 35 S. W. 643.

Or where he participates in the organization meeting and is elected and serves as a director and is elected treasurer. *Evans v. Texas Printing & Lithographing Co.*, 4 Tex. Civ. App. 326, 23 S. W. 476.

The fact that he gives to the person making the subscription his proxy to vote at a stockholders' meeting, and that the latter attends and votes, are circumstances indicative of ratification, and are properly submitted to the jury. *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25.

The fact that the attorney for certain alleged subscribers satisfied judgments in their favor by taking stock in a corporation, and that they did not disavow his act in so doing, is some evidence of their ratification of a subscription to such stock made by him for them. *McHose & Co. v. Wheeler*, 45 Pa. St. 32.

⁵⁵ *Kesner v. World's Fair Hippodrome, Amusement, Ballet, Pantomime & Fireworks Co.*, 62 Ill. App. 89.

A person named in the certificate for incorporation as a subscriber, though he has never subscribed, will

the jury.⁵⁶ Full knowledge of all the material facts is essential to a ratification,⁵⁷ and the party must know that he would not be bound without such ratification.⁵⁸

A ratification will not be implied from the fact that the person for whom the subscription was made is elected a director without his knowledge, where he does not accept the office or act as director;⁵⁹ nor from the fact that he signs a proxy authorizing a third person to represent him at a meeting of the company, where he signs it under a special agreement that it is to be used only under certain conditions, and that he is to take the stock only in case it is used, where before the time for its use arrives it is found that the conditions cannot be complied with, and it is therefore never delivered to the person for whom it was intended, and is never used, but is destroyed according to the agreement;⁶⁰ nor from the fact that he makes a payment on the subscription as a compromise of the claim against him, and to avoid a lawsuit;⁶¹ nor from the subsequent declarations of the person in whose name the subscription is made to strangers that he has taken that amount of stock.⁶² Whether or not

be liable as a subscriber in so far as creditors are concerned, unless he disavows the relation as soon as he discovers the use of his name. *McHose & Co. v. Wheeler*, 45 Pa. St. 32.

Where an agent accepts stock for his principal in exchange for goods to be purchased from the latter, subject to the principal's approval, and the principal refuses to accept the stock, he is not bound because the agent fails to notify the company of such refusal according to his agreement. *Merrick Thread Co. v. Philadelphia Shoe Mfg. Co.*, 115 Pa. St. 314, 8 Atl. 794. But see *Hume v. Commercial Bank*, 9 Lea (Tenn.) 728.

⁵⁶ *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

⁵⁷ *McClelland v. Whiteley*, 11 Biss. (U. S.) 444; 15 Fed. 322; *Great Western Tel. Co. v. Mears*, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298; *Merrick Thread Co. v. Philadelphia Shoe Mfg. Co.*, 115 Pa. St. 314, 8 Atl. 794;

Pittsburgh & S. R. Co. v. Gazzam, 32 Pa. St. 340; *Evans v. Texas Printing & Lithographing Co.*, 4 Tex. Civ. App. 326, 23 S. W. 476.

⁵⁸ *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340.

⁵⁹ *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480.

A person whose name is signed to the subscription list by another without authority is not estopped to deny that he is a stockholder because he was named as a director, where he was never notified that he had been chosen as director, never acted as such, and never was in control of the business or had access to the books, and all the directors were not required to be stockholders. *Hume v. Commercial Bank*, 9 Lea (Tenn.) 728.

⁶⁰ *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480.

⁶¹ *Great Western Tel. Co. v. Mears*, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298.

⁶² *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206.

there has been a ratification is ordinarily a question for the jury.⁶³

If an agent subscribes in his own name, but for his principal, and there is no special charter or statutory provision preventing such a subscription,⁶⁴ nor any estoppel,⁶⁵ the principal is bound by the subscription, and he will be entitled to the benefit of it, both as against the corporation and as against the agent.⁶⁶ And if the agent is subjected to liability to creditors of the corporation or to the corporation by reason of the subscription, he may recover the amount paid from the principal.⁶⁷

One who subscribes as trustee⁶⁸ or agent⁶⁹ for another may be compelled by the latter to account.

As in other cases, a trust in respect to stock subscribed for may arise or be created by a parol agreement, if founded on a sufficient consideration. But the intention to create such a trust must be evidenced with clearness and certainty, and loose, vague and indefinite expressions are insufficient to create it. Moreover, there must be

⁶³ *Great Western Tel. Co. v. Mears*, 54 Ill. App. 667, aff'd 154 Ill. 437, 40 N. E. 298; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

⁶⁴ See *Troy & B. R. Co. v. Warren*, 18 Barb. (N. Y.) 310; *Perkins v. Savage*, 15 Wend. (N. Y.) 412; *State v. Lehre*, 7 Rich. (S. C.) 234.

⁶⁵ See *In re Rowley's Appeal*, 115 Pa. St. 150, 9 Atl. 329.

⁶⁶ *McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876, aff'g 39 Fed. 292; *Colt v. Clapp*, 127 Mass. 476; *Stoner v. Flock*, 30 N. Y. 64, 41 Barb. (N. Y.) 162; *Burr v. Wilcox*, 22 N. Y. 551; *Davidson v. Grange*, 4 Grant Ch. (U. C.) 377.

In a suit by a subscriber to compel the corporation to admit him as a stockholder, it was held that an answer alleging that he subscribed under an agreement that his subscription was to be wholly for the benefit of another was responsive to the bill. In *re Rowley's Appeal*, 115 Pa. St. 150, 9 Atl. 329.

Where an officer purchases subscription rights in his own name, if title

to the rights does not vest in the corporation by reason of lack of authority in the officer to make the purchase, title to the subscription rights does not vest in the officer personally. In such case he is estopped to deny his agency as against the company. *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

In *E. H. Taylor, Jr. & Sons v. Johnson*, 30 Ky. L. Rep. 656, 99 S. W. 320, the evidence was held to show that the plaintiff subscribed for stock for the benefit of a third person and not for himself, so that he was not entitled to the possession of it.

See also *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273, as to the right of the beneficiary to stock purchased from the corporation by one as trustee.

⁶⁷ *Stover v. Flock*, 30 N. Y. 64. And see *Orr v. Bigelow*, 14 N. Y. 556.

⁶⁸ *McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876, aff'g 39 Fed. 292; *Levi v. Evans*, 57 Fed. 677; *Chapman v. Porter*, 69 N. Y. 276.

⁶⁹ See *Colt v. Clapp*, 127 Mass. 476.

proof of an actual or constructive payment for the stock by the party claiming the trust.⁷⁰

Where one subscribes for stock in the name of another and pays for it, the presumption is that the latter holds it in trust for the benefit of the former.⁷¹ But if the subscription is made by a parent in the name of his child, the transaction is *prima facie* an advancement, although this presumption may be rebutted by proof of a contrary intention.⁷² A court of equity will recognize and enforce a declaration of trust by a parent for his son constituted by the payment for stock by a parent and the taking thereof by the parent in his name as trustee for his son.⁷³

Where an officer of a reorganized corporation subscribes for stock as trustee for certain creditors of the original corporation, both he and other organizers of the new corporation who participate in the transaction are estopped, as to third persons, to deny that the stock was subscribed for, regardless of whether the creditors assented to the arrangement or not.⁷⁴

All of several joint trustees must join in making a subscription in order to bind the trust estate.⁷⁵

Where a constitutional or statutory provision prohibits the investment of trust funds in the stock of private corporations, the cestui que trust is not bound by a subscription to the stock of such a corporation made by the trustee as such.⁷⁶

§ 554. — Personal liability of agent or trustee. Whether a person who assumes to act as the agent of another in subscribing for stock

⁷⁰ *Levi v. Evans*, 57 Fed. 677.

⁷¹ *Butler v. Merchants' Ins. Co.*, 14 Ala. 777.

⁷² *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306.

Where a subscription was made in the names of a daughter of the subscriber and several other persons, and before they became payable a note and mortgage given therefor were canceled, and a firm of which the father was a member became bound for the instalments and afterwards paid them, it was held that the daughter held the stock as trustee for the firm. *Butler v. Merchants' Ins. Co.*, 14 Ala. 777.

⁷³ *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273.

On the ground that "a trust in personal property may be declared and proven by parol," where a subscription had been made to stock in the name of a person as trustee, disclosure not being made of the beneficiary, declarations of the trustee made at the time he subscribed, and later while in possession of the stock were held admissible to prove the identity of the beneficiary. *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273.

⁷⁴ *Munson v. Gunder*, 70 Wash. 629, 127 Pac. 193.

⁷⁵ *Bagnell v. Ives*, 184 Fed. 466

⁷⁶ *Bagnell v. Ives*, 184 Fed. 466.

is himself liable, when he has no authority, and when the subscription is not ratified by the person for whom he acts, is a question upon which the courts have differed. In some states it has been held that he becomes himself a subscriber and stockholder, and is liable as principal on the subscription, just as if he had assumed to act for himself,⁷⁷ and this regardless of whether he believed that he had such authority or not.⁷⁸ And they apply the same rule where a person assumes to subscribe for a person who is not capable of making a binding subscription,⁷⁹ as, for example, where promoters or other persons subscribe for stock in a proposed corporation as trustees or agents for such corporation;⁸⁰ or where one subscribes in behalf of or as trustee for another corporation which has no power under the law to become a subscriber;⁸¹ or where a husband subscribes for

⁷⁷ **Connecticut.** *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816.

Missouri. *Boatmen's Bank v. Gillespie*, 209 Mo. 217, 259, 108 S. W. 74.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

Pennsylvania. *Allibone v. Hager*, 46 Pa. St. 48.

Vermont. *State v. Smith*, 48 Vt. 266.

See also *Pim's Case*, 3 De G. & Sm. 11, 64 Eng. Reprint 358.

The fact that one holds stock as trustee for a third person is no defense to an action against him for an assessment regardless of the liability of the cestui que trust. *French v. Busch*, 189 Fed. 480.

Where stock in a reorganized corporation is subscribed for by and issued to one of its officers as trustee for the creditors of the old corporation, if such creditors do not assent to the arrangement, he occupies a position analogous to that of an agent who has subscribed for stock in his own name, and, in so far as third persons are concerned, may be held as a subscriber. *Munson v. Gunder*, 70 Wash. 629, 127 Pac. 193.

⁷⁸ *Boatmen's Bank v. Gillespie*, 209 Mo. 217, 259, 108 S. W. 74.

⁷⁹ *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

See the cases in the note preceding.

⁸⁰ *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816.

The court in the above case distinguishes *Russell v. Bristol*, 49 Conn. 251, which held that one who made a subscription as "treasurer, in trust" for the corporation, and whose act in so doing was subsequently ratified by the corporation before any corporate liability was incurred, could not be held personally liable on the subscription either by the corporation or its receiver, on the ground that the ratification took place while the corporation was solvent and before it had incurred any liability, that the subscription was then vacated by vote of the directors and was never included in any return made by the corporation to the proper state officers, and that therefore there could be no claim that any person had relied on the subscription in giving credit to the corporation.

See also *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199, 226; *Allibone v. Hager*, 46 Pa. St. 48.

⁸¹ *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172. See also *Penn Safe Deposit & Trust Co. v. Kennedy*, 175 Pa. St. 160, 34 Atl. 659.

stock in the name of his wife, who is incapable of contracting because of her coverture;⁸² and also where one assumes to subscribe as trustee for the benefit of the cestui que trust, in violation of a constitutional or statutory provision prohibiting the investment of trust funds in the stock of private corporations.⁸³ In other states it has been held that he does not become a stockholder, and is not liable on the subscription, because of his want of authority, but that the only remedy of the corporation is by an action against him to recover any damages it may have sustained by reason of his false assumption of authority.⁸⁴

It has been held that one who in terms subscribes for a corporation is not personally liable as a subscriber where such corporation has no power to subscribe and that fact is known to both parties, or they are chargeable with notice of it.⁸⁵

A subscription by one as agent⁸⁶ or trustee⁸⁷ for an undisclosed principal binds such agent or trustee personally equally with his principal. But this rule has no application where there is no contract relation existing between the agent and the corporation.⁸⁸

⁸² *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149.

A person is liable on a subscription made by him in his wife's name, and entitled to the stock, where he intends it for himself, participates in organizing the company, and takes part of the stock in his own name. See *Shields v. Casey*, 155 Pa. St. 253, 35 Am. St. Rep. 879, 25 Atl. 619.

⁸³ *Bagnell v. Ives*, 184 Fed. 466.

⁸⁴ *Salem Mill-Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

See *Mechem, Agency*, § 541 et seq.

⁸⁵ *Merchants & Planters Packet Co. v. Streuby*, 91 Miss. 211, 124 Am. St. Rep. 651, 44 So. 791. See also *Holt v. Winfield Bank*, 25 Fed. 812.

⁸⁶ *American Alkali Co. v. Kurtz*, 134 Fed. 663, aff'd 138 Fed. 392.

⁸⁷ *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835, aff'g sub nom. *Morse v. Pacific Ry. Co.*, 93 Ill. App. 53; *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, aff'g 27 Ill. App. 546; *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App.

172; *State v. Superior Court for Pacific County*, 56 Wash. 214, 105 Pac. 637; *State v. Superior Court for Skamania County*, 45 Wash. 321, 88 Pac. 334; *State v. Superior Court of Clarke County*, 45 Wash. 316, 88 Pac. 332; *State v. Superior Court of Clarke County*, 44 Wash. 108, 87 Pac. 40. See also *Crease v. Babcock*, 10 Metc. (Mass.) 525, 545; *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

As against creditors, subscribers cannot show an undisclosed arrangement whereby their subscriptions were made as trustees for the corporation. *Allibone v. Hager*, 46 Pa. St. 48.

Promoters who subscribe "Parham & Weil, Tr.," are personally liable on their subscription although they intend to sell the stock to others. *Heiskell v. Morris*, 135 Tenn. 238, 186 S. W. 99.

⁸⁸ So an agent for an undisclosed principal who did not himself subscribe for the stock, and who never owned it, and never agreed to pay any assessments thereon, and in whose name the stock never stood on the books of the company, but who merely

One whose name appears on the corporate books as trustee for a named person, and to whom a certificate is issued as trustee for such person, is personally liable for calls.⁸⁹

In England it has been held that persons who subscribe as trustees for the corporation are primarily liable for calls even though they may have a right to be reimbursed by the company.⁹⁰

It has also been held that one who applies for shares in a false or fictitious name is liable to the same extent as if he had taken them in his own name. And this rule has been applied in a case where a father applied for shares in the name of his daughter who was married and hence was incapable of contracting.⁹¹

A subscription by one person "to be paid by" another binds the former personally, and not the latter.⁹²

§ 555. — Subscriptions by partners. A partner may enter into a contract of subscription in the name of the firm, so as to bind the firm, if he is expressly authorized to do so by the other members of the firm, or without express authority, if the contract is within the scope of the business of the partnership,⁹³ but not otherwise,⁹⁴ unless his action in so doing is subsequently ratified by the other members of the firm.⁹⁵

procured it to be registered in the name of a dummy for the benefit of his principal and with full knowledge on the part of the corporation, was not liable for assessments thereon. *American Alkali Co. v. Kurtz*, 138 Fed. 392, aff'g 134 Fed. 663. And see *Bean v. American Alkali Co.*, 134 Fed. 57, rev'g 125 Fed. 823.

But a bill of discovery will lie in such case at the instance of the receiver of the corporation to compel the agent to disclose his principal. *American Alkali Co. v. Kurtz*, 138 Fed. 392, aff'g 134 Fed. 663; *Kurtz v. Brown*, 152 Fed. 372, 11 Ann. Cas. 576.

⁸⁹ *Union Sav. Bank of San José v. Willard*, 4 Cal. App. 690, 88 Pac. 1098.

⁹⁰ *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, 59 Eng. Reprint 900.

⁹¹ *Pugh & Sharman's Case*, L. R. 13 Eq. 566.

⁹² *Langford v. Ottumwa Water Power Co.*, 59 Iowa 283, 13 N. W. 303.

⁹³ *Maltby v. Northwestern Virginia*

R. Co., 16 Md. 422; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

⁹⁴ *Maltby v. Northwestern Virginia R. Co.*, 16 Md. 422; *Livingston v. Pittsburgh & S. R. Co.*, 2 Grant (Pa.) 219; *Patty v. Hillsboro Roller Mill Co.*, 4 Tex. Civ. App. 224, 23 S. W. 336; *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315; *Morse v. Hagenah*, 68 Wis. 603, 32 N. W. 634.

It must appear that he was authorized to subscribe by the other partners, or that ownership of the stock was within the scope of the partnership business. *Wright Bros. v. Merchants' & Planters' Packet Co.*, 104 Miss. 507, Ann. Cas. 1915 C 1111, 61 So. 550.

In *Maltby v. Northwestern Virginia R. Co.*, 16 Md. 422, the question whether the subscription was within the scope of the partnership business was held to be for the jury.

⁹⁵ *Livingston v. Pittsburgh & S. R. Co.*, 2 Grant (Pa.) 219. See also

A partner who subscribes for the firm without authority is himself liable unless his act is ratified by the other partners.⁹⁶ And similarly one who subscribes in the name of a firm which has no actual existence is liable as upon his individual subscription.⁹⁷

Liability on subscriptions made for the partnership account, although in the individual names of the partners, is a partnership debt.⁹⁸ And since the liability of partners for firm debts is joint and several,⁹⁹ the partners may be held jointly liable on a joint subscription made by them in the firm name,¹ or may be sued individually therefor.²

But where each of two partners individually pays half of what is paid on the stock with the understanding that each shall own half of it, they are tenants in common of the stock, and liability on the subscription is not a firm debt.³

§ 556. Authority and duties generally as to receiving subscriptions. It is clear that a subscription to the stock of a corporation is not binding upon it, in the absence of ratification, unless the person accepting the same had authority from the corporation, or by reason of some provision in its charter or the general law under which it was organized.⁴ And it is equally clear, since mutuality of obligation is necessary,⁵ that a subscriber is not bound unless the cor-

Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs, 21 Barb. (N. Y.) 541.

The question whether the other partner assented is usually one for the jury. The fact that he knew of the subscription and of payments made thereon is strong evidence of his assent. *Livingston v. Pittsburgh & S. R. Co.*, 2 Grant (Pa.) 219.

⁹⁶ *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536. See also *Pim's Case*, 3 De G. & Sm. 11, 64 Eng. Reprint 358.

Where a certificate of incorporation named "W. R.'s Sons" as the holder of a certain number of shares and was signed with the individual names of two of the three sons of W. R., who constituted the firm of W. R.'s Sons, and the two so signing had no authority to bind the firm, it was held that it would be conclusively presumed that the signers intended to bind

whom they could, and that they became stockholders individually. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

⁹⁷ *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

⁹⁸ *Farnsworth v. Union Trust & Deposit Co.*, 211 Fed. 912.

⁹⁹ See works on partnership.

¹ *Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547.

² A creditor of the corporation may have execution against one partner individually, where he could have it against the firm. *Bray's Adm'r v. Seligman's Adm'r*, 75 Mo. 31.

³ *Morse v. Pacific R. Co.*, 191 Ill. 356, 61 N. E. 104, aff'g 93 Ill. App. 31, followed in 191 Ill. 371, 61 N. E. 1136, aff'g 93 Ill. App. 23.

⁴ *Fraser v. Home Telephone & Telegraph Co.*, 91 Wash. 253, 157 Pac. 692.

⁵ See § 526, supra.

poration is bound.⁶ Unless prevented, however, by the charter or general law, a corporation or its board of directors may authorize any person it may see fit to solicit and receive subscriptions.⁷

If the charter or statute appoints particular persons, and expressly or impliedly makes their authority exclusive, subscriptions cannot be received by any other person, except in so far as the person so appointed may act by agent or deputy. The same is true where the articles of association appoint a particular person to receive subscriptions. It has been held, therefore, in some jurisdictions, that where the charter or statute appoints commissioners to open books and receive subscriptions, subscriptions not made through them are void.⁸

Where an act of the legislature ipso facto makes certain persons a corporation, provides that the stock shall consist of a certain number

⁶ **Alabama.** *White v. Kahn*, 103 Ala. 308, 15 So. 595.

Kentucky. *Deboe v. Wilson*, 11 Ky. L. Rep. 581 (abstract).

Massachusetts. *Essex Turnpike Corporation v. Collins*, 8 Mass. 292.

Michigan. *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 23.

New York. *Kelsey v. Northern Light Oil Co.*, 45 N. Y. 505.

Where a corporation, at its first meeting, passed a vote authorizing a person to solicit and receive subscriptions, it was held that a subscription paper bearing date the same day must be considered as authorized by the corporation, no other subscription paper being proved to exist. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

⁷ *Lohman v. New York & E. R. Co.*, 2 Sandf. (N. Y.) 39.

Where the charter provides for the taking of subscriptions under the direction of such persons as may be determined on by a majority of the incorporators, subscriptions taken by a person appointed to receive them are valid though he has not been appointed commissioner. *Cheraw & C. R. Co. v. White*, 10 S. C. 155.

In *North Eastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278, it was held

that a subscription was valid though not made to the commissioners, but at the instance of a third person who took an interest in the enterprise.

⁸ *Northern Cent. Michigan R. Co. v. Eslow*, 40 Mich. 222; *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 23; *Shurtz v. Schoolcraft & Three Rivers R. Co.*, 9 Mich. 269. *Contra*, *North Eastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278.

A subscription taken during the process of organization by a person or persons other than the board of incorporators provided for by the statute is unauthorized and is not binding on the corporation unless ratified by it in a proper way. It is a mere offer on the part of the subscriber, revocable at any time until accepted. *White v. Kahn*, 103 Ala. 308, 15 So. 595.

Where under the charter the commissioners are to receive subscriptions until the directors are appointed, and after that the directors are to receive them, the declaration in an action on a subscription must show by whom the subscription was received. *Corydon Steam Mill Co. v. Pell*, 4 Blackf. (Ind.) 472.

of shares of a specified value each, and does not appoint commissioners to receive subscriptions, or require that any portion of the capital shall be subscribed or paid in before organization, but endows the corporation at once with all the rights and privileges conferred by a general law upon corporations of its class, its directors have power, after its organization, to accept subscriptions for such of its stock as remains untaken until the authorized amount is fully subscribed.⁹

If subscriptions are received by a person who is without authority from the corporation, his act may be expressly or impliedly ratified by the corporation, so as to make the subscription binding to the same extent as if there had been previous authority;¹⁰ and there is a ratification if the corporation accepts the subscription, or otherwise recognizes it as binding,¹¹ as by bringing an action upon it.¹² And the corporation may be estopped by its conduct to deny that a certain person was its agent to receive subscriptions.¹³

The corporation may reject subscriptions taken by its agent where express power to do so is reserved in the subscription contract, and the subscriber may be justified in assuming that it has done so where it refuses to accept notes execute^d by him for a part of the price of the stock, which are attached to and made a part of the contract, and fails to send him stock certificates.¹⁴ If it does reject the subscription it is bound to return any money paid by the subscriber on account of it.¹⁵

⁹ *Curry v. Scott*, 54 Pa. St. 270.

¹⁰ *California*. *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

Indiana. *Judah v. American Live Stock Ins. Co.*, 4 Ind. 337.

Maryland. *Scarlett v. Academy of Music of Baltimore City*, 46 Md. 132; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Mississippi. *Walker v. Mobile & O. R. Co.*, 34 Miss. 245.

New Hampshire. *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

¹¹ *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Acquiescence by board of directors conclusively evidences their ratification. *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

¹² *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

¹³ A corporation is not estopped to deny that a person was its agent to receive subscriptions for its stocks and bonds by reason of the fact that he, with the knowledge of the company, represents himself as having underwritten them, where the subscriber testifies that he did not know what the term "underwriter" meant, since, if he did not know its meaning, he could not have acted upon it as a representation that such person was the company's agent. *Fraser v. Home Telephone & Telegraph Co.*, 91 Wash. 253, 157 Pac. 692.

¹⁴ *Amicable Life Ins. Co. v. Keener*, — Tex. Civ. App. —, 166 S. W. 462.

¹⁵ So it must return money paid by the subscriber to the agent soliciting the subscription although the same

Agents appointed to receive subscriptions have such authority only as is conferred upon them. As a rule, they have no authority to receive conditional subscriptions or subscriptions upon special terms, and, if they do so, the corporation is not bound unless it ratifies their act.¹⁶ But they may have such authority, and where such is the case the corporation is chargeable with notice of the conditions and bound by them.¹⁷

A corporation which seeks to recover on a subscription contract made by its agent cannot question the agent's authority to make it in the particular form in which it was made.¹⁸ So it cannot deny the authority of its agent to assent to a condition in a subscription and at the same time seek to enforce such subscription as an unconditional one.¹⁹ If it denies the authority to insert provisions without which the contract would not have been made, the subscriber may rescind the contract and recover back what he has paid provided he can restore the corporation to its former position.²⁰

The rule that if the corporation adopts as its own a contract made by a promoter it takes it cum onere and cannot accept its benefits without taking over its burdens as well²¹ applies to subscription contracts,²² and hence, under such circumstances, the corporation is bound

never came into its hands, and although the contract provided that the amount so paid was to become the property of the agent as his compensation. *Amicable Life Ins. Co. v. Keener*, — Tex. Civ. App. —, 166 S. W. 462.

¹⁶ *Farmers & Mechanics Bank v. Nelson*, 12 Md. 35.

The directors, however, have authority to receive conditional subscriptions and subscriptions on special terms, if the conditions or terms are not contrary to law or fraudulent as to other subscribers or creditors. *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

As to subscriptions upon conditions precedent, see § 573, *infra*.

As to subscriptions upon special terms, see § 601, *infra*.

¹⁷ *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *East New York & J. R. Co. v. Lighthall*, 6 Rob. (N. Y.) 407,

36 How. Pr. 481, 5 Abb. Pr. (N. S.) 458.

¹⁸ It cannot contend that it was invalid because of changes in the printed form in order to escape liability for money paid to the agent under it, where by a cross-action it seeks to enforce it against the subscriber. *Amicable Life Ins. Co. v. Keener*, — Tex. Civ. App. —, 166 S. W. 462.

¹⁹ *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363.

Of course this would not be true as to subscriptions made prior to incorporation in those states where the condition is held to be void under such circumstances and the subscription enforceable as an unconditional one. See § 578, *infra*.

²⁰ *Dennette v. Boston Securities Co.*, 206 Mass. 401, 92 N. E. 498.

²¹ See § 152, *supra*.

²² *Commonwealth Bonding & Cas-*

by the representation and promises of the promoter.²³ So if the promoter agrees that if one will subscribe the corporation will make him a certain loan, and the corporation, after its organization, accepts the subscription, it thereby becomes bound to make such loan, and its failure to do so constitutes a breach of the contract, entitling the subscriber either to rescind the same and recover what he has paid under it or to recover damages for the breach.²⁴

The liability of the corporation for fraud on the part of its promoters or agents in procuring subscriptions will be considered in a subsequent section.²⁵

The authority of an agent appointed to receive subscriptions is exhausted when subscriptions are received. The subscription at once inures to the benefit of the corporation, creating a contract between it and the subscriber, and the agent has no authority to modify or rescind the same.²⁶

Whether or not a particular person is the agent of the corporation with power to take subscriptions is a question of fact.²⁷ And the same is true as to the scope of the agent's authority as affecting his power to take conditional subscriptions.²⁸

§ 557. Commissioners to open books and receive subscriptions

—**In general.** Commissioners are sometimes appointed by the charter of a corporation or the general law under which it is organized to open subscription books and receive subscriptions.²⁹ Or they may be appointed by the articles of association adopted in pursuance of the statute. As we have seen, the authority thus conferred may be exclusive, so that subscriptions cannot be received by others.³⁰ The commissioners, however, may act by deputy, in so far as their duties are merely ministerial. The act of the commissioners in receiving

ualty Ins. Co. v. Curry, — Tex. Civ. App. —, 183 S. W. 1; American Home Life Ins. Co. v. Compere, — Tex. Civ. App. —, 159 S. W. 79. See also § 166, *supra*.

²³ Commonwealth Bonding & Casualty Ins. Co. v. Curry, — Tex. Civ. App. —, 183 S. W. 1.

²⁴ American Home Life Ins. Co. v. Compere, — Tex. Civ. App. —, 159 S. W. 79.

²⁵ See § 611, *infra*. See also § 166, *supra*.

²⁶ Lowe v. Edgefield & K. R. Co., 1 Head (Tenn.) 659.

The promoter taking the subscription has no right to release the subscriber before organization. Shattuck v. Robbins, 68 N. H. 565, 44 Atl. 694.

²⁷ Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

²⁸ Hastings Industrial Co. v. Cope-land, 114 Ark. 415, 169 S. W. 1185.

²⁹ A formal assignment by the commissioners to the corporation of subscriptions received by them is not necessary to render the subscribers liable to the corporation. Danbury & N. R. Co. v. Wilson, 22 Conn. 435.

³⁰ See § 556, *supra*.

subscriptions is ministerial where they are not required to exercise any discretion as to who shall be permitted to subscribe, and they may therefore, in such a case, appoint an agent or deputy to receive subscriptions, or ratify subscriptions received without authority by a person assuming to act as their agent or deputy.³¹ Commissioners cannot act by deputy in the performance of acts in which they are required to exercise a discretion, for as to these they act judicially.³²

The statutes sometimes require the commissioners to take an oath, but it has been held that their failure to do so will not render subscriptions received by them invalid.³³

§ 558. — Authority and powers of commissioners. Commissioners to open books and receive subscriptions before the corporation is organized are not the accredited agents of the corporation, for it is not yet in being,³⁴ but are rather agents of the public or the government,³⁵ acting under limited and definite powers,³⁶ and the act defining their duties is in the nature of a power of attorney.³⁷

“They are not special agents clothed with power to do a single act, nor are they what is sometimes designated in the books as universal agents, clothed with plenary authority to represent a principal in everything; but are general agents with specified powers.”³⁸

Their duties are largely ministerial in character.³⁹

In the exercise of the power conferred on them they are limited to the terms and manner of subscription prescribed by the legisla-

³¹ *Saugatuck Bridge Co. v. Town of Westport*, 39 Conn. 337; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

³² *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

As to the distribution of stock in the case of excessive subscriptions, see § 713 et seq., *infra*.

³³ *Hollman v. Williamsport & H. Turnpike Co.*, 9 Gill & J. (Md.) 462.

³⁴ *Rutz v. Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363.

³⁵ *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Napier v. Poe*, 12 Ga. 170; *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *Caley v. Philadelphia & C. C. R.*

Co., 80 Pa. St. 363; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271.

³⁶ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363; *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593; *North Eastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278.

³⁷ *Napier v. Poe*, 12 Ga. 170.

They are agents appointed by law with a specified power of attorney. *Nippenose Mfg. Co. v. Stadon*, 68 Pa. St. 256.

³⁸ *Napier v. Poe*, 12 Ga. 170.

³⁹ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593.

ture,⁴⁰ and subscriptions taken or allowed by them in violation of their instructions as contained in the grant are void and of no effect whatever.⁴¹

They cannot bind the corporation by any acts or contracts,⁴² nor by any stipulations or conditions,⁴³ or representations,⁴⁴ which are beyond the scope of their authority. And since all persons dealing with them are bound to look to the statute for their authority and to know the extent of it,⁴⁵ if any person is misled by representations which they

⁴⁰ *Florida*. *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 152, 58 Am. Dec. 448.

Georgia. *Wood v. Coosa & C. R. Co.*, 32 Ga. 273.

Maryland. See *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 595, 89 Am. Dec. 760.

New York. *Jenkins v. Union Turnpike Road Co.*, 1 Caines' Cas. 86.

Pennsylvania. *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. 219, 11 Am. Dec. 593.

South Carolina. *North Eastern R. Co. v. Rodrigues*, 10 Rich. 278.

⁴¹ *Florida*. *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 152, 58 Am. Dec. 448.

Georgia. *Wood v. Coosa & C. R. Co.*, 32 Ga. 273.

Maryland. See *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 595, 89 Am. Dec. 760.

New York. *Jenkins v. Union Turnpike Road Co.*, 1 Caines' Cas. 86.

Pennsylvania. *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. 219, 11 Am. Dec. 593.

They have no authority to dispense with statutory requirements. *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169.

⁴² *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271.

⁴³ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *McCarty v. Selinsgrove & N. B. R. Co.*, 87 Pa. St. 332; *Caley v. Philadelphia & C. County R. Co.*, 80 Pa. St. 363; *Nippenose Mfg.*

Co. v. Staddon, 68 Pa. St. 256, overruling *McConahy v. Centre & K. Turnpike Co.*, 1 Penr. & W. 426; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Pittsburgh & S. R. Co. v. Biggar*, 34 Pa. St. 455; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271; *North Eastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278. And see § 576, *infra*.

As to the authority of commissioners to receive subscriptions upon conditions precedent, see § 576, *infra*.

And as to their authority to receive subscriptions upon special terms, see § 608, *infra*.

⁴⁴ *Rutz v. Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83.

A statement by a commissioner as to a matter of law, as, for example, that it would be allowable for subscribers to forfeit their stock by failing to pay an assessment thereon, cannot have any effect on the validity of a subscription, regardless of the purpose for which it was made. *Hall v. Selma & T. R. Co.*, 6 Ala. 741. And see, to the same effect, *North Eastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278.

As to the liability of the corporation for false representations by commissioners, see § 611, *infra*.

⁴⁵ *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363; *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271; *North Eastern R. Co.*

have no right to make, it is due to his own folly.⁴⁶ But the corporation may ratify unauthorized stipulations or conditions, if they are within the powers conferred upon it by its charter, and not contrary to law.⁴⁷

Whether or not the commissioners have any discretion as to receiving subscriptions must depend upon the nature of the powers and duties conferred or imposed upon them by the statute. They can undoubtedly refuse to receive fictitious subscriptions, or subscriptions by infants or others under a legal disability, or by insolvent persons, or subscriptions which are conditional or upon special terms. And their discretionary power may extend even further.⁴⁸ So if they are required to receive upon the stock a certain percentage on each share subscribed, and no particular time is designated when it shall be paid, discretionary power to fix such time is implied.⁴⁹

v. Rodrigues, 10 Rich. (S. C.) 278. See also *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

⁴⁶ *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363. See also *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

And see § 611, *infra*.

⁴⁷ This subject will be treated at length in subsequent sections. See §§ 573-609, *infra*.

⁴⁸ It is their duty to see that the subscriptions are legal, and to require those who seek to subscribe to comply with the conditions imposed by law. *State v. Lehre*, 7 Rich. (S. C.) 234, 320.

Where the charter prohibits any person from subscribing for stock for his own benefit in the name of another, they have power to require a person who seeks to subscribe in the name of another under a power of attorney to produce further evidence that the subscription is bona fide intended for the benefit of the latter, and to refuse to accept the subscription if he does not do so. *State v. Lehre*, 7 Rich. (S. C.) 234, 320.

"If they are, for example, required to dispose of the stock to persons who will subscribe bona fide, and the act

does not declare what shall be evidence of bona fides, they have implied power to determine what is or is not a bona fide subscription." *Napier v. Poe*, 12 Ga. 170, 179.

It has been held that commissioners, having discretionary power in receiving subscriptions, may limit the number of shares which any one individual shall be allowed to subscribe for. *Brower v. Passenger Ry. Co.*, 3 Phila. (Pa.) 161, where a resolution was adopted that no commissioner or other person should have the privilege of subscribing for more than two hundred shares on the first day; *Thomas v. Citizens' Passenger Ry. Co.*, 15 Leg. Int. (Pa.) 189, where their refusal to accept a subscription for more than half the stock by one person was sustained.

Commissioners appointed to receive stock subscriptions are not bound to receive a subscription by one signing as trustee, without disclosing the person for whom he is acting. *Thomas v. Citizens' Passenger Ry. Co.*, 15 Leg. Int. (Pa.) 189.

As to the powers and duties of the commissioners where there is an over-subscription, see § 714, *infra*.

⁴⁹ *Napier v. Poe*, 12 Ga. 170.

They are sometimes given authority to determine when sufficient stock has been subscribed to carry out the corporate enterprise, and when such is the case their decision on that question is conclusive.⁵⁰

It has been said that the act defining their powers "is not to be so construed as to give to them authority to do anything other than those things which are specified; nor is it to be so strictly construed as to divest them of all discretion as to the manner of doing those things which are specified, if the manner is not expressed."⁵¹

Their right to apportion or distribute the stock among the subscribers when the subscriptions exceed the authorized capital is considered in a subsequent section.⁵²

§ 559. — Notice of time and place of opening books. A statute authorizing the formation of a corporation, and appointing commissioners to open books and receive subscriptions for stock, generally, if not always, requires that public notice shall be given of the time and place of opening the books and receiving subscriptions.⁵³ Even when the statute does not in express terms require such notice, it is impliedly required where the time and place for opening the books and receiving subscriptions is not fixed by the statute, but is to be fixed by the commissioners.⁵⁴

The object in requiring notice is to prevent a monopoly of the stock by a few, and to give the public generally an opportunity to subscribe,⁵⁵ and it has been held, therefore, that one who has subscribed cannot avoid liability on his subscription on the ground that the notice was not given.⁵⁶

⁵⁰ *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337.

⁵¹ *Napier v. Poe*, 12 Ga. 170.

⁵² See § 714, *infra*.

⁵³ *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337; *Napier v. Poe*, 12 Ga. 170; *Hagerstown Turnpike Road Co. v. Creeger*, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495.

In *Napier v. Poe*, 12 Ga. 170, it was held that, where notice of the first meeting of the commissioners was given, but no applications for stock were then received, and the commissioners adjourned, and the charter lay unappropriated for two years, subscriptions taken at a subsequent meeting were valid though no notice thereof was given. The act did not

require notice of meetings other than the first one, and by inference rendered it unnecessary.

A provision in the charter that books for subscriptions shall be opened under the direction of the persons named in the act, and public notice thereof given, does not make it necessary that such notice shall be signed by all the persons named in the act. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

⁵⁴ *State v. Bull*, 16 Conn. 179.

⁵⁵ *Napier v. Poe*, 12 Ga. 170; *Hagerstown Turnpike Road Co. v. Creeger*, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495.

⁵⁶ *Hagerstown Turnpike Road Co. v.*

§ 560. — **Termination of commissioners' authority and responsibility.** When commissioners are appointed to open books and receive subscriptions for the purpose of organizing a corporation, their authority, duties and responsibility continue until the requisite amount of stock has been subscribed, and they have fulfilled all duties in relation to the organization of the corporation which are imposed upon them by the statute.⁵⁷ Their authority ceases, however, in the absence of special provision to the contrary, as soon as the required amount of stock is subscribed, the corporation organized, and its officers elected. The corporation then succeeds to the powers previously vested in the commissioners, and may sell or otherwise dispose of remaining shares of stock, without regard to conditions which may have been imposed upon the commissioners.⁵⁸

The commissioners no longer have any authority,⁵⁹ and a bill will lie to enjoin them from acting further after the authority has so terminated.⁶⁰

§ 561. — **Neglect, fraud or illegal action on part of commissioners.** If the commissioners appointed to open books and receive subscriptions neglect to proceed, or proceed illegally, mandamus will lie.⁶¹ It has been held, however, that a writ of mandamus will not be granted to

Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495.

⁵⁷ Where commissioners are appointed to open subscription books on a certain day, and keep them open until the required amount of stock is subscribed for, the time during which they are authorized to keep the books open is unlimited, except as to its commencement, and the commissioners are not discharged from their duties as such until the subscription is filled in accordance with the statute. *Lallande v. Louisiana State Ins. Co.*, 9 La. 326.

⁵⁸ *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Smith v. Bangs*, 15 Ill. 399; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Wellersburg & W. N. Plank Road Co. v. Hoffman*, 9 Md. 568.

⁵⁹ *Smith v. Bangs*, 15 Ill. 399; *Ellison v. Mobile & O. R. Co.*, 36 Miss.

572; *James v. Cincinnati, H. & D. R. Co.*, 2 Disn. (Ohio) 261.

Commissioners appointed to receive subscriptions, and who are directed by the statute to call a meeting of stockholders to elect directors when a certain amount of stock has been subscribed, have no authority to open the books for further subscriptions after such amount has been subscribed, and the meeting of the stockholders has been called. *Van Dyke v. Stout*, 8 N. J. Eq. 333.

They cannot thereafter reapportion the stock. *State v. Lehre*, 7 Rich. (S. C.) 234, 322.

⁶⁰ *Smith v. Bangs*, 15 Ill. 399.

⁶¹ *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *In re White River Bank*, 23 Vt. 478.

Mandamus will lie to compel them to receive legal and valid subscriptions. *Napier v. Poe*, 12 Ga. 170.

compel a particular commissioner to act, where his action is not necessary, as in a case where there are a number of other commissioners, who are willing to act, and the statute allows a majority to act.⁶²

If the commissioners fraudulently refuse to receive subscriptions from persons who have a right to subscribe, they are liable in damages, or, under some circumstances, the corporation may be liable.⁶³ But there is no such liability where the refusal to receive a subscription is due to an honest mistake.⁶⁴

If the commissioners fraudulently or wrongfully refuse to allow persons to subscribe, and attempt to subscribe for all the shares themselves, there can be no doubt of the power of a court of equity to control them, and to grant relief to a person or persons entitled and desiring to subscribe, for the commissioners are in the position of trustees.⁶⁵

If the commissioners fraudulently or wrongfully refuse to allow persons to subscribe, and take all the shares themselves, and then organize the corporation and enter upon the exercise of corporate powers under the charter, there is not a corporation *de jure*, and an information in the nature of *quo warranto* may be filed by the attorney general to oust it from the exercise of corporate powers.⁶⁶ It has been held, however, that there is a corporation *de facto*, the existence of which cannot be collaterally attacked in a suit to enjoin it from exercising corporate powers,⁶⁷ and that a court of equity has no jurisdiction to interfere by injunction either at the suit of an attorney general, or at the suit of individuals.⁶⁸

Fraud practiced by one of the commissioners upon his co-commissioners in a matter as to which they act judicially does not affect

⁶² *In re White River Bank*, 23 Vt. 478.

⁶³ *Lallande v. Louisiana State Ins. Co.*, 9 La. 326; *Walden v. Union Bank*, 6 La. 248; *Union Bank v. McDonough*, 5 La. 66.

⁶⁴ *Walden v. Union Bank*, 6 La. 248.

⁶⁵ See *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

⁶⁶ As to the right of the state to maintain *quo warranto* proceedings against persons who assume to exercise corporate powers without being legally incorporated, see § 277, *supra*.

See *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

⁶⁷ See *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

See § 274, *supra*.

⁶⁸ *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

As to the jurisdiction of courts of equity generally to enjoin the exercise of corporate powers because of want of legal incorporation, see § 274, *supra*.

As to the jurisdiction of courts of equity to forfeit corporate charters, see chapter on Forfeiture, Dissolution, etc., *infra*.

the validity of their proceedings as respects subscribers, if they have jurisdiction in the premises.⁶⁹

§ 562. — Subscriptions by commissioners or other agents. When commissioners or other agents are appointed to open books or otherwise receive subscriptions to the stock of a corporation, they may enter their own names, and become subscribers,⁷⁰ provided they act fairly and without prejudice or fraud as to others who subscribe or apply to subscribe. But they cannot wrongfully exclude persons who wish to subscribe, and subscribe for all the shares themselves.⁷¹

§ 563. Revocation or withdrawal of subscriptions—Before acceptance by the corporation. According to the weight of authority, a subscription may be withdrawn at any time before it is accepted by the corporation, whether made before or after the formation of the corporation, for the reason that until such acceptance there is no binding contract, because, until then, there is no agreement and no mutuality of object, and hence no consideration,⁷² and, in the case

⁶⁹ *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

⁷⁰ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Greer v. Chartiers Ry. Co.*, 96 Pa. St. 391, 42 Am. Rep. 548.

⁷¹ See *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

⁷² *United States. Cook v. Chittenden*, 25 Fed. 544.

Alabama. *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977; *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

Georgia. *Allen & Co. v. Hastings Industrial Co.*, 2 Ga. App. 291, 58 S. E. 504.

Illinois. *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261, 40 N. E. 318, aff'g 51 Ill. App. 447; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

Louisiana. *Feitel v. Dreyfus*, 117 La. 756, 42 So. 259.

Maine. *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A.

593, 47 Am. St. Rep. 323, 32 Atl. 888; *Carr v. Bartlett*, 72 Me. 120; *Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me. 374.

Maryland. *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665.

Massachusetts. *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465; *Essex Turnpike Corporation v. Collins*, 8 Mass. 292, as explained in *Taunton & S. B. Turnpike Corporation v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124.

Michigan. *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562.

Ohio. *Wallace v. Townsend*, 43 Ohio St. 537, 54 Am. Rep. 829, 3 N. E. 601.

Tennessee. *Lowe v. Edgefield & K. R. Co.*, 1 Head 659.

Virginia. See *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383.

A subscription made prior to incorporation may be withdrawn at any time before the corporation is organized and accepts the same. *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977; *Knox v. Childersburg*

of subscriptions made before the corporation is formed, for the addi-

Land Co., 86 Ala. 180, 5 So. 578; National Bank of Union Point v. Amoss, 144 Ga. 425, 87 S. E. 406; Vermilion Sugar Co. v. Vallee, 134 La. 661, Ann. Cas. 1916 A 695, 64 So. 670; Wright Bros. v. Merchants' & Planters' Packet Co., 104 Miss. 507, Ann. Cas. 1915 C 1111, 61 So. 550.

In Pennsylvania it is held that until the association is ready to file the articles with the secretary of state the whole scheme is inchoate and the subscriber may withdraw. *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269, 13 Atl. 747; *Auburn Bolt & Nut Works v. Shultz*, 143 Pa. St. 256, 22 Atl. 904; *Hawthorn Bottle Co. v. Cribbs*, 51 Pa. Super. Ct. 555. See also *Edinboro' Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421; *Mackey Baking Co. v. Mackey*, 19 Dist. Rep. (Pa.) 893.

In *Lewis v. Hillsboro Roller Mill Co.* (Tex. Civ. App.), 23 S. W. 338, and *Patty v. Hillsboro Roller Mill Co.*, 4 Tex. Civ. App. 224, 23 S. W. 336, it is held that a subscription made prior to incorporation may be revoked before organization or acceptance, and before any liabilities or expenses have been incurred on the strength of it. In *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, — Tex. Civ. App. —, 180 S. W. 936, it is said that a proposition to take stock in a corporation when formed is subject to withdrawal until accepted. In *Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319, the court refers to the conflict of authority as to the right to withdraw, and states both rules, but refuses to decide which is the correct one, for the reason that the defendant was liable under either. In *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145, after quoting the

statement in *Steely v. Texas Improvement Co.*, supra, on this subject, it is held that those of the subscribers who actually obtain the charter cannot set aside the original subscription agreement and bring the corporation into existence under a separate subscription undertaking, nor avoid liability on such original agreement signed by them, without the unanimous consent of all the subscribers, and hence that their action in naming themselves in the affidavit for the charter as the only subscribers will not have that effect, and will not deprive the corporation, when organized of the right to enforce the original subscriptions.

Where a subscription paper is left in the hands of the soliciting agent with directions not to deliver it to the company until the subscriber has made certain investigations and until he directs its delivery if they prove satisfactory, and he makes such investigation within a reasonable time, and, upon its proving unsatisfactory, notifies the agent and the company to cancel the subscription, to which they consent, and he never acts or is regarded as a stockholder, the subscription is not binding on him. *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261, 40 N. E. 318, aff'g 51 Ill. App. 447.

The rule stated in the text applies in the case of subscriptions taken during the progress of organization by persons other than the statutory board of corporators. *White v. Kahn*, 103 Ala. 308, 15 So. 595.

See also *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164, where this rule is stated, but the question is not decided.

As to the necessity for acceptance of the subscription by the corporation, see § 522, supra.

tional reason that, until it is formed, the other contemplated party to the contract is not yet in existence;⁷³ nor, where this rule obtains, is a subscriber deprived of the right to withdraw under such circumstances because other subscribers have acted upon the strength of his subscription,⁷⁴ nor because he has induced others to subscribe.⁷⁵

A number of courts, however, have held that a subscription made prior to incorporation is a binding contract from the time when it is made, and hence that, in the absence of fraud or mistake, it cannot be revoked even before it has been accepted by the corporation unless with the consent of all the other subscribers.⁷⁶

As to withdrawal by consent of the corporation, or release, see § 638, *infra*.

⁷³ "Until the organization of the corporation, the subscription is a mere proposition or offer, which may be withdrawn, like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw.

* * * For the time being, and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence; and for this reason, there being no contract, the whole undertaking is inchoate and incomplete, and since there is no contract the party may withdraw." *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465.

"Such a subscription is not a completed contract. It takes two parties to make a contract. A nonexistent corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it." *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888, quoted with approval in *Vermilion Sugar Co. v. Vallee*, 134 La. 661, Ann. Cas. 1916 A 695, 64 So. 670.

For a discussion of the proposition that until the corporation is formed there is no contract, see § 523, *supra*.

⁷⁴ *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465.

⁷⁵ *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269, 13 Atl. 747; *Hawthorne Bottle Co. v. Cribbs*, 51 Pa. Super. Ct. 555.

⁷⁶ *Indiana*. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981. In *Johnson v. Wabash & Mt. V. Plank Road Co.*, 16 Ind. 389, it was held that one who subscribed upon the preliminary articles of incorporation could not withdraw before the organization of the corporation without the consent of the other subscribers.

Kentucky. Persons who enter into an agreement to pay certain sums to a company in consideration of its agreement to erect a factory, they to form a corporation to operate the factory after it is built and to receive stock therein for the amounts subscribed, cannot withdraw before the corporation is formed and thereby escape liability on their subscriptions. *Chicago Bldg. & Mfg. Co. v. Peterson*, 133 Ky. 596, 118 S. W. 384.

Maryland. The obligation of the subscriber to pay for his stock and his right to demand the stock from the company when it is organized create a mutuality of contract binding as between the cosubscribers which cannot be discharged by the

This latter doctrine is generally based on the theory, previously

act of one of them without the consent of the others. Hence, a subscriber cannot withdraw his subscription before incorporation is completed. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Minnesota. *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026.

Missouri. *Palais Du Costume Co. v. Beach*, 163 Mo. App. 499, 143 S. W. 852, 144 Mo. App. 456, 129 S. W. 270; *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172. See also *State v. Garroute*, 67 Mo. 445, where a subscription by a county to the stock of a railroad company was rescinded, but the rescinding order was itself subsequently rescinded, and the right to rescind was not discussed.

In this respect the subscriber's contract differs from an executory agreement to purchase stock, which may be revoked at any time before it has been accepted by the corporation. *Palais Du Costume Co. v. Beach*, 163 Mo. App. 499, 143 S. W. 852, 144 Mo. App. 456, 129 S. W. 270.

New York. In *Raegener v. Brockway*, 58 App. Div. 166, 68 N. Y. Supp. 712, aff'd 171 N. Y. 629, 63 N. E. 1121, it was held that a stock note sent to the promoters of a mutual fire insurance company was an open, continuing offer, which was subject to revocation at any time before the company was actually formed or had accepted the proposition. In *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451, one who subscribed by signing the articles of association was not permitted to show that he revoked his subscription by serving written notice of revocation on three of the persons named as directors, who were active promoters. In the course of the opinion it is said that the advantages to

be derived from being a member of the company are a sufficient consideration to support the contract to take and pay for the stock, and that: "If the contract to pay for and take the stock was a valid contract, made upon a sufficient consideration, then his subscription was not open to revocation. Until the incorporation of the company was perfected, the other subscribers had an interest in its execution and performance of which they could not be deprived by the act of the defendant; and after the articles were filed and recorded in the secretary's office, and the corporation had a legal existence, it acquired a vested interest in the defendant's agreement."

West Virginia. In *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911, it is intimated, though not decided, that informal preliminary subscriptions to the stock of a corporation to be formed are not revocable. In the course of its opinion the court says: "Without deciding the question, it is deemed not inappropriate, however, to suggest what seems to be a lack of any legal impediment to a conclusion that the subscription was irrevocable. Read in the light of the purpose expressed or indicated by them, the circumstances and situation of the parties, the subscriptions can be fairly interpreted as constituting an agreement among the subscribers to form a corporation, and a consideration for each subscription may be found in the benefit conferred upon the subscriber by the others, or the detriment to which each subscriber subjects himself for the benefit of the others. * * * Considering the subscription as an offer to take stock in the corporation, the consideration just indicated would render it irrevocable, under well-settled legal principles.

discussed, that a subscription by a number of persons to the stock of a corporation to be thereafter formed by them is a contract between the subscribers as well as a continuing offer to the proposed corporation,⁷⁷ and hence that their mutual promises constitute a sufficient consideration for the same.⁷⁸

Another reason sometimes given for so holding is that the promoter of the proposed corporation who solicits and obtains the subscriptions is the agent of the subscribers as a body, to hold the subscriptions until the corporation is formed and then turn them over to it, so that the delivery of a subscription to him is a complete and valid delivery and the subscription becomes eo instante a binding contract.⁷⁹

In the application of this rule "it is immaterial when the subscription was made, or where the name of the subscriber appears, if he is one of those who did subscribe for stock in the original organization of the company," and his subscription is none the less irrevocable even though he was the last to sign the subscription list.⁸⁰

These holdings have been criticised as being contrary to reason and the weight of authority.⁸¹

The terms of an offer and the consideration upon which it rests

Though, in a sense, unilateral, an option or offer founded upon a valuable consideration is not revocable. * * * If this principle is applicable, and no reason is perceived why it should not be, the subscription is irrevocable, because founded upon a valuable consideration." But see *Greenbrier Industrial Exposition v. Rhodes*, 37 W. Va. 738, 17 S. E. 305.

See also *King v. Howeth & Co.*, 42 Okla. 178, 140 Pac. 1182; *Chicago Bldg. & Mfg. Co. v. Lyon*, 10 Okla. 704, 64 Pac. 6; *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164; *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

⁷⁷ See § 532, *supra*.

⁷⁸ See § 526, *supra*.

⁷⁹ *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026; *Clapp v. Gilt Edge Consol. Mines Co.*, 83 S. D. 123, 144 N. W. 721.

⁸⁰ *Palais Du Costume Co. v. Beach*, 163 Mo. App. 499, 143 S. W. 852.

⁸¹ In *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888, it is said that, while some authorities sustain the view that the subscriptions create binding and enforceable contracts between the subscribers themselves and are therefore irrevocable except with the consent of all the subscribers, "reason and the weight of authority are opposed to such a view," and "that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon." These observations were quoted with approval by the Alabama Supreme Court in *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977. See also *Vermilion Sugar Co. v. Vallee*, 134 La. 661, Ann. Cas. 1916 A 695, 64 So. 670.

may render it irrevocable even before it has been accepted by the corporation.⁸² Nor can a subscription under seal be revoked if the corporation is in existence, unless the common-law doctrine that a seal renders a consideration unnecessary has been abolished.⁸³

The contract of subscription may expressly authorize a revocation or withdrawal.⁸⁴ But if it authorizes the subscriber to withdraw at a certain time, or in a certain way, or under certain conditions, he must show compliance with such provisions in order to escape liability.⁸⁵

The right to revoke conditional subscriptions before performance of the condition will be considered in a subsequent section.⁸⁶

To constitute a substitution of one subscriber for another, the signature of the original subscriber must be erased from the subscription book, and that of the other person substituted.⁸⁷

A subscriber who, before the organization of the corporation, repudiates his subscription and refuses to pay it, and takes no further part in its organization or the conduct of its affairs, and whose action in so doing is acquiesced in by his associates, who complete the organization without him, is bound by his election, and cannot, after a number

⁸² "When it rests on a valuable consideration, such as a promise for a promise, then, as a rule, it becomes an irrevocable option, provided incorporation according to the terms of the offer is perfected within a reasonable time." *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578, quoted in *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

⁸³ See § 565, *infra*.

⁸⁴ In *Proskey v. Manning*, 110 N. Y. Supp. 221, a provision permitting subscribers to withdraw all payments made by them on their subscriptions and to receive back the amount so paid, "after deducting an expense charge of eight per cent.," was held to authorize the computation of the eight per cent. upon the entire subscription price of the stock and not merely upon instalments paid prior to the subscriber's withdrawal.

⁸⁵ Where one is induced to subscribe

by a contemporaneous parol agreement that he may withdraw at the next meeting of the subscribers if he wishes, if he desires to withdraw he must attend such meeting and announce that fact, and if he attends and does not indicate in any manner that he wishes to withdraw, but, on the contrary, takes part in the meeting, he is bound. *Burnap Building & Supply Co. v. Ladd*, 57 Pa. Super. Ct. 164.

⁸⁶ See § 584, *infra*.

⁸⁷ A plea merely alleging that the original subscriber refused to retain the stock, that another person agreed to take it, and that the commissioners counted it as belonging to the latter, does not show a legal discharge of the original subscriber or a binding assumption of his obligation by such other person. *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

As to the right of a subscriber to transfer his subscription, see § 643, *infra*.

of years and after the stock has become valuable, compel the company to accept his money and issue stock therefor to him.⁸⁸ And if after the corporation is organized a subscriber recognizes his subscription as existing and as binding, he is bound thereby though before such organization he notified the person in charge of the subscription lists that he desired to revoke his subscription and directed him to erase his name from the list.⁸⁹

A subscriber who withdraws cannot recover from the corporation money voluntarily paid by him on his subscription to meet preliminary expenses.⁹⁰

The burden of proving that a subscription was withdrawn before the corporation was organized and accepted the subscription is on a subscriber who sets up such withdrawal as a defense.⁹¹ Declarations of the subscriber himself are not admissible to show a revocation.⁹²

§ 564. — After acceptance. A subscription for stock cannot be revoked by the subscriber after it has been expressly or impliedly accepted by the corporation. There is then a binding contract, and neither party can withdraw without the consent of the other. And the same is true when a corporation makes an offer of shares by opening subscription books and soliciting subscriptions. When a person accepts the offer by entering his name as a subscriber, the contract of subscription is consummated, and neither the corporation nor the subscriber can withdraw.⁹³

⁸⁸ *McDonald v. Markesan Canning Co.*, 142 Wis. 251, 125 N. W. 444.

⁸⁹ *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

⁹⁰ *Hawthorne Bottle Co. v. Cribbs*, 51 Pa. Super. Ct. 555.

⁹¹ *Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319.

⁹² This is true of a declaration "No, I am out of it," made in response to an inquiry as to whether he was going to a meeting of the subscribers. *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

⁹³ *Alabama. Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

Illinois. Richelleu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234, 29

N. E. 1044; *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

Indiana. Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

Iowa. See Davis v. Campbell, 93 Iowa 524, 61 N. W. 1053.

Kentucky. Bullock v. Falmouth & C. H. Turnpike Road Co., 85 Ky. 184, 3 S. W. 129; *Twin Creek & C. Turnpike Road Co. v. Lancaster*, 79 Ky. 552, 3 Ky. L. Rep. 368; *Clarke County Court v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon. 143. See also *Chicago Bldg. & Mfg. Co. v. Peterson*, 133 Ky. 596, 118 S. W. 384.

Maine. Bryant's Pond Steam Mill Co. v. Felt, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323, 32 Atl. 888.

Massachusetts. Athol Music Hall Co. v. Carey, 116 Mass. 471.

Michigan. International Fair & Ex-

In a Pennsylvania case, a railroad company, after its organization, opened subscription books and placed them in the hands of agents to receive subscriptions. One of these agents entered his own name in the book in his possession as a subscriber for a certain number of shares, but, after keeping the book for several months, he cut out his name for the purpose of withdrawing the subscription, because of some difference respecting pay for his services, and then returned it. It was held that he could not withdraw, as the contract of subscription was complete. The company, said the court, "made a continuing offer which became an agreement with each acceptant for the number of shares for which he subscribed. At the time a

position *Ass'n v. Walker*, 83 Mich. 386, 47 N. W. 338.

Montana. *Deschamps v. Loisselle*, 50 Mont. 565, 148 Pac. 335. See also *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

New Hampshire. *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548.

Ohio. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

Oklahoma. *King v. Howeth & Co.*, 42 Okla. 178, 140 Pac. 1182.

Oregon. *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164.

Pennsylvania. *Greer v. Chartiers Ry. Co.*, 96 Pa. St. 391, 42 Am. Rep. 548; *Shober v. Lancaster County Park Ass'n*, 68 Pa. St. 429.

South Carolina. *Cheraw & C. R. Co. v. White*, 10 S. C. 155.

Tennessee. *Lowe v. Edgefield & K. R. Co.*, 1 Head 659; *Gleaves v. Brick Church Turnpike Co.*, 1 Sneed 491.

Texas. *Gulf, C. & S. F. R. Co. v. Neely*, 64 Tex. 344; *Bivins v. Panhandle Packing Co.*, — Tex. Civ. App. —, 140 S. W. 523; *Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319.

Wisconsin. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

"If an offer, which has no valuable consideration to rest on, be permitted to stand until it is accepted by incorporation according to its terms," it becomes an irrevocable subscription.

Knox v. Childersburg Land Co., 86 Ala. 180, 5 So. 578, quoted in *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

A subscriber cannot rescind the contract of subscription by forfeiting the payment made by him on the stock, but the right of forfeiture belongs exclusively to the corporation. *Klein v. Alton & S. R. Co.*, 13 Ill. 514.

Subscribers to stock of an existing corporation have no right to forfeit what they have paid and recede from their agreement or to refuse to pay for the stock which they have agreed to take unless the contract so provides. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Provisions authorizing a forfeiture for nonpayment of calls are for the benefit of the corporation and not of the stockholders, and do not give the latter the right to abandon his subscription without the consent of the corporation. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

An agent authorized by the corporation to receive subscriptions who himself signs the subscription list cannot revoke his own subscription by canceling his name even before he has turned over the list to the company. *Cheraw & C. R. Co. v. White*, 10 S. C. 155.

person signed his name, as a continuance of his act he might have erased it, as one who had written an acceptance of an offer by letter, before mailing the same might destroy it. But if the subscriber returned the book to the company's agent he could not afterwards withdraw his subscriptions, for he had completed the agreement. The defendant was acting as agent in soliciting subscriptions, no matter whether for pay or not, and by procuring subscriptions under his own name he declared his acceptance and admitted his agreement for the stipulated number of shares. The book was not his—he had no right to its possession but for a specific use. In that use he exhibited the evidence of his agreement with the company to every subsequent contracting party. Had the book been accidentally destroyed there was ample evidence of the contents of the written contract, upon which he could have held the company to performance; or if it refused, to payment of damages. Clearly the company was bound to him the same as to any other subscriber, and so was he to the company.”⁹⁴

§ 565. — Subscriptions under seal. A subscription under seal for stock in a corporation after it has been formed is binding before acceptance in those jurisdictions in which the common-law doctrine that a seal dispenses with the necessity for a consideration is still recognized.⁹⁵

But it has been held that a subscription made prior to incorporation may be revoked at any time before the corporation is formed, notwithstanding it is under seal. “Until the organization of the corporation,” said Judge Allen in a Massachusetts case, “the subscription is a mere proposition or offer, which may be withdrawn, like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw. It is not on the ground that there was no sufficient consideration; the seal would do away with any doubt on that score; but it is on the ground that for the time being, and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence; and for this reason, there being no contract, the whole undertaking is inchoate

⁹⁴ Greer v. Chartiers Ry. Co., 96 Pa. St. 391, 42 Am. Rep. 548. See also Cheraw & C. R. Co. v. White, 10 S. C. 155.

⁹⁵ See Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544; Xenos v. Wickham, L. R. 2 H. L. 296.

and incomplete, and since there is no contract, the party may withdraw.”⁹⁶

§ 566. — Notice of revocation. It is a general rule that revocation or withdrawal of an offer does not take effect, so as to prevent an acceptance thereof which will change it into a binding contract, until it is communicated to the person to whom the offer was made; and this rule necessarily applies to subscriptions for stock in a corporation. Until notice of its revocation or withdrawal is given, a subscription remains open for acceptance by the corporation.⁹⁷

Notice of revocation or withdrawal need not be given to all the other subscribers. It is sufficient if it be given to the corporation, if in existence, or, if it is not, to the person who acted as promoter or agent in receiving it. A subscription to stock in a corporation may be withdrawn before its organization by notification of such withdrawal to another subscriber, who is acting as a member of the committee of subscribers appointed to manage their business, and who has been chosen their president.⁹⁸

But it has been held that notification to the agent who took the subscription is insufficient where the subscription contract expressly provides that his authority is limited to the taking of subscriptions and that the company will not be responsible for any pledges, promises or interpretations made by its agents which do not appear in the written contract.⁹⁹

In England, as we have seen, when a written application is made for shares in a company, it is not binding until the company has accepted it, allotted the shares, and communicated such fact to the applicant,¹ and the application or offer may be revoked at any time before then.²

⁹⁶ *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465.

⁹⁷ *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680.

⁹⁸ *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680. See also *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269, 13 Atl. 747, where the notice of withdrawal was given to the chairman of the meeting for the organization of the corporation.

Notice to the promoter who is soliciting subscriptions and who has charge of the subscription list and a direction to him to erase the subscriber's name from the list is sufficient. *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977.

⁹⁹ *Chicago Bldg. & Mfg. Co. v. Lyon*, 10 Okla. 704, 64 Pac. 6.

¹ See § 522, *supra*.

² *Harris' Case*, 7 Ch. App. 587; *In re Peruvian Ry. Co.*, 4 Ch. App. 322; *Pellatt's Case*, 2 Ch. App. 527; *In re Portuguese Consol. Copper Mines*, 42

Where the applicant expressly or impliedly authorizes the company to communicate notice of acceptance and allotment by mail, the acceptance is binding from the time the notice is properly deposited in the mail, and after that time there can be no revocation, even though the letter, without fault of the company, may be delayed in reaching the applicant or may be lost, and never reach him.³ In order that a revocation of the offer may be effectual, so as to prevent an acceptance, notice thereof must be communicated to the company. An acceptance and notice thereof before notice of a revocation will result in a binding contract.⁴

When notice of a revocation is communicated by a letter deposited in the mail, the post office is the agent of the sender, not of the company, and the revocation does not take effect until the letter is actually received by the company. And since a letter of acceptance takes effect from the time it is properly mailed, it follows that a binding contract of subscription is made where a letter of acceptance is mailed after a letter revoking the application or offer is mailed, but before it has reached the company.⁵

§ 567. Lapse or abandonment of subscriptions. A subscription will lapse, or be revoked, as it is sometimes said, if the subscriber dies before it is accepted by the corporation, and it can make no difference whether there is notice of the death or not.⁶ This is necessarily so, for "the continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man."⁷

Ch. Div. 160; *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216; *Hebb's Case*, L. R. 4 Eq. 9; *Ramsgate Victoria Hotel Co. v. Montefiore*, L. R. 1 Exch. 109.

An oral revocation is good. In re *Brewery Assets Corporation*, [1894] 3 Ch. 272; *Wilson's Case*, 20 L. T. (N. S.) 962.

³ *Harris' Case*, 7 Ch. App. 587; *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216; *Townsend's Case*, L. R. 13 Eq. 148.

⁴ *Harris' Case*, 7 Ch. App. 587; *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Exch. Div. 216.

⁵ *Harris' Case*, 7 Ch. App. 587;

Household Fire & Carriage Acc. Ins. Co. v. Grant, 4 Exch. Div. 216.

⁶ *Illinois*. *Pratt v. Baptist Soc. of Elgin*, 93 Ill. 475, 34 Am. Rep. 187.

Massachusetts. *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680.

Missouri. *Sedalia, W. & S. Ry. Co. v. Wilkerson*, 83 Mo. 235.

Ohio. *Wallace v. Townsend*, 43 Ohio St. 537, 54 Am. Rep. 829, 3 N. E. 601.

Pennsylvania. *Phipps v. Jones*, 20 Pa. St. 260, 59 Am. Dec. 708.

⁷ *Pratt v. Baptist Soc. of Elgin*, 93 Ill. 475, 34 Am. Rep. 187.

A subscription will also lapse or be revoked if the subscriber becomes insane before it is accepted, if there is notice of the insanity, and perhaps without notice.⁸ But the death or insanity of a subscriber does not revoke a subscription after it has been accepted by the corporation.⁹

A subscription will also lapse, and be no longer open for acceptance, if it is not accepted within the time, if any specified therein, or within a reasonable time, if no time is specified for acceptance. A corporation cannot wait indefinitely before accepting or rejecting a subscription or complying with the conditions on which it is made. Nor can one be held indefinitely to his offer to take stock in a corporation to be formed, at least where the rights of creditors are not involved.¹⁰

As between the corporation and the subscriber, "such an offer cannot be held in abeyance at the will of other subscribers who have arrogated to themselves the right to organize the corporation, without regard to the conditions fastened upon the subscription contract, to the exclusion of others equally interested," nor can the question whether such offer is or is not accepted and the conditions under which it was made complied with be made to depend upon the final determination of those who take an active part in the organization in which other subscribers are not given an opportunity to participate.¹¹

⁸ *Beach v. First M. E. Church*, 96 Ill. 177.

⁹ Where the subscriber does not die until after his subscription has been accepted, any balance remaining unpaid may be collected from his estate. *Welch v. Sargent*, 127 Cal. 72, 81, 59 Pac. 319.

See also the cases above cited. And see § 564, *supra*.

¹⁰ *Carter, Rittenberg & Hainlin Co. v. Hazzard*, 65 Minn. 432, 68 N. W. 74. See also *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164.

And see *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578, where it is said by way of dictum that where the offer rests upon a valuable consideration it becomes an irrevocable option, "provided incorporation according to the terms of the offer is perfected within a reasonable time."

¹¹ *Carter, Rittenberg & Hainlin Co. v. Hazzard*, 65 Minn. 432, 68 N. W. 74, in which case the subscription contract provided for the formation of a corporation with common and preferred stock. A majority of the directors were to be chosen from the holders of preferred stock, and they were to have other advantages. The defendant subscribed for preferred stock. The corporation was organized but no provision was made in the articles for two classes of stock, or for a selection of a majority of directors from the holders of preferred stock. Over two years thereafter, by-laws were adopted containing these provisions, the corporation having done business and contracted debts in the meantime, and an action was then brought against the defendant on his subscription. It was held that the

Similarly, one to whom the promoters offer an opportunity to subscribe must accept it within a reasonable time.¹²

What is a reasonable time for the acceptance of the offer depends upon the facts of each particular case.¹³

The parties contemplating the organization of a corporation may abandon the enterprise at any stage of the proceedings prior to the creation of any liability to outside parties, and, if they do so, previous subscribers are thereby released.¹⁴

Assuming that a subscriber can abandon his subscription so as to deprive himself of the right to pay the balance due thereon and to enforce recognition of his rights as a stockholder, the question whether he has done so is one of intention, to be determined from the facts and circumstances of each particular case.¹⁵ Before he can be said to have formed the intention of abandoning it, his acts must be positive, unequivocal and inconsistent with any other intention.¹⁶

The party claiming the abandonment must show that fact by clear and unequivocal evidence.¹⁷

If the corporation, within the time fixed by the statute of limitations, fails to sue to recover the amount of unpaid calls or to forfeit

delay on the part of the corporation to organize in the manner agreed upon, and to comply with the conditions under which he subscribed, was unreasonable, and released him from his subscription.

As to the lapse of conditional subscriptions by failure to perform the conditions within a reasonable time, see § 584, *infra*.

As to the right to withdraw conditional subscriptions, see § 584, *infra*.

¹² *Meyer v. Cherokee Development Co.*, 30 Okla. 769, 120 Pac. 1106.

¹³ *Carter, Rittenberg & Hainlin Co. v. Hazzard*, 65 Minn. 432, 68 N. W. 74.

¹⁴ Where there is such an abandonment of all attempt to organize under the original subscription list, a subscriber cannot be held liable by the creditors of a corporation subsequently formed by a part of the original subscribers, there being a new subscription list to which he was not a party, and he never having recognized

his liability to such corporation as a stockholder. *Harrison Nat. Bank of Cadiz v. Votaw*, 51 Kan. 362, 32 Pac. 1111.

¹⁵ *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

The corporation cannot rely on certain acts as constituting an abandonment where it subsequently recognizes the contract as existing. *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84.

¹⁶ *In Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501, the facts were held not to show an abandonment. See also *Ekberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

¹⁷ *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501. See also *Ekberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

and sell the stock because of such nonpayment, the subscriber retains the right to pay up his subscription and demand stock certificates.¹⁸

§ 568. Illegality in contracts of subscription. A contract of subscription to the capital stock of a corporation, like other contracts, may be illegal, and therefore void, because it is in violation of some statutory prohibition, or of some principle of the common law, or because it is contrary to public policy.¹⁹ And where such is the case, it cannot be made the basis of any relief by either party,²⁰ nor can either party be compelled to perform it, or be rendered liable in damages for its nonperformance.²¹

No performance on either side can give the illegal contract any validity or be the foundation of any right of action based upon it.²²

¹⁸ *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501; *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84.

¹⁹ *United States*. *Maine Northwestern Development Co. v. Northern Commercial Co.*, 213 Fed. 103.

Arkansas. *Clemshire v. Boone County Bank*, 53 Ark. 512, 14 S. W. 901.

Indiana. See *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Iowa. *Wapello County v. Burlington & M. River R. Co.*, 44 Iowa 585. See also *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

Maryland. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543; *Sturtevant Mill Co. v. Cosmic Cement & Stone Co.*, 111 Md. 667, 76 Atl. 412; *Miller v. Cosmic Cement, Tile & Stone Co.*, 109 Md. 11, 71 Atl. 91.

New York. *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518. See also *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

Texas. *Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513.

²⁰ *Wapello County v. Burlington & M. River R. Co.*, 44 Iowa 585.

²¹ See *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; *Wapello County v. Burlington & M. River R. Co.*, 44 Iowa 585; *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543; *Sturtevant Mill Co. v. Cosmic Cement & Stone Co.*, 111 Md. 667, 76 Atl. 412; *Miller v. Cosmic Cement, Tile & Stone Co.*, 109 Md. 11, 71 Atl. 91; *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518. See also *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

A corporation cannot collect assessments on a subscription by another corporation, where the contract was made in behalf of the defendant by its president who was at the same time the promoter and managing director of the plaintiff company, and was personally interested in procuring subscriptions to its stock, and the plaintiff admits the fraud. *Maine Northwestern Development Co. v. Northern Commercial Co.*, 213 Fed. 103.

²² *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

It cannot be ratified by either party, since it could not have been authorized by either;²³ and neither party can be estopped to set up its invalidity.²⁴ Nor will the fact that the contract is illegal justify the court in making and enforcing a contract which the parties never made.²⁵

If a corporation is organized for a purpose which is prohibited by statute or by the common law, or which is contrary to public policy, subscriptions to the capital stock are illegal and void, and can neither confer rights upon the subscribers nor be enforced by the corporation.²⁶ This is true, for example, of subscriptions for stock in a corporation formed for the purpose of carrying on an infringing telephone business;²⁷ and of subscriptions which are in violation of express charter, statutory, or constitutional prohibitions as to the terms or medium of payment.²⁸

The contract may also be void because of want of capacity on the

²³ *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

²⁴ See § 716, *infra*.

²⁵ So where a county subscribes for stock in a railroad corporation and issues bonds in part payment therefor, but, on the court declaring subscriptions by counties to be illegal, refuses to pay the balance, it cannot compel the company to issue paid up stock for the amount so paid, and thereby deprive the company of its remedy by forfeiture, if it could not have done so had the contract been valid. *Wapello County v. Burlington & M. River R. Co.*, 44 Iowa 585.

²⁶ *Clemshire v. Boone County Bank*, 53 Ark. 512, 14 S. W. 901. See also *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929.

When a certificate of incorporation expresses no illegal purpose on the part of the corporators, and the agreements between the corporation and subscribers are valid on their face, subsequent corporate acts manifesting, or tending to show, an illegal purpose on the part of the directors—as a purpose to combine in restraint of trade, or create a monopoly—will not affect the legality of the corpora-

tion, so as to constitute a defense in actions by the corporation on subscriptions. *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403, *aff'g* 74 Hun (N. Y.) 435. Compare *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729, *aff'g* 67 Hun (N. Y.) 356.

Where the object of the corporation, as declared by its charter, is a lawful one, the fact that it was organized and used for an unlawful purpose will not preclude a purchaser of its stock from ratifying the sale. *Anderson v. Chicago Trust & Savings Bank*, 195 Ill. 341, 63 N. E. 203, *aff'g* 93 Ill. App. 347.

²⁷ *Clemshire v. Boone County Bank*, 53 Ark. 512, 14 S. W. 901.

²⁸ *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

A contract to issue shares for property is void unless authorized by the stockholders, where the statute requires such authorization. *Miller v. Cosmic Cement, Tile & Stone Co.*, 109 Md. 11, 71 Atl. 91; *Sturtevant Mill Co. v. Cosmic Cement & Stone Co.*, 111 Md. 667, 76 Atl. 412.

As to the medium in which subscriptions may be paid, see § 712, *infra*.

part of the subscriber to enter into it, as in the case of subscriptions by municipal or quasi municipal corporations,²⁹ or because it provides for the issuance of bonus stock,³⁰ or for the issuance of fully paid stock upon payment of less than its par value,³¹ in violation of law. A promise to pay for stock issued in violation of law is a nullity.³² And where a corporation attempts to increase its capital stock without legislative authority, subscriptions for the additional stock are void and unenforceable, both because they are without consideration, and because they are illegal.³³

If the contract of subscription is indivisible, and a part of the consideration therefor is illegal, the whole contract is void.³⁴ But if the contract is divisible, illegal provisions forming no part of the consideration for the stock and which are for the benefit of the subscriber may be waived by him and he may enforce delivery of the stock.³⁵

If the contract is merely *malum prohibitum* and not *malum in se*, the subscriber may rescind it while it remains executory, and may recover back any money that he has paid under it.³⁶

²⁹ See § 549, *supra*.

³⁰ A recovery cannot be had on a subscription to preferred stock which provides that each subscriber shall receive a bonus of common stock, where the statute prohibits the issuance of stock except for money, labor done, or property received. And this is equally true whether such common stock has never been previously issued to any one, or has been previously issued to a promoter for worthless property taken at an overvaluation and by him transferred to the company. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

Even if the subscriber would not assume any liability to corporate creditors by reason of his acquisition of the bonus stock, that fact is no reason for enforcing the subscription at the instance of the corporation. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

³¹ *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518; *Keystone*

Wrapping Mach. Co. v. Bromeier, 42 Pa. Super. Ct. 384.

As to watered stock generally, see § 524, *supra*.

³² *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

³³ See § 524, *supra*.

³⁴ *Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513.

Where an agreement by the company to issue common stock as a bonus to subscribers to preferred stock is an inseparable and essential part of the subscription contract, and is in violation of the statute, the company cannot recover on the subscription. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

³⁵ *First Nat. Bank of Wallace v. Callahan Min. Co.*, 28 Idaho 627, 155 Pac. 673.

³⁶ He may do so, for example, where stock is issued to him in excess of the amount which the corporation is authorized to issue. *Pruitt v. Oklahoma*

The legality of the contract is to be determined by the laws of the state where the company is incorporated.³⁷

If, by reason of a change in the law between the time when the subscription is made and the corporation is organized, the contract becomes illegal, this discharges the subscriber.³⁸ And the contract is also avoided where, though valid under the decisions of the supreme court when it is

Steam Baking Co., 39 Okla. 509, 135 Pac. 730.

A subscriber may sue to cancel his subscription and a note and mortgage given for the price of the stock where the transaction violates a constitutional provision that no corporation shall issue stock except for money paid, labor done, or property actually received. Prudential Life Ins. Co. of Texas v. Pearson, — Tex. Civ. App. —, 188 S. W. 513.

And a note and mortgage given under such circumstances may be canceled in an action in which it is sought to enforce the same. General Bonding & Casualty Ins. Co. v. Mosely, — Tex. Civ. App. —, 174 S. W. 1031.

In Knowlton v. Congress & Empire Spring Co., 57 N. Y. 518, it was held that a contract of subscription to an increase of stock which provided for the issuance of fully paid stock upon payment of less than its par value violated the spirit and policy of the statute and was illegal; that a subscriber, who was a trustee and vice president of the company and actively participated in the scheme to procure the increase of stock and in the preparation of the subscription agreement and in procuring signatures thereto, was in *pari delicto* with the corporation; and that the contract was to be regarded as executed to the extent of payments made by him thereunder; and hence that he could not recover from the corporation the money so paid. The case was reversed and remanded for a new trial, and was then removed to the federal circuit court on the ground of diverse

citizenship. A judgment in that court in favor of the plaintiff was affirmed by the United States Supreme Court on error (Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347), holding that the contract was not executed but executory, and that in view of the fact that the contract was merely *malum prohibitum* and not *malum in se*, the subscriber might rescind it and recover back what he had paid. The court further says that the rule permitting recovery under such circumstances is generally applied even where the parties are in *pari delicto*, but that, in view of the fact that the statute did not expressly prohibit the issuance of stock as fully paid when it had not been fully paid, but the illegality of such an issue was deduced from several provisions of the law under which the corporation was organized, it was fairly inferable from the record that the plaintiff did not know that the plan adopted by the trustees for the increase was illegal, and that when they discovered that fact, and before any harm was done, the scheme was abandoned, and that under such circumstances a rule which would prohibit a recovery of the money paid would be a very harsh one, not founded on any law or public policy.

³⁷ Trent Import Co. v. Wheelwright, 118 Md. 249, 84 Atl. 543.

See also § 570, *infra*.

³⁸ As where an agreement to make payment by conveying land to the corporation is made illegal. Knox v. Childersburg Land Co., 86 Ala. 180, 5 So. 578.

made, those decisions are subsequently overruled and contracts of that character are held to be invalid before the one in question is sought to be enforced.³⁹ But if a subscriber to stock in an existing corporation has capacity to subscribe when the contract is made, its validity is not affected by a change in the law which takes away that capacity.⁴⁰

Illegality in the purpose of a corporation cannot be set up by subscribers for stock therein to defeat liability to creditors of the corporation, or to a receiver or an assignee in bankruptcy.⁴¹

§ 569. Proof of subscriptions. The records of a corporation are competent and sufficient evidence to show whether or not the number of shares required by its charter have been subscribed, where no proof is introduced to destroy their effect.⁴²

Admissions of a party against his interest inscribed upon the record books of a corporation are competent and persuasive evidence against him.⁴³

³⁹ Subscription by a county. *Wapello County v. Burlington & M. River R. Co.*, 44 Iowa 585.

⁴⁰ As where a county makes a subscription pursuant to statutory authority, and a constitutional provision prohibiting such subscriptions is subsequently adopted. *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631.

⁴¹ *Roney v. Crawford*, 135 Ga. 1, 68 S. E. 701; *Augir v. Ryan*, 63 Minn. 373, 65 N. W. 640.

The fact that the defendant was induced to subscribe by reason of a proposed distribution of lots among stockholders by a drawing to be conducted by the company is no defense to an action by a receiver, where the creditors had no knowledge of that fact and the subscription contract is valid on its face. *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Cardwell v. Kelly*, 95 Va. 570, 40 L. R. A. 240, 28 S. E. 953.

⁴² *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep.

288, 57 N. E. 1043, aff'g 87 Ill. App. 605; *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Marlborough Branch R. Co. v. Arnold*, 9 Gray (Mass.) 159, 69 Am. Dec. 279; *Central Turnpike Corporation v. Valentine*, 10 Pick. (Mass.) 142.

The books of the corporation are prima facie evidence of stock subscriptions, and are sufficient to show subscription in full to the stock under a statute making subscription in full a condition precedent to the right to maintain condemnation proceedings, where there is no issue upon the question. *State v. Superior Court for Clarke County*, 45 Wash. 316, 88 Pac. 332, 44 Wash. 108, 87 Pac. 40.

See generally Chap. 45.

⁴³ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

Subscription books⁴⁴ or papers⁴⁵ are admissible to show that a person whose name appears thereon is a subscriber, or that the amount required by the charter or statute has been subscribed, and are generally held to be *prima facie* evidence of those facts.⁴⁶ And a written subscription is properly admitted in evidence notwithstanding a difference in the name of the corporation issuing the stock, where it is shown that in the process of organization the corporate name was changed.⁴⁷

Receipts written upon the stubs of the certificate of stock and

⁴⁴ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); *Breedlove v. Martinsville & F. R. Co.*, 12 Ind. 114; *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa 357, 6 N. W. 547; *Girard Life Insurance, Annuity & Trust Co. v. Loving*, 71 Kan. 558, 81 Pac. 200; *Hinsdale Sav. Bank v. New Hampshire Banking Co.*, 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

The subscription books with the orders of the company requiring payment of instalments are proper evidence to establish the subscriber's legal liability in assumption to recover the amount of a call. *Peake v. Wabash R. Co.*, 18 Ill. 88.

The original subscription book, made up by copying from lists carried around to solicit subscriptions, and shown to have been accepted and used by the directors, is admissible on the issue as to whether the amount required by the charter has been subscribed. *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

Where subscriptions are made by signing in a book, or on a slip of paper, and the subscriptions are afterwards transcribed by an officer of the corporation into a stock book, it was held that the latter book was admissible in evidence, the officer being authorized by the subscribers to make the entries. *Iowa & Minnesota R. Co. v. Perkins*, 28 Iowa 281.

⁴⁵ *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

The original stock subscription list is admissible to show that the required amount has been subscribed. *Bunni v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

A subscription paper made before the organization of the corporation, but after the passage of the act of incorporation, is competent evidence to prove the facts of the subscriber being a member and the number of shares held by him, and is *prima facie* proof of those facts and decisive in the absence of any countervailing proof. *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. (Mass.) 311.

"The commissioners' book of subscriptions is *prima facie* evidence that the subscriptions were genuine, or made by persons duly authorized." *Rockville & W. Turnpike Road v. Van Ness*, 2 Cranch C. C. 449, Fed. Cas. No. 11,986.

⁴⁶ *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. (Mass.) 311.

The subscription book is *prima facie* evidence of the amount and number of shares subscribed for. *Marlborough Branch R. Co. v. Arnold*, 9 Gray (Mass.) 159, 69 Am. Dec. 279.

⁴⁷ *Priest v. Glenn*, 51 Fed. 400, aff'g 48 Fed. 19, 47 Fed. 472.

shown to have been signed by the alleged subscriber are also admissible against him.⁴⁸

Some courts hold that corporate books or records which do not contain the signature of the alleged subscriber or other similar act to which he is a party are not admissible to prove his membership in the corporation unless supported by other evidence, or, in other words, they cannot be used, independently of anything else, to establish his connection with the corporation.⁴⁹

A reason given for this rule is that, "while the records of the corporation are evidence of all corporate proceedings therein recorded, they cannot be used against a stranger to connect him with the corporation, and until defendant has been shown to be a stockholder by other evidence, he is a stranger, and the records of the corporation would be binding on it but not on him."⁵⁰ As to him they are to be regarded merely as the declaration of the corporation or its officers, and are hearsay.⁵¹ "But when his membership is shown by other and competent evidence, then the books may be introduced to explain acts done by the defendant, to show what those acts mean and the inevitable inference to be drawn from them when they are compared in point of time, similarity, and purpose with the acts of the other stockholders."⁵² For example, where it is shown by the testimony of a director,

⁴⁸ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

⁴⁹ *Arkansas. Steed v. Henry*, 120 Ark. 583, 180 S. W. 508.

District of Columbia. National Exp. & Transp. Co. v. Morris, 15 App. Cas. 262.

Georgia. Howard v. Glenn, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610.

Kansas. Girard Life Insurance, Annuity & Trust Co. v. Loving, 71 Kan. 558, 81 Pac. 200; *Hinsdale Sav. Bank v. New Hampshire Banking Co.*, 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

Missouri. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

See also *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780.

The rule is not changed by a statutory provision that a person in whose name stock stands on the books of

the company shall be deemed the owner thereof as regards the company. *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. (D. C.) 262.

⁵⁰ *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

⁵¹ *Hinsdale Sav. Bank v. New Hampshire Banking Co.*, 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

⁵² *Steed v. Henry*, 120 Ark. 583, 180 S. W. 508; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

The stock ledger is admissible where it is shown by a receipt signed by the stockholder that he is a stockholder. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Where the relation of shareholder has been otherwise shown to exist, the books of the corporation are admissible to aid in determining when it commenced, and what, if anything, has been paid upon the shares. *Fish v.*

or otherwise, that a person sought to be charged as a subscriber attended directors' meetings, acted as a director, and paid calls and assessments on his stock, then the minutes and records of the corporation are admissible against him, "not only to explain the force and meaning of the payment of such calls, by comparing such payments with those of other stockholders, but also on the principle that, having attended the meetings in person and participated therein, he is presumed to have knowledge of what was done; and consequently anything done with his knowledge and implied consent is admissible to bind him."⁵³ And where one admits that he subscribed for stock in a corporation, its books are admissible to show that he was a stockholder and the number of shares for which he subscribed and their value, and also to show any other transactions between him and the company.⁵⁴ And the records of a meeting of the directors at which the contract is claimed to have been made is admissible to show that they accepted the subscription.⁵⁵

On the other hand, many courts hold that where a person's name appears upon the stock book or stock ledger of a corporation, even though not signed by him, the book is competent evidence to show that he is a subscriber or stockholder, and is *prima facie* proof and raises a *prima facie* presumption of that fact,⁵⁶ and that, in an action

Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

In *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015, an entry on the stub of the stock certificate books that a certificate was issued to the defendant, the testimony of the person making the entry to the same effect, and the fact that the defendant signed on the back of the certificate in question a blank transfer of the stock, was held to warrant a finding that he accepted the stock and expressly or impliedly agreed to pay for it.

⁵³ *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

⁵⁴ *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610. See also *Hinsdale Sav. Bank v. New Hampshire Banking Co.*, 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

⁵⁵ *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780.

⁵⁶ *United States. Taussig v. Glenn*,

51 Fed. 409, rev'g on other grounds 47 Fed. 472; *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308. He is presumed to be the owner of the stock if his name appears upon the corporate books as such owner. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936; *Alsop v. Conway*, 188 Fed. 568. This rule is laid down in *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437, and *Glenn v. McAllister's Ex'rs*, 46 Fed. 883, but it is to be noted that in this case there was other evidence that the defendant was a stockholder.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

California. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

Colorado. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

brought against him as a stockholder or subscriber, the burden of

Iowa. See *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa 357, 6 N. W. 547.

Maryland. *Weber v. Fickey*, 47 Md. 196.

Minnesota. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

North Carolina. *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538.

Rhode Island. See *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540.

Virginia. *Stuart v. Valley R. Co.*, 32 Gratt. 146; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806. (In this case, however, there was other evidence of the subscription.)

Washington. *State v. Superior Court for Clarke County*, 45 Wash. 316, 88 Pac. 332, 44 Wash. 108, 87 Pac. 40.

West Virginia. *South Branch Ry. Co. v. Long's Adm'r*, 43 W. Va. 131, 27 S. E. 297; *Pittsburgh, W. & K. R. Co. v. Applegate & Son*, 21 W. Va. 172.

England. *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448, 133 Eng. Reprint 408.

In *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46, it is said that while it may be difficult, on principle or well recognized rules of evidence, to maintain this proposition, it is upheld by the great weight of authority.

There is no presumption that the names have been fraudulently inserted on the books by an act of forgery. *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

In an action by creditors to enforce the liability of stockholders for the corporate debts, the stock certificate book, stock ledger and stock journal are admissible to show the amount of

stock outstanding, where the secretary testifies that they contain the names of all the stockholders, and that no other persons appear on the books of the company as having owned stock at the time in question. *Knowles v. Sanderecock*, 107 Cal. 629, 40 Pac. 1047.

The books of the company are competent evidence to prove the number of shares subscribed for at a particular time and who were the shareholders at that time. *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089.

In *Chapman v. Porter*, 69 N. Y. 276, it was held that evidence of entries in the stock ledger and books of a corporation was competent to show the amount of stock issued to the defendant, and also whether it included stock allotted to the owner of property which the defendant held as mortgagee of the plaintiff, it being claimed that since he was entitled to subscribe only because of his interest in the property under the mortgage, he held the stock as trustee for the plaintiff.

In *Hoagland v. Bell*, 36 Barb. (N. Y.) 57, which was an action to enforce a stockholder's individual liability for the corporate debts, it was held that the fact that the defendant's name appeared on the stock or transfer book of the company was presumptive evidence that he was a stockholder. Apparently the defendant was not an original subscriber, but acquired the stock by assignment.

The books of a foreign corporation are admissible under the express provisions of N. Y. Code Civ. Proc. §§ 755, 756. *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, aff'g 58 N. Y. App. Div. 436, 69 N. Y. Supp. 295, 33 N. Y. Misc. 50, 68 N. Y. Supp. 141.

The rule is especially applicable where the defendant interposes no

rebutting that presumption and showing that he is not a stockholder or subscriber is on him.⁵⁷

It has been said that this rule is founded in convenience, and also rests upon the further ground that corporations are creatures of the statute, with prescribed rights and powers, and subject to an important extent to public control and supervision, and are therefore presumed to exercise their powers as allowed and required by law, and to keep their records correctly.⁵⁸

Other reasons sometimes given are that in the ordinary course of business books of this character are consulted to determine who are the owners of stock in corporations.⁵⁹ And also that persons who knowingly permit their names to appear upon the books of a company as holders of stock therein may be estopped from proving the contrary as against parties who have acted upon the faith of what thus appears upon the face of such books.⁶⁰

plea denying the genuineness of the subscription, and is shown to have paid an assessment on the stock. *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

The books showing the state of an alleged subscriber's account with the corporation are competent to show that he is a stockholder where that fact is not denied by him in his answer. *Fisk v. Sampson*, 118 Minn. 525, 136 N. W. 315.

⁵⁷ *United States*. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Alsop v. Conway*, 188 Fed. 568; *Tausig v. Glenn*, 51 Fed. 409, rev'g on other grounds 47 Fed. 472; *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472; *Glenn v. McAllister's Ex'rs*, 46 Fed. 883.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

Minnesota. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

New York. *Signa Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, aff'g 58

App. Div. 436, 69 N. Y. Supp. 295, 33 Misc. 50, 68 N. Y. Supp. 141; *Hoagland v. Bell*, 36 Barb. 57.

North Carolina. *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538.

Washington. *State v. Superior Court of Clarke County*, 44 Wash. 108, 87 Pac. 40.

West Virginia. *Pittsburgh, W. & K. R. Co. v. Applegate & Son*, 21 W. Va. 172.

⁵⁸ *Glenn v. McAllister's Ex'rs*, 46 Fed. 883; *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538. See also *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

⁵⁹ "On principle it would seem to be true that ordinarily whatever is received and acted upon by the business community, as proper evidence of a given fact, may be admitted in evidence when the existence of the fact is a matter to be proven in the trial of a cause in court." *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472. See also *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

⁶⁰ *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472.

To render corporate books and records admissible, however, it must appear that the entries relative to the matter in question were regularly made, in due course of business, by the proper officers of the company.⁶¹ And it must also be shown, by the contents of the book or otherwise, that the name found therein was so entered as the name of the person sought to be charged as a subscriber or stockholder.⁶² So a book will not be admitted where the name therein is different from the name of the person sought to be charged, if the two are not idem sonans, and there is no evidence tending to establish that they were intended to describe the same person or firm.⁶³ But errors in transcribing a name will not overcome the presumption, where they are manifestly inadvertent, and the name as transcribed is manifestly intended for that of the person sought to be charged.⁶⁴

The fact that a person's name does not appear in the stock book is also evidence that he is not a subscriber or stockholder.⁶⁵ And records of the company relating to its organization and the proceedings of the commissioners prior thereto containing lists of subscribers in which the name of an alleged subscriber does not appear are admissible to show that the corporation when formed never accepted or recognized him as a subscriber, it being claimed that his subscription had been previously revoked.⁶⁶ Of course the books of

See also *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

⁶¹ *Glenn v. McAllister's Ex'rs*, 46 Fed. 883. See also *Weber v. Fickey*, 47 Md. 196; *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538.

⁶² *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472.

⁶³ "'*Tanssing, Livingston & Co.*' is not idem sonans with '*Taussig, Livingston & Co.*,' and an entry in the stock ledger of a corporation of the former name is not competent evidence that the latter firm, or any of its members, were stockholders or subscribers to the stock of the corporation.'" *Taussig v. Glenn*, 51 Fed. 409, rev'g 47 Fed. 472.

Under such circumstances, a draft drawn by the corporation on the defendant about the time of the alleged subscription has no tendency to prove that the corporation referred to the

defendant by the account against the person or firm of another name in the stock book, where it does not correspond in date with any requisition entered in that account, and there is no evidence that it was ever brought to the defendant's attention. *Taussig v. Glenn*, 51 Fed. 409, rev'g 47 Fed. 472.

⁶⁴ The fact that in some of the entries the name of "*Thompson McAllister*" was written "*Thompson C. McAllister*," the "*C*" being subsequently crossed out, was held not to disprove the presumption that *Thompson McAllister* was a stockholder, the name being manifestly that of the same person and the insertion of the initial merely inadvertent. *Glenn v. McAllister's Ex'rs*, 46 Fed. 883.

⁶⁵ *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245.

⁶⁶ *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

record of a corporation, or a subscription paper, containing a person's name as a subscriber or stockholder, is nothing more than *prima facie* evidence, and may be rebutted by evidence that his name was placed there without his consent.⁶⁷

Generally, the corporate records are the best evidence as to the amount of stock subscribed, and parol evidence is not admissible for that purpose.⁶⁸

Where subscriptions were made by signing the subscription books, or otherwise in writing, the books or writing are the best evidence, and unless they have been lost or destroyed, parol or other evidence is not admissible to prove the subscription.⁶⁹ If they have been lost or destroyed, however, parol or other secondary evidence is admissible.⁷⁰

⁶⁷ *Pittsburgh, W. & K. R. Co. v. Applegate & Son*, 21 W. Va. 172.

He may show that he never owned or subscribed for any stock or authorized the issuance of any to him by the corporation. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

The mere fact that the amount of a subscription was charged to a certain corporation will not support a finding that it subscribed, where the certificate was taken in the name of another person, who was neither an officer nor agent of the corporation, and who paid the first assessment. *Chapman v. Virginia Real Estate Inv. Co.*, 96 Va. 177, 31 S. E. 74.

The fact that a subscriber's name is entered upon the books of the company as a stockholder will not prevent him from showing, as against a receiver for the corporation, that he subscribed upon a valid condition that has not been performed, unless he expressly or impliedly consented to such entry. *Grier v. Union Nat. Life Ins. Co.*, 217 Fed. 287.

See the cases above cited. And see § 554, *supra*.

⁶⁸ Where the stock book is introduced in evidence, the witness may verbally state that it shows that a certain amount of stock has been sub-

scribed. *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499.

⁶⁹ *Coffin v. Collins*, 17 Me. 440; *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489. See also *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762, *rev'g* 14 Ill. App. 327.

Where the action is based on a written contract of subscription, the writing is the best evidence, and until it is produced or its absence accounted for, the stock ledger is incompetent. *Taussig v. Glenn*, 51 Fed. 409, *rev'g* 47 Fed. 472.

Where the names of the subscribers and the amounts of their subscriptions are written upon small books or slips of paper by the parties soliciting, upon the subscribers authorizing them to do so, and thereafter are transcribed into one subscription book by an officer of the company empowered by the subscribers, by authority conferred at the meeting to procure subscriptions, to do so, the last named book becomes the original contract or subscription, and is admissible without proof of the loss of the books or slips on which the names were first written. *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

⁷⁰ *Dupee v. Chicago Horse Shoe Co.*, 117 Fed. 40, *certiorari* denied 188 U.

If the corporate books and papers showing the amount subscribed are so considerable and unwieldy as to make their direct and immediate examination in court impracticable or difficult, a person having charge of them and who is familiar with their contents may be permitted to give a general summary of their contents for the purpose of showing the amount subscribed, where their production has not been required or called for by the opposite party.⁷¹ And of course the testimony of an officer or agent of a corporation as to the fact, or other parol evidence, is admissible to prove a subscription which was not made in writing.⁷² If the original stock book has been lost, other books of record are admissible.⁷³

In the absence of better evidence, as where there is no written subscription, declarations and admissions of a party are admissible to prove that he is a subscriber or stockholder.⁷⁴ So, where there is no written contract, recitals in other contracts as to the fact of subscription are admissible to show that one is a stockholder, and may be sufficient for that purpose.⁷⁵

S. 740, 47 L. Ed. 677, appendix; Central Turnpike Corporation v. Valentine, 10 Pick. (Mass.) 142; Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17; Graff v. Pittsburgh & S. R. Co., 31 Pa. St. 489.

Where the book in which the original subscriptions were made is not in the possession of the company, but is in the possession of a third person who is outside the jurisdiction of the court, and who refuses to produce it, the corporate secretary may testify as to its contents. Wisconsin River Lumber Co. v. Walker, 48 Wis. 614, 4 N. W. 803.

Evidence that the original subscription book has been lost, that the defendant authorized a share of stock to be issued to him, that a certificate was issued, that only stockholders were eligible to office, and that the defendant was elected and acted as president, and that he has made payments on his share, is clearly sufficient evidence of a subscription. York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440. See also Haynes v. Brown, 36 N. H. 545.

⁷¹ Where no objection is made on the ground that the books have not been produced, and the opposite party has been given an opportunity to examine them. Louisiana Purchase Expos. Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099.

⁷² Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17; Congdon v. Winsor, 17 R. I. 236, 21 Atl. 540.

⁷³ Congdon v. Winsor, 17 R. I. 236, 21 Atl. 540.

A cash book entry of payment of an assessment has been held inadmissible. Glenn v. Liggett, 47 Fed. 472.

⁷⁴ Congdon v. Winsor, 17 R. I. 236, 21 Atl. 540.

So where the subscription book is in the possession of a third person, who is beyond the jurisdiction. Wisconsin River Lumber Co. v. Walker, 48 Wis. 614, 4 N. W. 803.

⁷⁵ A recital in a bond given to a corporation to secure a loan that the obligor "has retained of his subscription for two shares of capital stock * * * the sum of two hundred dollars, being the amount of his subscrip-

Proof of conduct may also be admissible and sufficient, as proof that the party attended and participated in meetings of stockholders, acted as a director, paid assessments, or the like.⁷⁶ As we shall see, parol evidence is not admissible, in the absence of fraud or mistake, to vary or contradict a complete and unambiguous written contract of subscription.⁷⁷ And, in the absence of fraud or mistake, an unambiguous written contract, which on its face is other than a subscription for stock in a corporation, cannot be varied by parol evidence for the purpose of showing that it was such a subscription.⁷⁸ Where, however, a subscription is ambiguous or incomplete on its face, parol evidence is admissible to explain it and supply omissions.⁷⁹

The parol evidence rule also presupposes the due execution and

tion, as a loan," may be sufficient, in the absence of countervailing evidence, to show that a subscription of some kind has been made, though it is not conclusive, either upon the corporation or the obligor, that the latter is a stockholder. *Butler University v. Schoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

⁷⁶ *United States. Glenn v. McAllister's Ex'rs*, 46 Fed. 883.

Alabama. Lehman, Durr & Co. v. Glenn, 87 Ala. 618, 6 So. 44.

Maine. Barron v. Burrill, 86 Me. 66.

Massachusetts. Lexington & W. C. R. Co. v. Chandler, 13 Metc. 311.

Missouri. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

Nebraska. York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440.

New Hampshire. Haynes v. Brown, 36 N. H. 545.

Pennsylvania. Bavington v. Pittsburgh & S. R. Co., 34 Pa. St. 358; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489.

See also § 543, *supra*.

⁷⁷ See § 609, *infra*.

That parol evidence is admissible to show fraud, see § 610, *infra*.

⁷⁸ *Crane v. Elizabeth Library Ass'n*, 29 N. J. L. 302.

⁷⁹ *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363.

If the writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove other portions thereof not inconsistent with the writing. *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596; *Hendrix v. Academy of Music*, 73 Ga. 437; *Espy v. Mt. Lebanon Cemetery*, 1 Walk. (Pa.) 40. See also *Guthrie Ice Co. v. Selby*, 166 Iowa 474, 147 N. W. 923.

Where the subscription states the purpose of the corporation to be the erection of a hotel "on the Dempsey property," the location of that property may be shown by parol evidence even if the subscription is required to be in writing. *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.

In *Espy v. Mt. Lebanon Cemetery*, 1 Walk. (Pa.) 40, parol evidence was held admissible to show the name of the company.

Where the terms of a contract of subscription for shares of stock in a building and loan association were ambiguous, it was not prejudicial error to permit the subscriber to state the representations in reference thereto made by the party taking the subscription, for the purpose of getting at the true intent of the agreement. *Field v. Eastern Building & Loan Ass'n*, 117 Iowa 185, 90 N. W. 717.

delivery of the written contract in a way to bind both parties to its terms, and has no application when the execution of the writing is the subject of inquiry, but on that issue what was said and done at the time may be shown.⁸⁰ Nor does it exclude evidence of oral agreements or understandings waiving or modifying the provisions of the written contract, where they have been acted upon.⁸¹

A statement in a newspaper to the effect that a person has subscribed is not admissible to show that fact.⁸²

Proof that the corporation was financially embarrassed at a time subsequent to the alleged agreement is immaterial on the issue as to whether a person subscribed to an increase of stock or merely took the stock as security for an existing indebtedness;⁸³ nor, in such case, is it competent for the alleged subscriber to testify that he would not have kept the stock if he had understood that it was issued as testified by another witness.⁸⁴

Where the subscription contract and the corporate charter provide that after the first payment the record holders of stock when assessments are made rather than the original subscribers shall be liable therefor; and it is sought to hold an original subscriber liable for such assessment on stock standing in the name of a third person on the ground that the latter holds the stock for the benefit of the defendant, who is the real owner, and that it was placed in his name for the purpose of enabling the defendant to escape liability, the defendant may show that he had an arrangement with the corporation to obtain subscriptions on its behalf, and that he subscribed for the stock in question as a broker only, and had it issued to the third person as trustee for his clients, to whom the certificates had since been delivered.⁸⁵

The articles of incorporation,⁸⁶ or the charter or certificate of incorporation issued by the proper state officer pursuant to law,⁸⁷

⁸⁰ *White v. Kahn*, 103 Ala. 308, 15 So. 595.

⁸¹ *Guthrie Ice Co. v. Selby*, 166 Iowa 474, 147 N. W. 923.

⁸² *Louisiana Purchase Expos. Co. v. Emerson*, 149 Mo. App. 594, 129 S. W. 753.

⁸³ *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

⁸⁴ *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

⁸⁵ *Bean v. American Alkali Co.*, 134 Fed. 57, rev'g 125 Fed. 823.

⁸⁶ *Kern v. Chicago Co-operative*

Brewing Ass'n, 40 Ill. App. 356, aff'd 140 Ill. 371; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

The articles do not necessarily show who were shareholders, or in what amounts, at a time subsequent to their date and hence are inadmissible for that purpose. *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089.

⁸⁷ *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

So of a certified copy of the certificate filed by the directors naming the stockholders, and letters patent issued

are *prima facie* evidence that the persons therein named were members of the corporation when it was formed.

Where a statute provides for a certain number of subscriptions to the stock of a corporation as prerequisite to the grant of a charter, the duty of determining whether subscriptions have been made as the law requires necessarily falls on the incorporators, and where they decide in good faith that the necessary bona fide subscriptions have been taken, their decision in the matter may be deemed conclusive.⁸⁸

Where commissioners are appointed by the legislature to open books and receive subscriptions for the purpose of organizing a corporation, and to certify the fact when the required amount of stock has been subscribed, their certificate, at least in the absence of a direct attack on the ground of fraud or collusion, is conclusive as to the validity of subscriptions received by them, and the amount thereof, so far as the legality of the organization of the corporation is concerned; and it cannot be shown, in contradiction of such a certificate, that less than the required amount of stock has been subscribed, or that some of the subscriptions are fictitious.⁸⁹

Similarly, a final certificate of complete incorporation issued by the secretary of state pursuant to the statute is *prima facie* proof that the full amount of the capital stock has been subscribed.⁹⁰ And a certificate filed by corporate officers pursuant to law showing the amount of capital paid in and the names of the stockholders and the number of shares held by each is *prima facie* evidence that the persons therein named are stockholders.⁹¹

Mere declarations or reports by officers of a corporation are not admissible.⁹² Nor can a subscription be proved by a certificate or other paper, or a certified copy thereof, filed in the office of the secretary of state, where the filing of such paper is not required or author-

by the governor pursuant to such certificate and reciting it. *McHose & Co. v. Wheeler*, 45 Pa. St. 32.

⁸⁸ *Louisiana Purchase Expos. Co. v. Kuenzel*, 108 Mo. App. 105, 82 S. W. 1099.

⁸⁹ *Lane v. Brainerd*, 30 Conn. 565; *Litchfield Bank v. Church*, 29 Conn. 137; *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181. See also *Wood v. Coosa & C. R. Co.*, 32 Ga. 273.

⁹⁰ *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep.

288, 57 N. E. 1043, aff'g 87 Ill. App. 605.

Articles of association of a corporation, certified by the secretary of state, are *prima facie* evidence of the fact that the full amount of the capital stock required by the articles has been subscribed. *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

⁹¹ *Steed v. Henry*, 120 Ark. 583, 180 S. W. 508; *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67.

⁹² *Glenn v. Liggett*, 47 Fed. 472.

ized by any statute.⁹³ But a resolution by the directors of a railroad company that sufficient stock has been subscribed to build the road, if passed by them in good faith, renders a person liable on a subscription to stock in the company made upon condition that such an amount of stock should be subscribed as should, in the judgment of the directors, be sufficient for the construction of the road.⁹⁴

Where, in a petition to recover a subscription to the stock of a corporation, it is averred that the directors had been duly elected by the stockholders, in pursuance of notice, it is to be presumed that the requisite amount of stock had been subscribed to authorize such election, and also to authorize the commencement of business, and the making of assessments by the directors so elected.⁹⁵ And where the directors have accepted and approved subscriptions to the required amount, the burden is on the subscriber to show that any of them were not bona fide subscriptions, but were of no real value, or were bogus or fraudulent.⁹⁶

It has been held that declarations of a subscriber that at the time he made his subscription he did not intend or expect to pay it, but only subscribed to make up the amount required by the charter so that the other subscriptions would be binding, are not admissible.⁹⁷ But, on the other hand, it has been held that proof of statements made in the presence of any of the directors by any of the subscribers tending to show a want of apparent ability to pay on their part is admissible on the issue of good faith.⁹⁸

Hearsay evidence and information derived from others is inadmissible on the issue of good faith, except that it may be shown what information the directors had as to the ability of the subscribers in contest, since this will illustrate whether they exercised ordinary care

⁹³ See *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

⁹⁴ *Cass v. Pittsburg, V. & C. Ry. Co.*, 80 Pa. St. 31.

⁹⁵ *Stone v. Monticello Const. Co.*, 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369; *Ash-tabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328.

⁹⁶ *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233; *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

⁹⁷ *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

Declarations of a subscriber showing that his subscription was not made or accepted in good faith, but was fraudulent, made long after the organization of the corporation, are not admissible to affect the organization of the corporation, or the liability of other subscribers. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

⁹⁸ *Stone v. Monticello Const. Co.*, 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

in accepting the subscriptions as made by persons of apparent ability to pay.⁹⁹

Questions as to the admissibility of evidence are governed by the *lex fori*.¹

Ordinarily, the burden of proving the subscription is on the party asserting it.²

§ 570. Construction of subscription contracts. As in the case of contracts generally, a contract of subscription is to be construed according to the intention of the parties,³ as manifested by the language used,⁴ the object contemplated,⁵ and the circumstances under which the contract was made.⁶

In applying the rules of construction, everything within "the four corners" of the instrument is to be considered,⁷ and "if from the whole instrument the intention of the parties can be discovered, that intention will be supported, however imperfectly it may be expressed in portions of the contract."⁸

Subsequent acts of the parties tending to show how they understood the contract may be considered in arriving at their intention,⁹

⁹⁹ *Stone v. Monticello Const. Co.*, 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

¹ *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. (D. C.) 262.

² Burden of proof is on receiver who alleges depositor was a subscriber to stock and that the deposit must be applied in payment of subscription. *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

³ *Hastings Industrial Co. v. Cope-land*, 114 Ark. 415, 169 S. W. 1185; *Arkadelphia Cotton-Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776; *Spangler v. Indiana & I. C. R. Co.*, 21 Ill. 276; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

⁴ *Spangler v. Indiana & I. C. R. Co.*, 21 Ill. 276; *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

The intention of the parties is to be derived from the instrument itself, and its terms cannot be varied by inference as to the intention or purpose of those who executed it. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

⁵ *Spangler v. Indiana & I. C. R. Co.*, 21 Ill. 276.

⁶ *Hastings Industrial Co. v. Cope-land*, 114 Ark. 415, 169 S. W. 1185; *Ventura & O. Val. Ry. Co. v. Collins (Cal.)*, 46 Pac. 287; *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

⁷ *Ventura & O. Val. R. Co. v. Collins (Cal.)*, 46 Pac. 287; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

⁸ *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

⁹ *Ventura & O. Val. R. Co. v. Collins (Cal.)*, 46 Pac. 287.

and they will generally be bound by a construction which they have themselves adopted.¹⁰

As between two constructions, each reasonable, one of which will make the contract enforceable and the other unenforceable, the former will be preferred.¹¹ So a construction which will make one or more clauses of the contract inconsistent with the rest of it will not be adopted if it can be avoided consistently with the apparent object of the contract and the intent of the parties.¹²

The provisions of the corporate charter or of the general laws by which the corporation is governed become a part of the contract of subscription,¹³ and such contract must therefore be construed

¹⁰ *Hastings Industrial Co. v. Cope-land*, 114 Ark. 415, 169 S. W. 1185.

Bankers' Money Order Ass'n v. Nachod, 128 N. Y. App. Div. 281, 112 N. Y. Supp. 721.

¹¹ *Hastings Industrial Co. v. Cope-land*, 114 Ark. 415, 169 S. W. 1185.

¹² An agreement "to take the number of shares set opposite our names, respectively, and thereon to pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed," the amount following the defendant's name being two thousand dollars, was construed as a promise to pay the two thousand dollars, and not merely ten per cent. of that sum. *Ventura & O. Val. R. Co. v. Collins (Cal.)*, 46 Pac. 287.

¹³ *United States. Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); *Giesen v. London & N. W. American Mortg. Co.*, 102 Fed. 584; *Pope v. Board Com'rs Lake Co.*, 51 Fed. 769.

Arkansas. Witter v. Mississippi, O. & R. River Co., 20 Ark. 463.

California. Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

Colorado. Supply Ditch Co. v.

Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

Connecticut. Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Florida. Gibbs v. Davis, 27 Fla. 531, 8 So. 633.

Illinois. Mayfield v. Alton Rail-way, Gas & Electric Co., 198 Ill. 528, 65 N. E. 100, aff'g 100 Ill. App. 614; *Mandel v. Swan Land Co.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

Indiana. Falmouth & L. Turnpike Co. v. Shawhan, 107 Ind. 47, 5 N. E. 408; *Hill v. Nisbet*, 100 Ind. 341; *Bish v. Johnson*, 21 Ind. 299; *Hoagland v. Cincinnati & Ft. W. R. Co.*, 18 Ind. 452; *Sparrow v. Evansville & C. R. Co.*, 7 Ind. 369.

Maryland. Hambleton & Co. v. Glenn, 72 Md. 331, 20 Atl. 115; *Glenn v. Clabaugh*, 65 Md. 65, 3 Atl. 902.

New York. Dayton v. Borst, 31 N. Y. 435; *Small v. Herkimer Manufac-turing & Hydraulic Co.*, 2 N. Y. 330; *Leighton v. Leighton Lea Ass'n*, 146 App. Div. 255, 130 N. Y. Supp. 935; *Myers v. Sturgis*, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

Oregon. McAllister v. American

in connection with these charter provisions and general laws.¹⁴

The validity and effect of the contract of subscription, and the liability thereby imposed upon the subscriber, are to be determined in accordance with the laws of state or country where the corporation was created, and it is also to be interpreted according to those laws.¹⁵

The subscription agreement may consist of several pages, all of which are to be taken together as constituting a single contract.¹⁶ And the prospectus,¹⁷ the provisions of the articles of incorporation or by-laws,¹⁸ or other written agreements,¹⁹ may be incorporated into a written contract of subscription by reference, and when this is done they are to be considered as a part of it. Nor is actual annexation essential under such circumstances.²⁰

If the contract is in writing, its construction is ordinarily for the court.²¹

A contract whereby the subscriber agrees to pay to the corporation when formed a certain sum for the stock and also agrees to pay an additional sum to the promoters to cover promotion and incorporation expenses is severable, one part being in favor of the corporation when organized and the other in favor of the promoters,²² and hence, on rescission thereof for fraud or other reason, the corporation cannot be held liable for the return of the money received by the promoters under their part, under the rule that the corporation is not bound by the contracts of its promoters unless it adopts the same as its own.²³

Hospital Ass'n, 62 Ore. 530, 125 Pac. 286.

Texas. Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681.

West Virginia. Windsor Hotel Co. v. Schenk, — W. Va. —, 84 S. E. 911.

Wisconsin. Milwaukee Brick & Cement Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838; Port Edwards, C. & N. Ry. Co. v. Arpin, 80 Wis. 214, 49 N. W. 828; Anvil Min. Co. v. Sherman, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

¹⁴ Witter v. Mississippi, O. & R. River Co., 20 Ark. 463; Anvil Min. Co. v. Sherman, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

¹⁵ See chapter on Stock and Stockholders and chapter on Foreign Corporations, *infra*.

¹⁶ Chicago Bldg. & Mfg. Co. v. Peterson, 133 Ky. 596, 118 S. W. 384. See also § 534, *supra*.

¹⁷ Williams v. Matthews, 103 Va. 180, 48 S. E. 861.

¹⁸ Waukon & M. R. Co. v. Dwyer, 49 Iowa 121; Co-operative Tel. Co. v. Katus, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

¹⁹ The original subscription contract may be incorporated into a supplemental one. Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 Pac. 810.

²⁰ Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 Pac. 810.

²¹ Brand v. Lawrenceville Branch R. R., 77 Ga. 506, 1 S. E. 255.

²² American Home Life Ins. Co. v. Jenkins, — Tex. Civ. App. —, 138 S. W. 424.

²³ See Chap. 5.

The rules for determining whether particular provisions in subscription contracts are conditions precedent or special terms,²⁴ and for the construction of conditions precedent,²⁵ will be found in subsequent sections.

§ 571. General nature and extent of subscriber's liability. The liability of a subscriber for the amount of his unpaid subscription is contractual.²⁶ Such liability is a debt, and the subscriber is a debtor to the corporation.²⁷ And this debt is enforceable at law or in equity by the corporation, or its legal representative, in the same manner as any other valid indebtedness would be;²⁸ and the amount

²⁴ See § 574, *infra*.

²⁵ See § 581, *infra*.

²⁶ *Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82, rev'g 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

²⁷ *United States*. *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *Courtney v. Georger*, 228 Fed. 859, aff'g *Wilson v. Waldo*, 221 Fed. 505; *Bennett v. Glenn*, 55 Fed. 956.

Arizona. *Stiles v. Samaniego*, 3 Ariz. 48, 20 Pac. 607.

California. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

Connecticut. *Mann v. Cooke*, 20 Conn. 178.

Georgia. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412. See also *Stinson v. Williams*, 35 Ga. 170.

Illinois. *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

Minnesota. *Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266; *In re Minnehaha Driving Park Ass'n*, 53 Minn. 423, 55 N. W. 598; *Spooner v. Bay St. Louis Syndicate*, 47 Minn. 464, 50 N. W. 601.

Missouri. *Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co.*, 168 Mo. 634, 68 S. W. 1026; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Eppright v. Nickerson*, 78 Mo. 482; *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New York. *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g on other grounds 32 App. Div. 265, 53 N. Y. Supp. 607; *Myers v. Sturgis*, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635.

Pennsylvania. *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146.

Washington. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

Wisconsin. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

"The relation of the stockholder who has not paid for his stock, to the corporation or the creditor, is the ordinary one of debtor." *Parmelee v. Price*, 208 Ill. 544, aff'g 105 Ill. App. 271.

²⁸ It may be enforced by any appropriate common-law or equitable remedy. *Mann v. Cooke*, 20 Conn. 178; *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g on other

unpaid may be recovered by the corporation even though there are no corporate creditors.²⁹

As will be shown in a subsequent chapter, where the corporation has been adjudged insolvent and has ceased to be a going concern, there can be collected from subscribers only their pro rata share of the amount necessary to pay the creditors of the corporation and to wind up its affairs.³⁰

But this rule has no application where the corporation is a going concern and it is sought to collect the unpaid subscriptions for the purpose of continuing it as such, and to further its business and purposes.³¹

The liability of the subscribers is several and not joint,³² and each is liable only for the amount of stock subscribed by him individually

grounds 32 N. Y. App. Div. 565, 53 N. Y. Supp. 607; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 N. Y. App. Div. 589, 63 N. Y. Supp. 635.

As to the remedies of the corporation to enforce subscriptions, see § 657 et seq., *infra*.

²⁹ *Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266; *Spooner v. Bay St. Louis Syndicate*, 47 Minn. 464, 50 N. W. 601.

The liability of the subscriber to pay calls is a liability to the corporation, and it exists and may be enforced even though there are no corporate creditors. *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911.

³⁰ See chapter on Insolvency, *infra*.

³¹ So it does not apply in a suit by a stockholder to compel directors, who are also stockholders, to pay their subscriptions. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

³² *United States*. In *re Putnam*, 193 Fed. 464; *Bennett v. Glenn*, 55 Fed. 956.

Alabama. See *Curry v. Woodward*, 53 Ala. 371.

District of Columbia. *Crook v. International Trust Co.*, 32 App. Cas. 490; *People's Nat. Bank v. Saville*, 25 App. Cas. 139.

Illinois. *Edwards v. Schillinger*,

245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227; *Woman's Temperance Bldg. Ass'n v. Devore*, 160 Ill. App. 153.

Indiana. *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137.

Kentucky. *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New York. *Whittlesey v. Frantz*, 74 N. Y. 456.

Oregon. *Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989.

See also § 657, *infra*.

But see *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 140, 83 Pac. 62, where it is said that the liability is several after assessment, but that before, is contingent, and can hardly be said to either joint or several, though it more nearly resembles obligations of the former kind.

In *Chicago Bldg. & Mfg. Co. v. Peterson*, 133 Ky. 596, 118 S. W. 384, a contract with a building company to erect a factory to be taken over by a contemplated corporation was held to render the delinquent subscribers jointly and severally liable for the amount not paid when due.

and remaining unpaid. Hence, though several subscribers are joined in an action to recover their unpaid subscriptions, and though they all join in a single answer, a judgment or decree cannot be rendered against them jointly.³³

Where a subscription to the stock of an existing corporation is regarded as a contract of purchase and sale,³⁴ so that the subscriber does not become a stockholder until the subscription price is paid,³⁵ if the subscriber repudiates the contract while it is still executory the corporation may either cancel or annul the subscription, or may maintain an action for damages against him, in which the measure of damages will be the difference between the amount which he agreed to pay for the stock and its value when the action is brought. Under such circumstances he cannot be held liable for the balance due on the subscription, either by the corporation or its creditors.³⁶

But this rule has no application where the contract has been partly executed, as, for example, where a part of the subscription price has been paid and accepted, and under such circumstances the subscriber may be held liable for the entire unpaid balance of the subscription price.³⁷

The liability of a subscriber for interest on the amount of his unpaid subscription is considered in a subsequent section.³⁸

§ 572. Right of subscriber to particular stock subscribed for. One who subscribes for stock in one corporation cannot be compelled to accept stock in another corporation in lieu thereof,³⁹ even though the latter is of equal value,⁴⁰ or the property of the two is the same in character and value.⁴¹ So an agreement to take stock in one corporation does not bind the subscriber to take the same amount of stock in another corporation that may be organized as its successor.⁴²

³³ *Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989.

³⁴ See § 520, *supra*.

³⁵ See § 522, *supra*.

³⁶ *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947. See also *Philadelphia & G. Steamship Co. v. Clark*, 59 Pa. Super. Ct. 415.

³⁷ *Philadelphia & G. Steamship Co. v. Clark*, 59 Pa. Super. Ct. 415.

³⁸ See § 689, *infra*.

³⁹ *People's Nat. Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 763; *Gray v. Ellis*, 164 Cal. 481, 129 Pac. 791; *Owensboro Seating & Cabinet Co. v. Miller*,

130 Ky. 310, 113 S. W. 423; *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

It must appear that the person against whom a recovery is sought subscribed to the stock of the corporation in question. *Commonwealth Bonding & Casualty Ins. Co. v. Curry*, — Tex. Civ. App. —, 183 S. W. 1.

⁴⁰ *Gray v. Ellis*, 164 Cal. 481, 129 Pac. 791; *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

⁴¹ *Gray v. Ellis*, 164 Cal. 481, 129 Pac. 791.

⁴² The defendant subscribed to the stock of an existing Wisconsin cor-

If a subscriber to the stock of one corporation pays the amount of his subscription to an agent who subscribes in his principal's name for stock in another company, for which he is also an agent, and pays over the money to it, both the agent and the latter company are liable to him as for money had and received to his use, especially where it is no longer possible to apply the money on account of a subscription to the stock of the first corporation because all of its stock has been taken. Nor, under such circumstances, is it material on the question of the liability of the company receiving the money whether it then had knowledge of the terms upon which the agent received it.⁴³

One whose agreement is to take stock from the corporation as an original subscriber cannot be compelled to accept from others, in satisfaction of his rights under such contract, stock subscribed for by, and issued to, and then owned by them;⁴⁴ nor can he be compelled to accept from the corporation itself stock which has previously been issued to another;⁴⁵ nor can one who subscribes for common stock be compelled to accept preferred stock.⁴⁶

II. SUBSCRIPTIONS UPON EXPRESS CONDITIONS PRECEDENT, IMPLIED CONDITIONS PRECEDENT AND CONDITIONAL DELIVERY OF SUBSCRIPTIONS

§ 573. Conditional subscriptions defined. Subject to the limitations shown in the sections following, subscriptions to the capital stock of a corporation, instead of being absolute and unconditional,

poration. Thereafter the corporation was dissolved and a new corporation organized under the laws of Kentucky as its successor. The defendant took no part in the dissolution or reorganization proceedings, and did nothing amounting to a waiver or estoppel. It was held that the new corporation could not enforce his subscription. *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

⁴³ *Gray v. Ellis*, 164 Cal. 481, 129 Pac. 791.

⁴⁴ *Gray v. Ellis*, 164 Cal. 481, 129 Pac. 791; *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

In *Brainerd v. Kydd*, 26 Cal. App. 655, 148 Pac. 221, it was held that a contention that the consideration for

a note given for the amount of a subscription had failed, because about two months after it became due all the original issue of stock had been sold, was without merit, where it appeared that the number of shares of original stock called for by the contract was tendered to the subscriber on the day the note became due, which tender was open to his acceptance for two months thereafter, and the shares had been issued and stood in the names of certain other persons to be delivered to him at any time upon payment of the note.

⁴⁵ *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

⁴⁶ *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

may be expressly made upon a condition or conditions precedent. And some conditions precedent, as we shall see, are implied when not expressed. A subscription upon a condition precedent, or conditional subscription, is a subscription which, by its express or implied terms, does not take effect so as to make the subscriber a stockholder, or confer or impose any rights or liabilities as a stockholder, until the performance or fulfillment of some condition, unless there is a waiver or an estoppel, but which does make him a stockholder, with all the rights and subject to all the liabilities arising out of such a relation, as soon as the condition is performed or fulfilled. Thus, as we shall see, a person may subscribe for stock in a railroad company upon condition that its road shall be located upon a certain route, which will render it beneficial to him. Until the road is so located, he does not become a stockholder, nor incur any liability to pay the amount of his subscription; but he does become a stockholder, and liable on his subscription, as soon as the road is so located.⁴⁷

Any condition which may be legally performed by a corporation may be a condition for subscription to its stock.⁴⁸

Whether or not a subscription is conditional is a question of construction.⁴⁹ A mere representation by the person soliciting the sub-

⁴⁷ See *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Merchants' & Planters' Ins. Co. v. Reeder*, — Okla. —, 153 Pac. 111.

Other illustrations of conditions precedent will be found in the sections following.

⁴⁸ *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40.

A person has a right to say upon what terms he is willing to become a stockholder. *Sherrod v. Duffy*, 160 Mich. 488, 136 Am. St. Rep. 451, 125 N. W. 366.

⁴⁹ In *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215, it was held that a subscription to stock in a railroad

corporation which provided that no part of the amount subscribed should be due and payable unless a specified sum should be raised for the purchase of a locomotive was conditional.

In *Merrill v. Reaver*, 50 Iowa 404, completion of a railroad to a certain point was held not to be a condition precedent.

In *Wing v. Smith*, — N. Y. App. Div. —, 159 N. Y. Supp. 454, it was held that an agreement by several stockholders to purchase the unissued stock of the corporation through certain of their number, denominated "syndicate managers," to whom they agreed to transfer all the stock which they then held to be pledged by them to secure a note for the purchase price, did not make a legal delivery and transfer of the stock to the committee by all of the subscribers a condition precedent to liability on their subscriptions, in view of a further provision of the contract that a failure

scription that a certain state of facts exists,⁵⁰ or a mere statement by the subscriber that he understands that a certain state of facts exists,⁵¹ will not make the subscription conditional on its existence. It has been held that an absolute and unconditional negotiable note given for stock is not rendered conditional by a collateral agreement that payment shall be made out of a certain fund.⁵²

Conditions are illegal where their performance would result in a violation by the corporation of its charter, and a subscription made upon such a condition is invalid.⁵³

§ 574. Conditional subscriptions distinguished from subscriptions upon special terms. Conditional subscriptions, or subscriptions upon conditions precedent, must be distinguished from subscriptions upon special terms or conditions subsequent, which will be considered in later sections. A conditional subscription, as we have seen, does not make the subscriber a stockholder, or render him liable to pay the amount of the subscription, until performance or fulfillment of the condition. A subscription upon special terms, on the other hand, is an absolute subscription, making the subscriber a stockholder, and rendering him liable as such, as soon as it is accepted, the special term being an independent stipulation, for a breach of which the subscriber's remedy is against the corporation for damages,⁵⁴ or else

of any subscriber to perform his undertakings thereunder should not affect or release any other subscriber.

⁵⁰ A representation to subscribers for railroad stock that they will not have to pay for it until the road is completed between certain points. *Tanner v. Nichols*, 25 Ky. L. Rep. 2191, 80 S. W. 225.

⁵¹ The binding force of a subscription was not deemed to have been made conditional upon a third party being actually interested in the corporation where in subscribing to stock thereof the subscriber stated to the person who took the subscription that he understood that the person taking the subscription and such third party held the chief interest in the proposed corporation. *Smith v. First Nat. Bank of Flatonia* (Tex. Civ. App.), 95 S. W. 1111.

⁵² Under Rem. & Bal. Wash. Code 1915, § 3394, this is true of a note accompanied by a written agreement that it shall be paid out of the proceeds of the sale of certain lots. "The legal meaning of the collateral agreement is no more than that the note is to be paid pro tanto as funds become available out of the proceeds of the sale of lots. If there are no proceeds the promise to pay remains." *Van Tassel v. McGrail*, — Wash. —, 160 Pac. 1053. See works on negotiable instruments.

⁵³ See *Melvin v. Hoitt*, 52 N. H. 61, where it was held that a railroad corporation had a right under its charter to locate its road on the route prescribed by a conditional subscription.

⁵⁴ *Georgia. Johnson v. Georgia Midland & G. R. Co.*, 81 Ga. 725, 8 S. E. 531.

a stipulation affecting merely the mode or extent of payment, or the rights of the subscriber as a stockholder, etc.

Whether a subscription is conditional, or merely upon special terms, depends, of course, upon the intention of the parties, to be ascertained, as in other cases, by a construction of their contract. As was said in a Maine case, whether the conditions in a subscription are precedent or subsequent is a question of intent, to be determined by considering, not only the words of a particular clause, but also the language of the whole contract, the nature of the act, and the subject-matter to which it relates.⁵⁵ If the parties themselves have treated the stipulation as a condition, they will be bound by the construction which they have adopted.⁵⁶

Kansas. Sarbach v. Kansas Fiscal Agency Co., 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113.

Maine. Belfast & M. L. R. Co. v. Inhabitants of Brooks, 60 Me. 568.

Michigan. See McIntyre v. E. Beament's Sons, 146 Mich. 74, 10 Ann. Cas. 143, 109 N. W. 45.

Minnesota. Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 827.

Missouri. McGinnis v. Kortkamp, 24 Mo. App. 378.

North Carolina. Warren County Co-op. Ass'n v. Boyd, 171 N. C. 184, 88 S. E. 153.

Ohio. Stunt v. Newark Weldless Tube & Steel Co., 22 Ohio Cir. Ct. 120.

Tennessee. Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 S. W. 732; Morrow v. Nashville Iron & Steel Co., 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495; Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 18 S. W. 842.

"A subscription upon condition subsequent ordinarily renders the subscriber liable as a stockholder, and the company liable on the collateral agreement." Sarbach v. Kansas Fiscal Agency Co., 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113.

And see the cases cited in the following notes, and also § 601, *infra*.

⁵⁵ Bucksport & B. R. Co. v. Inhabitants of Brewer, 67 Me. 295. See also

Hastings Industrial Co. v. Copeland, 114 Ark. 415, 169 S. W. 1185; Chase v. Sycamore & C. R. Co., 38 Ill. 215; Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225; Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 S. W. 732.

Where certain stipulations are expressly made conditions precedent, the maxim "*Expressio unius est exclusio alterius*" will be applied, and other stipulations not included among them will not be deemed conditions precedent. Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 S. W. 732.

Where a subscription for stock in a corporation stipulated that the amount subscribed should not be payable until any contract which might be made by the company with another corporation for the purchase of its property should be ratified by the persons holding a majority of the stock, it was held that the making of a contract was not a condition precedent to liability on the subscription, and that the subscription could not be withdrawn, or its collection defeated, by assailing a contract actually made and ratified as stipulated. Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

⁵⁶ So where they have interpreted the contract as not requiring the subscriber to pay any part of his subscrip-

In case of doubt as to the intention of the parties, a subscription should be construed as an absolute subscription upon special terms, rather than as conditional.⁵⁷

The mere fact that the word "condition" is used, as where the subscription recites that it is made "upon condition that" a certain thing shall be done, does not make the provision a condition precedent.⁵⁸

If it appears from the language of the subscription, or from extraneous circumstances, that it was intended that the subscriber should become and act as a stockholder prior to the performance of the stipulations contained in the contract, they are clearly special terms, and not conditions precedent, for a subscriber does not become a stockholder until conditions precedent are performed.⁵⁹ The same is true where it appears that the corporation was expected to expend money, which must be paid by the subscribers, before performance of the stipulation.⁶⁰

A stipulation in a subscription that the money paid thereon shall be applied by the corporation for a certain purpose clearly contemplates liability upon the subscription before performance of the stipu-

tion unless permitted to do so by hauling material, the corporation cannot collect it where it does not permit him to do any hauling in payment of it. *Hastings Industrial Co. v. Copeland*, 114 Ark. 415, 169 S. W. 1185.

⁵⁷ *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732; *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842.

In *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842, it was said: "Conditional subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely and upon the faith that all the stock is equally bound to contribute to the hazards of the enterprise. It misleads creditors, and is the fruitful source of litigation and disaster. Tending to the ensnarement of creditors, and con-

trary to a sound public policy, conditional subscriptions to corporate shares ought not to be encouraged." And this statement was quoted with approval in *Sweeney v. Tennessee R. Co.*, 118 Tenn. 297, 100 S. W. 732.

⁵⁸ See *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112, 1 N. W. 827.

⁵⁹ *Lane v. Brainerd*, 30 Conn. 565; *Johnson v. Georgia Midland & G. R. Co.*, 81 Ga. 725, 8 S. E. 531; *Stunt v. Newark Weldless Tube & Steel Co.*, 22 Ohio Cir. Ct. 120; *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

⁶⁰ *Connecticut. Lane v. Brainerd*, 30 Conn. 565.

Kentucky. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358.

Minnesota. *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112, 1 N. W. 827.

Missouri. *McGinnis v. Kortkamp*, 24 Mo. App. 378.

Vermont. *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

lation, and the stipulation, therefore, is necessarily a special term, as distinguished from a condition.⁶¹

Where it was provided in a subscription for stock in a railroad company that a certain percentage of the subscription should be paid when the road should be completed to the county line, and that the remainder should be paid in four equal instalments of four months, as the work should progress through the country, "provided" the company should establish a depot at a specified point on the road, the court held that, while the provision as to the completion of the road to the county line was an express condition precedent, so that until then there was no liability to make the first payment, the provision as to establishing the depot was merely a special term, the performance of which was not necessary before enforcing payment of the subscription.⁶² A like construction has been placed upon provisions in subscriptions for stock in a railroad company that the road shall be located and constructed along a certain route, the location of the road being held a condition precedent, but its construction being a mere special term or condition subsequent;⁶³ upon a provision

⁶¹ *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358, and cases in the note preceding.

An agreement to pay a railroad company for stock "on their extension of said road from N. to L. * * * to be expended on the same" from a designated point to L., was held not to make the extension of the road to L. a condition precedent, but to mean that the stock was subscribed in or for such extension. *Anderson v. Newcastle & R. R. Co.*, 12 Ind. 376, 74 Am. Dec. 218.

⁶² *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842. See also *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

⁶³ Where a subscription for stock in a railroad company, by which the subscriber agrees to pay for the shares at such times and places as may be required by the board of directors, is on condition that the road shall be "located and constructed" along a certain route, it does not mean that the road shall be actually constructed

and completed before any payment can be required, but means that, when the road is constructed and completed, it shall occupy the route designated. The subscription, therefore, becomes absolute and payable as soon as the road is definitely located along such route, and before it is constructed, and payments thereon can be then required to raise funds for its construction.

Kentucky. *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181.

Maine. *Bucksport & B. R. Co. v. Inhabitants of Brewer*, 67 Me. 295; *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561.

Michigan. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Missouri. *North Missouri R. Co. v. Winkler*, 29 Mo. 318.

Ohio. *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

Pennsylvania. *Miller v. Pittsburgh & C. R. Co.*, 40 Pa. St. 237, 80 Am. Dec. 570.

A provision that when the road is

that the road shall be built through a certain town upon a line as run by the engineer, with a suitable depot for the convenience of the public;⁶⁴ or shall secure the privilege of entering a certain city;⁶⁵ or shall locate its shops within a certain city;⁶⁶ or shall build a side-track on the subscriber's premises;⁶⁷ or that the road is to be operated independently of a certain other railroad;⁶⁸ or that the subscriptions are to be expended between certain points on the road;⁶⁹ or that the company shall expend a certain amount of money in the construction of its road within a specified time, since "it would be exceedingly inconsistent to say that the corporation must expend that sum in the construction of their road, and at the same time deny them the right and power of collecting their subscriptions for that purpose;"⁷⁰ or that the company shall not bond its road for more than a certain amount per mile; or that it shall deposit a majority of its certificates of stock with a designated company as trustee, to be held and voted in a certain manner.⁷¹

A provision in a subscription for stock in a hotel company that the hotel shall be located and built at a certain point is not a condition precedent.⁷² And the same is true of a stipulation in a subscription for organization stock in a corporation, that the corporation shall issue bonds to the subscriber to the full amount of his subscription, secured by a mortgage on its plant;⁷³ of a provision in a sub-

located it shall touch or pass near a certain point does not make such location a condition precedent. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (55 Ky.) 358.

A provision that the subscription is made for the purpose of extending the road by a certain route through a certain town does not make application of the money collected to that purpose a condition precedent. *New Albany & S. R. Co. v. Fields*, 10 Ind. 187.

A provision that the money subscribed is to be used for the purpose of extending the road from one city to another does not raise a condition to payment or require an averment of readiness on the part of the company to construct the road between such cities. *New Albany & S. R. Co. v. Pickens*, 5 Ind. 247.

⁶⁴ *Belfast & M. Lake R. Co. v. Inhabitants of Brooks*, 60 Me. 568.

⁶⁵ *Johnson v. Georgia Midland & G. R. Co.*, 81 Ga. 725, 8 S. E. 531.

⁶⁶ *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

⁶⁷ *Johnson v. Georgia Midland & G. R. Co.*, 81 Ga. 725, 8 S. E. 531.

⁶⁸ *Johnson v. Georgia Midland & G. R. Co.*, 81 Ga. 725, 8 S. E. 531.

⁶⁹ *Lane v. Brainerd*, 30 Conn. 565.

So of a provision for their expenditure in a certain county. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (55 Ky.) 358.

⁷⁰ *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

⁷¹ *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

⁷² *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112, 1 N. W. 827.

⁷³ *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

scription for preferred stock that the subscriber shall receive a certain amount of common stock as a bonus;⁷⁴ of a provision that the subscription is to be used to do business on a particular system;⁷⁵ of a provision that the subscriber shall be given a position in the company at a stated compensation, and that if the company fails to comply with such provision the subscription shall be void;⁷⁶ and of a provision in the charter of a corporation that as soon as sufficient shares shall be subscribed, and sufficient money paid in, the trustees shall erect buildings required by the act.⁷⁷ Nor does an agreement by the corporation to repurchase the stock from a subscriber at his option make the subscription a conditional one.⁷⁸

§ 575. Validity of conditions precedent—Subscriptions after corporation is formed. Conditional subscriptions to the stock of a corporation after it has been organized are valid, provided there is nothing in the charter or enabling act to prohibit them, and provided the conditions are not such as to render their performance beyond the powers of the corporation or in violation of law, or contrary to public policy.⁷⁹

⁷⁴ Such a provision is a condition subsequent. The obligations of the parties are successive, and the subscriber must pay his subscription before he is entitled to the bonus. *Skillin v. Magnus*, 162 Fed. 689.

In *Sanders v. Barnaby*, — N. Y. App. Div. —, 159 N. Y. Supp. 579, it was held that a contract providing that a subscriber to a certain class of preferred stock should receive a specified number of shares of common stock and a certain number of another class of preferred stock did not make delivery of the latter classes of stock a condition precedent to the subscriber's liability on his subscription, and that, in the absence of a demand for and a refusal to deliver the same, the failure of the corporation to tender it to him was not a defense to an action on his subscription.

⁷⁵ A provision in a subscription note that "it is agreed by the acceptance of this note that this subscription is to be used to do business on the 'Rochdale' system, and for this purpose

only; otherwise this note is to be null and void," is a special term, or condition subsequent. *Warren County Co-op. Ass'n v. Boyd*, 171 N. C. 184, 88 S. E. 153.

⁷⁶ *Stunt v. Newark Weldless Tube & Steel Co.*, 22 Ohio Cir. Ct. 120.

⁷⁷ *Craig v. Cumberland Valley State Normal School*, 72 Pa. St. 46.

⁷⁸ *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113; *McIntyre v. E. Bement's Sons*, 146 Mich. 74, 10 Ann. Cas. 143, 109 N. W. 45.

For the validity of such provisions see § 575, *infra*.

⁷⁹ *Alabama*. *Hall v. Sims*, 106 Ala. 561, 17 So. 534.

Arkansas. *Jacks v. Helena*, 41 Ark. 213.

Georgia. *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506, 1 S. E. 255.

Illinois. *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215.

Indiana. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *New Albany & S.*

By the weight of authority, in the absence of a charter or statutory prohibition, subscriptions for stock in an existing railroad company, or turnpike or plank road company, may be made upon the condition that the road shall be located, or both located and constructed, between certain points, or along a certain route, or that a depot shall be established at a certain point;⁸⁰ that the road shall be completed, or fin-

R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337; **Evansville, I. & C. Straight Line R. Co. v. Shearer**, 10 Ind. 244; **Clem v. Newcastle & D. R. Co.**, 9 Ind. 488, 68 Am. Dec. 653; **Shick v. Citizens' Enterprise Co.**, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

Iowa. Burlington & M. River R. Co. v. Boestler, 15 Iowa 555.

Kentucky. McMillan v. Maysville & L. R. Co., 15 B. Mon. 218, 61 Am. Dec. 181.

Maine. Bucksport & B. R. Co. v. Inhabitants of Brewer, 67 Me. 295; **Ticonic Water Power & Mfg. Co. v. Lang**, 63 Me. 480; **Penobscot & K. R. Co. v. Dunn**, 39 Me. 587.

Maryland. Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; **Baltimore & D. P. R. Co. v. Pumphrey**, 74 Md. 86, 21 Atl. 559; **Taggart v. Western Maryland R. Co.**, 24 Md. 563, 89 Am. Dec. 760.

New York. Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; **Burrows v. Smith**, 10 N. Y. 550.

Ohio. Leshner v. Karshner, 47 Ohio St. 302, 24 N. E. 882; **Armstrong v. Karshner**, 47 Ohio St. 276, 24 N. E. 897; **Ashtabula & N. L. R. Co. v. Smith**, 15 Ohio St. 328; **Chamberlain v. Painesville & H. R. Co.**, 15 Ohio St. 225.

Oregon. Portland & F. R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688.

Pennsylvania. McCarty v. Selinsgrove & N. V. R. Co., 87 Pa. St. 332; **Miller v. Hanover Junction & S. R. Co.**, 87 Pa. St. 95, 30 Am. Rep. 349; **Caley v. Philadelphia & C. C. R. Co.**,

80 Pa. St. 363; **Pittsburgh & C. R. Co. v. Stewart**, 41 Pa. St. 54; **Philadelphia & W. C. R. Co. v. Hickman**, 28 Pa. St. 318; **Jeannette Bottle Works v. Schall**, 13 Pa. Super. Ct. 96; **Quaker City Apartment House Co. v. Kirk**, 26 Co. Ct. 405; **Hanover Junction & S. R. Co. v. E. Halden & Co.**, 2 Chest. Co. Rep. 256.

Texas. Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Wisconsin. Racine County Bank v. Ayres, 12 Wis. 512.

And see other cases more specifically cited in the notes following.

A corporation may offer, allot and register shares to a person subject to the condition that no title to the shares shall pass until he has fulfilled a certain condition, and may refuse to treat him as a stockholder until the condition has been fulfilled. **Spitzel v. Chinese Corporation**, 6 Manson Bankr. Cas. 355, 80 Law T. (N. S.) 347.

A condition as to the medium of payment is valid. **Merchants' & Planters' Ins. Co. v. Reeder**, — Okla. —, 153 Pac. 111.

One who agrees to take stock in a corporation to be formed, provided certain attorneys give an opinion that an invention to be assigned to it is patentable, is not obliged to take it where they do not give such an opinion. **Randall v. Claffin**, 194 Mass. 560, 80 N. E. 594.

⁸⁰**Florida. Martin v. Pensacola & G. R. Co.**, 8 Fla. 370, 73 Am. Dec. 713.

Illinois. Wear v. Jacksonville & S. R. Co., 24 Ill. 593.

Indiana. Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; **Shearer v.**

ished to a certain point;⁸¹ or completed to a certain point within a certain time;⁸² or that work shall be commenced on the road, or commenced within a certain time;⁸³ or that the construction of the road shall be put under contract within a certain time, with conditions in

Evansville, I. & C. Straight Line R. Co., 12 Ind. 452; *Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244.

Kentucky. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181.

Maine. *Bucksport & B. R. Co. v. Inhabitants of Brewer*, 67 Me. 295.

Maryland. *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. *Portage County v. Wisconsin Cent. R. Co.*, 121 Mass. 460; *Central Turnpike Corporation v. Valentine*, 10 Pick. 142.

Missouri. *Missouri Pac. Ry. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *North Missouri R. Co. v. Miller*, 31 Mo. 19.

Ohio. *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223; *Chapman v. Mad River & L. E. R. Co.*, 6 Ohio St. 119.

Pennsylvania. *Chartiers Ry. Co. v. Hodgens*, 85 Pa. St. 501, 77 Pa. St. 187; *Miller v. Pittsburgh & C. R. Co.*, 40 Pa. St. 237, 80 Am. Dec. 570; *Cumberland Valley R. Co. v. Baab*, 9 Watts 458, 36 Am. Dec. 132.

Vermont. *Connecticut & P. Rivers R. Co. v. Baxter*, 32 Vt. 805.

Wisconsin. *Racine County Bank v. Ayres*, 12 Wis. 512.

As to what constitutes location of a railroad, within the meaning of a condition, see *Parker v. Thomas*, 28 Ind. 277; *Evansville, I. & C. Straight Line R. Co. v. Dunn*, 17 Ind. 603;

Evansville, I. & C. Straight Line R. Co. v. Shearer, 10 Ind. 244.

It has been held in New York, contrary to the cases above cited, that a condition in a subscription for stock in a railroad company or turnpike company, that it shall locate its road along a certain route, is contrary to public policy and void, on the ground that it is against the interests of the general public that the directors, in locating the road, should be influenced by other motives or other considerations than the public good. *Ft. Edward & Ft. M. Plank Road Co. v. Payne*, 15 N. Y. 583; *Butternuts & O Turnpike Co. v. North*, 1 Hill (N. Y.) 518.

⁸¹ *Hall v. Sims*, 106 Ala. 561, 17 So. 534; *Jacks v. Helena*, 41 Ark. 213; *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *Toledo, C. & St. L. R. Co. v. Hinsdale*, 45 Ohio St. 556, 15 N. E. 665.

⁸² *Garner v. Hall*, 122 Ala. 221, 25 So. 187; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

The time runs from the date when the contract of subscription is entered into. *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016.

⁸³ *Taylor v. Fletcher*, 15 Ind. 80.

Where notes given for subscriptions to stock in a railroad company are to become due and payable upon the decision of the directors that the road has been completed, publication of such decision in certain papers to be conclusive notice thereof, such decision and publication do not render the notes due and payable if the road has not in fact been completed. *Garner v. Hall*, 122 Ala. 221, 25 So. 187.

the contract that it shall be built within a certain time from the letting of the contract;⁸⁴ or that certain grading work shall be actually done;⁸⁵ or that a certain building of the corporation shall be erected;⁸⁶ or that a contract with another corporation, which is under consideration, shall be ratified by a majority of the stockholders.⁸⁷

A subscription may be made upon condition that the whole or a certain percentage of the capital stock shall be subscribed, or shall be subscribed by persons in a certain locality, or of a certain class.⁸⁸ Indeed, as we shall hereafter see, a condition that the full amount of the capital stock shall be subscribed is implied unless there is something in the contract of subscription, or in the charter, enabling act or articles of association, to show an intention to the contrary.⁸⁹

A municipality having authority to make a subscription may subscribe conditionally in the absence of a provision to the contrary in the statute conferring such authority.⁹⁰

An agreement by the corporation not to enforce an absolute subscription until certain conditions have been performed is valid and binding if supported by a sufficient consideration,⁹¹ and its breach gives the subscriber a right of action for his damages.⁹²

The effect of oral conditions is considered in a subsequent section.⁹³

§ 576. — Subscriptions before corporation is formed. In the preceding paragraph, we have been treating of subscriptions made after the creation of a corporation. Different rules apply, for obvious reasons, to subscriptions prior to and for the purpose of forming a corporation. According to the overwhelming weight of authority, when a special charter or general enabling act authorizing the formation of a corporation expressly or impliedly requires, as a condition precedent to incorporation or the exercise of corporate powers, that the entire authorized capital stock, or a certain percentage thereof, shall be subscribed for, it contemplates and impliedly requires that

⁸⁴ *Burlington & M. River R. Co. v. Boestler*, 15 Iowa 555.

⁸⁵ *People's Freight Ry. Co. v. Hench*, 2 Walk. (Pa.) 478.

⁸⁶ *Johnston v. Ewing Female University*, 35 Ill. 518.

⁸⁷ *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

⁸⁸ See § 693, *infra*.

⁸⁹ See § 693, *infra*.

⁹⁰ *Jacks v. Helena*, 41 Ark. 213.

⁹¹ He may enjoin the collection of the subscription, and perhaps may set up the agreement as a defense to an action thereon, but if he fails to make any resistance to such an action he cannot maintain a suit to rescind, but is confined to an action for damages. *Scarce v. Indiana & I. C. Ry. Co.*, 17 Ind. 193.

⁹² *Scarce v. Indiana & I. C. Ry. Co.*, 17 Ind. 193.

⁹³ See § 577, *infra*.

the subscriptions shall be absolute and unconditional, and subscriptions cannot be made upon conditions precedent.⁹⁴

The reason for this doctrine is that the legislature, in requiring all or a certain part of the authorized capital stock to be subscribed before organization, or before the exercise of corporate powers, does so to protect the public against corporations which might otherwise undertake to do business and contract debts without the means of paying them. And it is held that conditional subscriptions are impliedly prohibited because the conditions may prevent their collection, and thus enable the corporation to commence business and contract debts without the required amount of capital.

In a leading case in the Supreme Court of the United States, where a statute authorizing the formation of a railroad company required

⁹⁴*Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361, aff'g 4 Biss. 365, Fed. Cas. No. 11,481; *Ft. Edward & Ft. M. Plank Road Co. v. Payne*, 15 N. Y. 583; *General Elce. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420; *In re Rochester, H. & L. R. Co.*, 50 Hun (N. Y.) 29, 2 N. Y. Supp. 457; *People ex rel. Averill v. Adirondack Co.*, 57 Barb. (N. Y.) 656; *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. (N. Y.) 317; *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363; *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Pittsburgh & S. R. Co. v. Biggar*, 34 Pa. St. 455; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271. Compare, to the contrary, *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

Where the law under which a corporation was formed required articles of incorporation to be filed, and a charter obtained, before any subscription for stock, and one-half the authorized capital stock to be subscribed

before organization, it was held that persons might subscribe conditionally, and that the conditions should not be held void, and the subscriptions held unconditional, for the purpose of determining whether the requisite amount of stock had been subscribed. *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688.

In Pennsylvania, this rule applied to subscriptions to stock of railroad companies under the general law of 1849, where the commissioners acted in a public capacity with powers strictly limited by law. It does not apply to private corporations organized under the Act of April 29, 1874, P. L. 73, which are the creation of associates. Subscriptions to the stock of a corporation proposed to be organized under that act may embrace any condition which does not involve a violation of law or of the rights of future creditors, and such a condition is binding on all the associates and on the corporation when formed. *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96.

In Pennsylvania, unauthorized conditional subscriptions prior to incorporation are treated as absolute, while in New York they are regarded as absolutely void. See § 578, *infra*.

that a certain per cent. of its capital stock should be subscribed before the corporation should exercise corporate powers, it was held that the statute impliedly required that subscriptions to the amount specified should be absolute and unconditional, and that conditional subscriptions were unauthorized. It was said in this case by Justice Strong: "When a company is incorporated under general laws, * * * and the law prescribes that a certain amount of stock shall be subscribed before corporate power shall be exercised, if subscriptions, obtained before the organization was effected, may be subsequently rendered unavailable by conditions attached to them, the substantial requirements of the laws are defeated. The purpose of such a requisition is, that the state may be assured of the successful prosecution of the work, and that creditors of the company may have, to the extent, at least, of the required subscription, the means of obtaining satisfaction of their claims. The grant of the franchise is, therefore, made dependent upon securing a specified amount of capital. If the subscriptions to the stock can be clogged with such conditions as to render it impossible to collect the fund which the state required to be provided before it would assent to the grant of corporate powers, a charter might be obtained without any available capital. Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the state of the security it exacted that the railroad would be built, and diminishing the means intended for the protection of creditors, are therefore a fraud upon the grantor of the franchise, and upon those who may become creditors of the corporation. They are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect."⁹⁵

Commissioners appointed to receive subscriptions prior to the organization of a corporation have no authority to receive conditional subscriptions.⁹⁶ The rule that conditional subscriptions prior to the formation of a corporation are invalid does not apply to subscriptions

⁹⁵ *Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361, aff'g 4 Biss. 365, Fed. Cas. No. 11,481.

⁹⁶ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Caley v. Philadelphia & C. C. R. Co.*,

80 Pa. St. 363; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Pittsburgh & S. R. Co. v. Biggar*, 34 Pa. St. 455; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

See also § 558, *supra*.

upon the condition that the whole or a certain percentage of the capital stock shall be subscribed for.⁹⁷ Indeed, as we shall hereafter see, such a condition is generally implied.⁹⁸ And it has been held that the rule does not invalidate a provision that if a city subscribes for a certain amount of stock, such subscription shall be satisfied in part by a transfer to it of a part of the stock subscribed for by residents of the city.⁹⁹

§ 577. Oral conditions affecting written subscriptions. Whether or not oral conditions can be shown to qualify or affect a subscription in writing which is absolute on its face must be determined by the application of the general principles with respect to the admission of parol evidence to vary or add to the terms of a written contract. As to these principles, there is some difference of opinion. According to the weight of authority, parol evidence is not admissible to import conditions into a written contract which is absolute and unconditional on its face, unless failure to express the conditions was due to fraud or mistake; and this doctrine has been applied where it has been attempted to show by parol evidence that a written subscription to the stock of a corporation absolute on its face was in fact made upon conditions.¹

⁹⁷ See § 693, *infra*.

⁹⁸ See § 693, *infra*.

⁹⁹ *Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361, aff'g 4 Biss. 365, Fed. Cas. No. 11,481.

¹ *Alabama*. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261; *Floyd v. State*, 177 Ala. 169, 59 So. 280.

Arkansas. *Snodgrass v. Zander & Co.*, 106 Ark. 462, 154 S. W. 212; *Collins v. Southern Brick Co.*, 92 Ark. 504, 135 Am. St. Rep. 197, 19 Ann. Cas. 882, 123 S. W. 652.

Connecticut. *Fairfield County Turnpike Co. v. Thorpe*, 13 Conn. 173.

Georgia. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988; *Johnson v. Georgia, M. & G. R. Co.*, 81 Ga. 725, 8 S. E. 531; *Bell v. Americus, P. & L. R. R.*, 76 Ga. 754.

Illinois. *Corwith v. Culver*, 69 Ill. 502; *Hays v. Ottawa, O. & F. R. V. R. Co.*, 61 Ill. 422; *Dill v. Wabash Val-*

ley R. Co., 21 Ill. 91; *Merrick v. Consumers Heat & Electric Co.*, 111 Ill. App. 153; *Stone v. Vandalia Coal & Coke Co.*, 59 Ill. App. 536. See also *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Indiana. *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68; *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395; *McAllister v. Indianapolis & C. R. Co.*, 15 Ind. 11; *Evansville, I. & C. Straight Line R. Co. v. Posey*, 12 Ind. 363; *Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547; *Railsback v. Liberty & A. Turnpike Co.*, 2 Ind. 656.

Iowa. *Merrill v. Gamble*, 46 Iowa 615.

Kentucky. *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

Minnesota. *Masonic Temple Ass'n*

In Pennsylvania, however, it is held that oral conditions may be shown even though they add to, vary or contradict the written con-

of *Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

Nebraska. *Nebraska Expos. Ass'n v. Townley*, 46 Neb. 893, 65 N. W. 1062.

New Jersey. *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363.

New Mexico. *Miller v. Preston*, 4 N. M. 396, 17 Pac. 565.

New York. See *Lyell Ave. Lumber Co. v. Lighthouse*, 137 App. Div. 422, 121 N. Y. Supp. 802.

North Carolina. *North Carolina R. Co. v. Leach*, 4 Jones 340.

Tennessee. *Anderson v. Middle & East Tennessee Cent. R. Co.*, 91 Tenn. 44, 17 S. W. 803.

West Virginia. *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929.

Subscriptions which are absolute and unconditional on their face cannot be qualified or limited by proof of any general understanding among the subscribers that the same should be abandoned and not collected unless a given amount should be subscribed. *Hickling v. Wilson*, 104 Ill. 54. Nor can a subscriber show that the stock was not to be issued to him and that he was not to be bound on the subscription, but that the purpose of his subscription was merely to enable the use of his name in the promotion of the company. *Wurtzbarger v. Anniston Rolling Mills*, 94 Ala. 640, 10 So. 129. Nor can he show a parol condition that no assessment would ever be levied upon the unpaid stock and that the subscriber would never be required to pay more than he had paid. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

Where there is an absolute agreement to take a specified number of shares and to pay for the same in

specified instalments, it cannot be shown by parol that there was an understanding that the stock was to be paid for by dividends and that the subscribers should not be liable to pay any money thereon. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

A subscriber to stock in a college corporation cannot show by parol that his stock was issued upon condition that he might use it to pay his debts to the corporation, in an action by the receiver of the corporation to recover such a debt. *Roach v. Burgess* (Tex. Civ. App.), 62 S. W. 803.

One whose subscription is absolute on its face cannot show that he holds the stock as treasury stock in trust for the corporation. *Newmann v. Sexton*, 156 Ill. App. 517. Nor can a subscriber to the stock of a railroad company show declarations as to the proposed location of the road unless the substance thereof is embodied in the contract as a condition precedent. *Mississippi, O. & R. R. Co. v. Cross*, 26 Ark. 443.

Where the subscription is absolute in its terms, a subscriber cannot escape liability by reason of nonperformance of conditions attached to a preliminary agreement among some of the members prior to incorporation, especially where the rights of creditors have supervened. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352.

In *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175, it was held that a subscription which was unconditional on its face would not be held to be conditioned on the subscription of the full amount of the capital stock where there was no evidence in the abstract showing that it was so conditioned.

tract, if the subscription would not have been made but for the oral condition,² provided such conditions would not be injurious to or in fraud of the rights of other subscribers.³ Under this rule the test to determine the admissibility of such proof is whether the effect of enforcing the condition would be to relieve the particular subscriber from payment while his fellows in the common adventure would still be held.⁴ If so, then the parol condition cannot be shown.⁵ But if the condition is common to all of the subscribers, so that all may take advantage of it, even though some do not, then it may be proved.⁶ Stated in another way, the subscriber "cannot escape liability to the corporation by showing that his subscription was subject to a parol condition, without also showing that all the subscribers assented to

² *Rinesmith v. People's Freight Ry. Co.*, 90 Pa. St. 262; *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363. See also *Nipponese Mfg. Co. v. Stadon*, 68 Pa. St. 256; *Quaker City Apartment House Co. v. Kirk*, 26 Co. Ct. (Pa.) 405.

But to introduce a new term into the contract, the evidence of the agreement of the parties to do so must be clear and distinct, and it must clearly appear that the contract was executed on the faith of such agreement. *Chartiers Ry. Co. v. Hodgens*, 85 Pa. St. 501.

³ *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349; *Quaker City Apartment House Co. v. Kirk*, 26 Co. Ct. (Pa.) 405.

⁴ *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332.

⁵ *Philadelphia & D. C. R. Co. v. Conway*, 177 Pa. St. 364, 35 Atl. 716; *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96.

In *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349,

it was held that a subscriber could not show that he subscribed to the stock of a railroad company on the secret parol condition that the road would be constructed over a different route than that specified in the contract and that he would not be obliged to pay until the road was so built, since to permit him to do so would be in fraud of the rights of those who subsequently subscribed in reliance on his subscription. See also *McClure v. People's Freight Ry. Co.*, 90 Pa. St. 269.

⁶ Subscribers may show that all the subscriptions contained in a subscription book which they signed were to be applied to building a certain branch line of railroad and were not to be of force until a certain amount was subscribed, that they objected to signing the subscriptions because these provisions were not embodied therein, but were assured by the president of the company, who obtained the subscriptions, that this was an omission, and that the subscriptions should be treated in all respects as though they contained such provisions, and that they signed on that understanding. *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332.

the condition, as to his particular subscription, or that all subscriptions were subject to the same parol condition.”⁷

By the weight of authority, in the absence of an estoppel, parol evidence is admissible to show that a written subscription was not to take effect as a contract at all until the performance of a condition, as it is admitted in such a case, not to vary the terms of the written instrument, but to show that there is no agreement at all.⁸ And where the writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove other portions thereof not inconsistent with the writing.⁹

Where a subscriber does not actually sign the subscription book, but his subscription is made by his authorized agent signing his name to a blank piece of paper, and his name is afterwards, without further authority, transferred to the subscription list, he may show by parol that he authorized the subscription only on certain conditions.¹⁰

Some courts hold that, as between the parties, any condition attached to the payment of a note given for stock and its nonfulfillment may be shown as a defense to an action thereon, provided it does not contradict or vary the terms of the written contract.¹¹ And it has been held that it may be shown as a defense to such a note that the subscription was conditional and that the condition has not been performed, though the condition is not embodied in the note.¹²

On the other hand, there is authority to the effect that the maker of such a note cannot show, either as against the payee or an indorsee, an oral contemporaneous parol agreement which makes the note payable on a contingency; as, for example, that the maker is not to be liable thereon unless the full amount of the capital stock of a railroad company required to build the road is subscribed for and taken and the road is built within a certain time.¹³ And it has also been held that, in an action on an unconditional note under seal, the maker cannot show by way of defense that there was an oral agreement that he should never be called upon to pay it.¹⁴

⁷ Jeannette Bottle Works v. Schall, 13 Pa. Super. Ct. 96.

⁸ See § 600, *infra*.

⁹ See § 569, *supra*.

¹⁰ Tonica & P. R. Co. v. Stein, 21 Ill. 96.

¹¹ Jefferson County Sav. Bank v. Compton, 192 Ala. 16, 68 So. 261.

The condition and its breach must be pleaded; otherwise it is not avail-

able as a defense. Jefferson County Sav. Bank v. Compton, 192 Ala. 16, 68 So. 261.

¹² Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

¹³ Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246.

¹⁴ Sasser v. McGovern, 11 Ga. App. 88, 74 S. E. 797.

§ 578. **Effect of unauthorized conditional subscriptions.** With respect to subscriptions prior to the formation of a corporation, and which the commissioners or other persons receiving them have no authority to accept, it has been held in Pennsylvania that such a subscription is not void, but that the condition is void, as a fraud upon the public and upon unconditional subscribers, and that the subscription is to be treated as absolute and unconditional, both for the purpose of enforcing the same, and for the purpose of determining the amount of stock subscribed.¹⁵

In New York and several other states, on the other hand, it has been held that the subscription itself is contrary to public policy and absolutely void for all purposes.¹⁶

If a corporation, after it has been formed, has no power under its charter or the enabling act to accept conditional subscriptions, such a subscription is not a binding contract at the time it is made, although accepted by the corporation. But it is not an absolute nullity for all purposes. It is to be treated as an offer to take the stock upon performance of the conditions specified, which may be withdrawn, like any other offer, at any time before it is changed into a contract, but

¹⁵ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Pittsburgh & S. R. Co. v. Biggar*, 34 Pa. St. 455; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271. See also *Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361; *aff'g* 4 Biss. 365, Fed. Cas. No. 11,481. See also § 576, *supra*, and *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349.

A parol condition is void under such circumstances where the subscription is absolute and unconditional on its face. *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256.

In *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96, it is said that this rule, "which has been enforced as to subscriptions to stock of railroad companies, prior to incorporation, under the general law of 1849, where

the commissioners acted in a public capacity with powers strictly limited by law," does not apply to purely private corporations organized under the Act of April 29, 1874, P. L. 73, but that a subscription to the stock of such a corporation may embrace any condition which does not involve a violation of law or of the rights of future creditors, and that all the associates and the corporation, when formed, are bound by such an agreement appearing on the face of the subscription. See also *Fleece v. Indiana & I. C. R. Co.*, 8 Ind. 460.

¹⁶ *La Grange & M. Plank Road Co. v. Mays*, 29 Mo. 64; *Ft. Edwards & Ft. M. Plank Road Co. v. Payne*, 15 N. Y. 583; *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420; *In re Rochester, H. & L. R. Co.*, 50 Hun (N. Y.) 29, 2 N. Y. Supp. 457; *People ex rel. Averill v. Adirondack Co.*, 57 Barb. (N. Y.) 656; *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. (N. Y.) 317; *Troy*

which, unless withdrawn, will continue open, and become binding as soon as the conditions are performed.¹⁷

It has been held that if the condition is void under the statute, the entire subscription is void and cannot be enforced as an absolute one.¹⁸

§ 579. Effect of valid conditional subscriptions—Before performance or fulfillment of condition. A conditional subscription, as distinguished from a subscription upon special terms,¹⁹ assuming that the subscription and the condition are valid, neither confers any rights as a stockholder nor imposes any liability, until the condition is substantially performed.²⁰ Of course this rule is without application

& *B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297.

¹⁷ *Armstrong v. Karshner*, 47 Ohio St. 276; 24 N. E. 897.

¹⁸ In *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638, it was held that a note given in payment of a subscription for stock in a railroad company, conditioned upon completion of the road within a given time, in violation of a statutory prohibition against the issue of stock except for money paid, labor done, or property actually received, and for which a certificate of stock was issued, was without consideration and void, as the subscription and certificate were void, and that the condition could not be treated as void and the subscription and note treated as absolute.

¹⁹ See § 574, *supra*.

²⁰ **United States.** *Hollander v. Healslip*, 222 Fed. 808; *Grier v. Union Nat. Life Ins. Co.*, 217 Fed. 287.

Alabama. *Broadus v. Russell*, 160 Ala. 353, 49 So. 327; *Garner v. Hall*, 122 Ala. 221, 25 So. 187; *Hall v. Sims*, 106 Ala. 561, 17 So. 534.

Arkansas. *Hastings Industrial Co. v. Copeland*, 114 Ark. 415, 169 S. W. 1185.

California. *Marysville Elec. Light & Power Co. v. Johnson*, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *California Southern Hotel*

Co. v. Russell, 88 Cal. 277, 26 Pac. 105; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106. See also *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

Florida. *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713.

Georgia. See *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801; *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.

Illinois. *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215; *Tonica & P. R. Co. v. Stein*, 21 Ill. 96; *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346.

Indiana. *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Taylor v. Fletcher*, 15 Ind. 80; *Wilson v. Evansville, I. & C. Straight Line R. Co.*, 14 Ind. 464; *Shearer v. Evansville, I. & C. Straight Line R. Co.*, 12 Ind. 452; *Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539; *Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244.

Iowa. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72; *Oskaloosa Agricultural Works v. Parkhurst*, 54 Iowa 357, 6 N. W. 547; *Burlington & M. River R. Co. v. Boestler*, 15 Iowa 555.

where performance of the condition is waived by the subscriber,

Kentucky. *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181; *Frankfort & S. Turnpike Co. v. Churchill*, 6 T. B. Mon. 427, 17 Am. Dec. 159.

Maine. *Bucksport & B. R. Co. v. Inhabitants of Brewer*, 67 Me. 295; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185; *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480; *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Massachusetts. *Central Turnpike Corp. v. Valentine*, 10 Pick. 142.

Michigan. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473; *Sherrod v. Duffy*, 160 Mich. 488, 136 Am. St. Rep. 451, 125 N. W. 366; *Brown v. Dibble's Estate*, 65 Mich. 520, 32 N. W. 656; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Nebraska. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *McCann v. American Cent. Ins. Co.*, 4 Neb. 256.

New Hampshire. *Porter v. Raymond*, 53 N. H. 519; *Monadnock R. Co. v. Felt*, 52 N. H. 379.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, rev'g on other grounds 15 Hun 371; *Stern v. McKee*, 70 App. Div. 142, 75 N. Y. Supp. 157; *Brewers' Fire Ins. Co. v. Burger*, 10 Hun 56.

North Carolina. *Alexander v. North Carolina Sav. Bank & Trust Co.*, 155 N. C. 124, 71 S. E. 69.

Ohio. *Toledo, C. & St. L. R. Co. v. Hinsdale*, 45 Ohio St. 556, 15 N. E. 665; *Trott v. Sarchett*, 10 Ohio St. 241.

Oklahoma. *Merchants' & Planters' Ins. Co. v. Reeder*, — Okla. —, 153 Pac. 111.

Oregon. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Pennsylvania. *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. St. 318; *Hanover Junction & S. R. Co. v. E. Haldeman & Co.*, 2 Chest. Co. Rep. 256; *People's Freight Ry. Co. v. Hench*, 2 Walk. 478.

South Dakota. *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838.

Tennessee. *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Bivins v. Panhandle Packing Co.*, — Tex. Civ. App. —, 140 S. W. 523; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Virginia. *Wright v. Agelasto*, 104 Va. 159, 51 S. E. 191; *Echols v. Bristol*, 90 Va. 165, 17 S. E. 943.

West Virginia. *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911.

See other cases cited § 574, et seq., *supra*.

Where notes are given for stock in a creamery to be built, on the express written agreement that they are to be void if the subscriber is not satisfied with the creamery, they are not enforceable if he expresses his dissatisfaction, regardless of whether he acted reasonably in so doing. *Sherrod v. Duffy*, 160 Mich. 488, 136 Am. St. Rep. 451, 125 N. W. 366.

If, after it becomes a going concern, the corporation accepts a conditional subscription made prior to its incorporation, it cannot hold the subscriber thereon without complying with the condition. It will not be permitted to accept the benefits of the contract without at the same time as-

or he is estopped by his conduct to set up its nonperformance.²¹

Nonperformance of conditions precedent constitutes a failure of consideration for a note given for the amount of a subscription.²² And if such a condition is violated or is not performed, the subscriber may recover back payments already made.²³

If the subscriber merely agrees to take such an amount of a particular class of stock as may be necessary to provide working funds and capital for the corporation, it must appear that the amount for which a recovery is sought is necessary for that purpose.²⁴ Prima facie the amount necessary is the amount of that stock which the parties agree is to be issued. The subscriber cannot be called upon to pay for more than that, and may be able to show that he should not be called upon to pay for that much.²⁵

The same rules are applicable to conditional agreements to subscribe in the future, and there is no obligation on the part of the promisor to subscribe until the condition precedent has been performed.²⁶

§ 580. — After performance or fulfillment of condition. A subscription upon a condition precedent becomes absolute as soon as

suming its burdens. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681.

Since books of the corporation are not evidence as against nonmembers, and since one who subscribes on condition is not a member until the condition is performed, the books are not admissible against such a subscriber to show performance of the condition. *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215.

Where the company refuses to accept the subscription on the conditions named, the subscriber cannot be held liable. *Natwick v. Terwilliger*, — Wyo. —, 157 Pac. 696.

²¹ See §§ 598, 599, *infra*.

²² See § 528, *supra*.

²³ *Alexander v. North Carolina Sav. Bank & Trust Co.*, 155 N. C. 124, 71 S. E. 69.

Where a condition as to the location of a railroad is violated by con-

structing it over a different route from that specified, the subscriber may recover back payments made before such violation. If the payment was made in land which has been transferred to an innocent holder, he may recover its value. *Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539.

²⁴ *Sanders v. Barnaby*, — N. Y. App. Div. —, 159 N. Y. Supp. 579.

²⁵ *Sanders v. Barnaby*, 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580; *id.* — N. Y. App. Div. —, 159 N. Y. Supp. 579.

²⁶ One who agrees with a broker, employed by a corporation to dispose of stock to be issued, that he will take all of such stock for which the broker cannot obtain other subscribers, is under no obligation to take the stock where the broker abandons all effort to obtain other subscribers. *Webb v. Moeller*, 87 Conn. 138, 87 Atl. 277.

the condition is substantially performed, without any further act or consent upon the part either of the corporation or of the subscriber, both for the purpose of rendering the subscriber liable on the subscription, and for the purpose of constituting him a stockholder, with all the rights of a stockholder, as the right to vote at corporate meetings, the right to receive dividends, and the like.²⁷

§ 581. — Construction and performance of conditions. The same principles apply to the construction of conditional subscriptions as in the case of any other conditional contract. The conditions must be performed, unless they are waived or the subscriber is estopped, but all that is required is that they shall be substantially performed according to the intention of the parties. And in determining whether they have been performed, they must be reasonably construed.²⁸

27 Illinois. *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593.

Indiana. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244; *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407.

Iowa. *Nichols v. Burlington & L. C. Plank Road Co.*, 4 Greene 42.

Kentucky. *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181.

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Michigan. *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

Missouri. *North Missouri R. Co. v. Miller*, 31 Mo. 19.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

Ohio. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897; *Mansfield, C. & L. M. R. Co. v. Stout*, 26 Ohio St. 241; *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

Pennsylvania. *Philadelphia & D. C. R. Co. v. Conway*, 177 Pa. St. 364, 35 Atl. 716; *Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258; *Pittsburgh & C. R. Co. v. Plummer*, 37 Pa. St. 413.

South Carolina. *Spartanburg & U. R. Co. v. De Graffenreid*, 12 Rich. L. 675, 78 Am. Dec. 476.

Wyoming. *Edwards v. Johnston*, 23 Wyo. 384, 152 Pac. 273.

28 Massachusetts. *People's Ferry Co. v. Balch*, 8 Gray 303.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

Pennsylvania. *Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258.

Tennessee. *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

Texas. *Jackson v. Stockbridge*, 29 Tex. 394, 94 Am. Dec. 290.

See also *Whitney v. Chicago, A. & N. R. Co.*, 133 Iowa 508, 110 N. W. 912.

Reasonable performance is all that is required. *Hall v. Sims*, 106 Ala. 561, 17 So. 534.

A condition that the railroad line of the corporation shall pass through the corporate limits of a certain town is sufficiently complied with if the line runs anywhere within the corporate

If a subscription is payable in instalments, each instalment being

limits, even though upon the very edge thereof. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

In *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181, it was held that a condition that the road should "be so located and constructed" as to make a certain town a point thereon did not make construction of the road to that point a condition precedent, but that the subscription could be collected when the road was so located as to make said town a point on it.

See *Leshner v. Karshner*, 47 Ohio St. 302, 24 N. E. 882, where a condition in a subscription to stock of a railroad company was construed as requiring the completion of the road between designated points only, and not the completion of the whole road, before it became due.

Where a subscription to stock of a railroad company is conditioned that the road shall be "so constructed that cars may be run over the same" by a specified date, no greater degree of completeness or perfection of the road can be required than that so specified. *Wemple v. St. Louis, J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906.

The condition of a subscription to the stock of a railroad company that bonds in payment therefor should not issue until the "work" performed should equal the amount subscribed, was held not to refer to earthwork alone, but to include all that entered into the construction of the road complete for the cars. *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313.

Where a subscription to railroad stock provides for payment "as soon as the cars shall run to" a certain point upon a contemplated road "completed to that place," recovery is not prevented by reason of the fact that

the company does not own or control any of the rolling stock used on the road. *Courtright v. Deeds*, 37 Iowa 503.

A contract of subscription to stock of a corporation to be formed provided that the contract should be void unless the seller obtained subscriptions to a specified amount in cash. By private agreement one of the subscribers was under obligation to pay but one-half of the amount of his subscription, and another subscription was not genuine. The court deemed that the facts justified a finding that the seller had not complied with the terms of the contract. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72.

Though a contract of subscription to preferred stock states that it is "understood that the amount subscribed shall be \$4,000, neither more nor less," the contract is not a joint obligation, and the striking of the name of one of the subscribers from the list or the unauthorized signing of the name of another will not invalidate the contract as against those who properly sign it, nor release them from the payment of their subscriptions upon a substantial performance of the contract by the corporation, though the amount subscribed is thereby reduced below \$4,000. Nor will the fact that more than \$4,000 is subscribed release them under such circumstances. *Snodgrass v. Zander & Co.*, 106 Ark. 462, 154 S. W. 212.

In an action on a subscription to stock in the World's Columbian Exposition, made upon condition that the exposition should be held in Chicago, the court will take judicial notice that it was held there, and hence that fact need not be proved. *McCoy v. World's Columbian Exposition*, 186

upon a separate and distinct condition, each instalment becomes payable upon performance of its condition, without regard to the other conditions.²⁹

If a note given for the subscription price of stock in a railroad company provides that it shall be payable when the board of directors decide that the road has been completed to a certain point, that it shall be void unless it is so completed within a specified time, and that publication of the board's decision shall be sufficient notice thereof to the subscriber, it is the reasonable bona fide completion of the work according to the terms of the contract which matures the subscriber's liability, and not the declaration of the directors, or, in other words, it is the truth of the fact declared, and not the mere declaration of it, that is important and controlling. A false declaration by the directors will not bind the subscriber to pay.³⁰ And though they make a declaration which is insufficient to mature the note, the holder of it may show by parol that the road was in fact completed to the designated point prior to that time.³¹ Nor will such a declaration and the publication thereof estop the corporation or one to whom it transfers the note from showing that the road was not in fact completed until a date later than that specified therein, where the subscriber has refused to be bound by such declaration and notice.³² Nor will the company or its assignee be estopped by declarations of its president that the road has been completed, contained in a written demand made by him on the subscriber for payment of the note, in the absence of any evidence as to the scope of his authority in the premises.³³

A provision that the location of the road in accordance with the condition shall be sufficiently evidenced by an order of the board of directors accepting the subscription in accordance with its terms does not prevent the company from showing by other evidence that the condition has been complied with, and proof that the road has been built and is in operation on the route specified will warrant a recovery.³⁴

Whether a condition has been performed is a question of fact.³⁵

Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605.

²⁹ Coos Bay, R. & E. R. & Nav. Co. v. Dixon, 30 Ore. 584, 48 Pac. 360.

³⁰ Garner v. Hall, 122 Ala. 221, 25 So. 187, 114 Ala. 166, 21 So. 835; Hall v. Sims, 106 Ala. 561, 17 So. 534.

³¹ Hall v. Sims, 106 Ala. 561, 17 So. 534.

³² Garner v. Hall, 122 Ala. 221, 25 So. 187.

³³ Garner v. Hall, 122 Ala. 221, 25 So. 187.

³⁴ Moore v. New Albany & S. R. Co., 15 Ind. 78.

³⁵ Jewett v. Lawrenceburgh & U. M. R. Co., 10 Ind. 539.

§ 582. — **Time of performance.** Conditions precedent must be performed within the time, if any, prescribed by the contract. If they are not performed within such time, the subscriber is discharged, in the absence of a waiver or estoppel, and he cannot be rendered liable by a subsequent performance.³⁶ Under such circumstances, it is not necessary that the subscription or proposition be formally withdrawn, but it ceases to have any vitality by its own limitation.³⁷ Nor can the liability of the subscriber be restored by any acts of the other subscribers without his consent.³⁸ A condition that the subscription is not to be binding unless a certain amount is subscribed "by" a certain day is performed where the required amount is subscribed at a meeting held on that day.³⁹

If no time for performance is fixed by the subscription, conditions must be performed within what is a reasonable time under the circumstances of the particular case.⁴⁰

³⁶ **Indiana.** Freeman v. Matlock, 67 Ind. 99.

Iowa. Burlington & M. River R. Co. v. Boestler, 15 Iowa 555.

Kansas. Memphis, K. & C. Ry. Co. v. Thompson, 24 Kan. 170.

Maine. Ticonic Water Power & Manufacturing Co. v. Lang, 63 Me. 480.

Minnesota. Bohn Mfg. Co. v. Lewis, 45 Minn. 164, 47 N. W. 652.

New York. Morris Canal & Bank- ing Co. v. Nathan, 2 Hall 262.

But see Missouri Pac. Ry. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97, where time was held not to be of the essence of the contract.

A provision in the contract that the subscription shall be void and the subscriber may recover back what he has paid unless the condition is performed within a reasonable time is valid and enforceable. Wood v. Universal Adding Mach. Co., 166 Ill. App. 346.

³⁷ **Ticonic Water Power & Manu- facturing Co. v. Lang**, 63 Me. 480.

³⁸ **Ticonic Water Power & Manu- facturing Co. v. Lang**, 63 Me. 480.

³⁹ The word "by," when used to

designate a terminal point of time, means "not later than." Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

⁴⁰ **Arkansas.** Jacks v. Helena, 41 Ark. 213.

Indiana. See Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

Iowa. Blake v. Brown, 80 Iowa 277, 45 N. W. 751.

Maine. Ticonic Water Power & Manufacturing Co. v. Lang, 63 Me. 480.

Michigan. Stevens v. Corbitt, 33 Mich. 458.

Minnesota. Carter, Rittenberg & Hainlin Co. v. Hazzard, 65 Minn. 432, 68 N. W. 74.

New York. Hutchins v. Smith, 46 Barb. 235.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

What is a reasonable time is to be determined from the facts of each case. Carter, Rittenberg & Hainlin Co. v. Hazzard, 65 Minn. 432, 68 N. W. 74.

§ 583. — **Notice of performance.** Notice of performance of a condition precedent in a subscription is necessary, of course, if it is required by the contract.⁴¹ Generally, notice is not necessary in the absence of such a provision,⁴² at least unless the fact of performance is peculiarly within the knowledge of the corporation.⁴³

The fact that a subscription provides that a certain kind of notice of performance of conditions precedent shall be sufficient does not make notice in the way mentioned necessary, but actual notice in any other way is sufficient.⁴⁴

Notice may be inferred or presumed from the circumstances. Thus, notice to a subscriber for stock in a railroad company that the road was located in a certain place, as required by the subscription, was presumed, where the place was a city of only fifteen thousand inhabitants, and the subscriber resided there, and the road had been constructed and was in operation for several years before he was sued on his subscription.⁴⁵

When the first instalment on a subscription for stock is not to become due until a certain amount of stock is subscribed, a call for the first instalment operates as notice to subscribers that the required amount has been subscribed.⁴⁶

§ 584. — **Right to withdraw conditional subscriptions.** If the acceptance of a conditional subscription by the corporation constitutes a present contract binding the corporation to perform the condition, then the subscriber is bound until performance of the condition to

⁴¹ *Garner v. Hall*, 122 Ala. 221, 25 So. 187, 114 Ala. 166, 21 So. 835. See also *Hall v. Sims*, 106 Ala. 561, 17 So. 534.

⁴² See *Nichols v. Burlington & L. C. Plank Road Co.*, 4 Greene (Iowa) 42; *Spartanburg & U. R. Co. v. De Graffenreid*, 12 Rich. L. (S. C.) 675, 78 Am. Dec. 476.

In *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932, it is held that whatever may be the rule as to the necessity for notice as a preliminary step to making a call as between the corporation while it is a going concern and the subscriber, a petition in an action by a receiver of the corporation, after it has become insolvent, to recover the entire amount of unpaid

subscriptions is not demurrable for failure to allege notice.

⁴³ Notice of performance must be given where the fact of performance is peculiarly within the knowledge of the corporation, as where a subscription provides that it shall not be payable unless a certain sum is raised for a specified purpose. *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215.

⁴⁴ *Garner v. Hall*, 114 Ala. 166, 21 So. 835; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337.

⁴⁵ *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337.

⁴⁶ *Harlem Canal Co. v. Seixas*, 2 Hall (N. Y.) 504.

await performance, and cannot withdraw his subscription,⁴⁷ at least unless performance is unreasonably delayed.⁴⁸ And the same is held to be true in those jurisdictions where the subscription is regarded as a contract between the subscribers.⁴⁹

On the other hand, conditional subscriptions are often held to be merely continuing offers to take the stock subscribed for on performance of the condition, in which case it has been held that they may be revoked or withdrawn by the subscriber at any time before the condition is performed.⁵⁰ In neither case, however, can the subscription be withdrawn after performance of the condition,⁵¹ for it then becomes an absolute subscription.⁵²

§ 585. Implied conditions precedent—In general. In the preceding sections, we have been dealing with subscriptions upon express conditions precedent. It remains to consider implied conditions. Although a subscription may be absolute and unconditional on its face, certain conditions precedent are implied as a matter of law.⁵³

An agreement with a broker, employed by a corporation to dispose of a new issue of stock, to take all of said issue for which the broker cannot obtain other subscribers is upon the implied condition that the broker will use all reasonable efforts to make sales to other persons.⁵⁴

There is no implied condition in a subscription to railroad stock that the road shall conform to any particular standard before subscriptions can be enforced.⁵⁵

⁴⁷ *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897. See also *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Hutchins v. Smith*, 46 Barb. (N. Y.) 235.

⁴⁸ See § 582, *supra*.

⁴⁹ *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

⁵⁰ *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897. See also *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Where the subscription is not binding upon the corporation until a speci-

fied amount has been subscribed and accepted by the corporation, the subscriber may withdraw his subscription or the corporation may refuse to accept it at any time before the condition has been performed. *Allen & Co. v. Hastings Industrial Co.*, 2 Ga. App. 291, 58 S. E. 504.

⁵¹ *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

⁵² See § 580, *supra*.

⁵³ See the following sections.

⁵⁴ *Webb v. Moeller*, 87 Conn. 138, 87 Atl. 277.

⁵⁵ There is no implied condition that the company shall build a first-class railroad. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

§ 586. — Formation of corporation and effect of irregularity or failure to incorporate—Subscriptions after formation of corporation. As we have seen in a former chapter, a corporation *de facto* has the same capacity to contract and to enforce its contracts as a corporation *de jure*.⁵⁶ And this doctrine applies to subscriptions to the capital stock of a corporation after its organization and assumption of corporate powers. If a person, therefore, subscribes for stock in a corporation after its organization and assumption of corporate powers, it is sufficient to show a *de facto* corporate existence to support an action on the subscription. The action cannot be defeated by showing that there have been such irregularities in the organization of the corporation that there is not a corporation *de jure*.⁵⁷ Further than this, although there may not be even a corporation *de facto*, a subscription may be enforceable by reason of the doctrine of estoppel. As we have seen, it is a general rule, recognized in most jurisdictions, although not in all, that a person who enters into a contract with an association as a corporation thereby admits its corporate existence, and is estopped to deny the same, whether it be a corporation *de facto* or not, in any action or proceeding based upon or arising out of the contract.⁵⁸ In those jurisdictions in which this

⁵⁶ As to what is necessary to constitute a corporation *de facto*, and the effect of contracts with such a corporation, see Chap. 10, *supra*.

⁵⁷ **Alabama.** *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

Illinois. *Washburn v. Roesche*, 13 Ill. App. 268.

Indiana. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

Kansas. *McCune Min. Co. v. Adams*, 35 Kan. 193, 10 Pac. 468.

Michigan. *Monroe v. Ft. Wayne, J. & S. R. Co.*, 28 Mich. 272; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

New York. *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75; *Eaton v. Aspinwall*, 19 N. Y. 119, *aff'd* 6 Duer 176.

North Carolina. *Tar River Nav. Co. v. Neal*, 3 Hawks 520.

Pennsylvania. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

South Carolina. *Spartanburg & A. R. Co. v. Ezell*, 14 S. C. 281.

Utah. *Ogden Clay Co. v. Harvey*, 9 Utah 497, 135 Pac. 510.

Vermont. *Montpelier & W. R. Co. v. Langdon*, 46 Vt. 284.

This is true of subscriptions by counties or other municipalities to the capital stock of a railroad company. *Dallas County v. Huidekoper*, 154 U. S. 654, 25 L. Ed. 974; *Macon County v. Shores*, 97 U. S. 272, 24 L. Ed. 889; *Chicago, K. & W. R. Co. v. Stafford County Com'rs*, 36 Kan. 121, 12 Pac. 593; *Smith v. Clark County*, 54 Mo. 58.

⁵⁸ As to this doctrine, and the conflict of authority on particular points, see Chap. 11, *supra*.

doctrine is recognized, a person who subscribes for stock in an association as an existing corporation is estopped to deny its corporate existence for the purpose of escaping liability on the subscription, both as against creditors and as against the corporation itself.⁵⁹ A subscriber is estopped in all jurisdictions as against creditors, where he has acted as an officer or stockholder, or otherwise participated in holding out the corporation as having a legal existence.⁶⁰

§ 587. — Subscriptions before corporation is formed. The principles above stated do not apply to the full extent when a subscription for stock is made prior to the formation of a corporation, and in contemplation thereof. In such a case, it is a condition precedent to any liability upon the subscription, implied if not expressed, that the corporation shall be legally organized as contemplated; and the subscriber, therefore, may defeat an action on his subscription, unless estopped, by showing that the condition has not been performed.⁶¹ Moreover, before such a subscription can be enforced there must be a corporation *de jure*, and not merely a corporation *de facto*,⁶² except

⁵⁹ See § 715, *infra*.

⁶⁰ See § 715, *infra*.

⁶¹ The law furnishes a condition that the concern shall in fact be incorporated. *McCord v. Southwestern Sundries Co.*, — Tex. Civ. App. —, 158 S. W. 226. And in an action to recover on such a subscription, the plaintiff must prove its corporate existence. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

See also cases cited in the following note.

⁶² **Alabama.** *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360.

Indiana. *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Williams v. Citizens' Enterprise Co.*, 153 Ind. 496, 55 N. E. 425, 25 Ind. App. 351, 57 N. E. 581; *Coppage v. Hutton*, 124 Ind. 401, 7 L. R. A. 591, 24 N. E. 112; *Williamson v. Kokomo Building & Loan Fund Ass'n*, 89 Ind. 389; *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *Rikhoff v. Brown's Rotary Shuttle Sew. Mach. Co.*, 68 Ind. 388; *Reed v. Richmond St. R. Co.*, 50 Ind. 342; *Nel-*

son v. Blakey, 47 Ind. 38; *Indianapolis Furnace & Mining Co. v. Herkimer*, 46 Ind. 142; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329.

Iowa. See *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa 357, 6 N. W. 547.

Maine. See *Richmond Factory Ass'n v. Clarke*, 61 Me. 351.

Maryland. *Maltby v. Northwestern Virginia R. Co.*, 16 Md. 422.

Minnesota. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Mississippi. *Wright Bros. v. Merchants' & Planters' Packet Co.*, 104 Miss. 507, 'Ann. Cas. 1915 C 1111, 61 So. 550.

Nebraska. *Capps v. Hastings Prospecting Co.*, 40 Neb. 470, 24 L. R. A. 259, 42 Am. St. Rep. 677, 58 N. W. 956.

New York. *Dorris v. Sweeney*, 60 N. Y. 463; *Crocker v. Crane*, 21 Wend. 211, 34 Am. Dec. 228. Compare *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185.

Pennsylvania. *Tonge v. Item Pub. Co.*, 244 Pa. 417, 91 Atl. 229.

West Virginia. *Greenbrier Indus-*

where an estoppel on the part of the subscriber is shown.⁶³ This rule has also been applied in cases where existing corporations are consolidated. So it has been held that even though an existing corporation has authority under its charter to consolidate with another corporation and therefore a valid consolidation will not discharge a previous subscriber to its stock,⁶⁴ the subscriber has a right to insist that the consolidation shall be effected in substantial conformity with the law, and is discharged if the statutory provisions on the subject are not substantially complied with even though the proceedings are sufficient to make the consolidated company a corporation de facto.⁶⁵ Some of the cases, however, appear to hold that it is sufficient to show a de facto corporate existence and that when this is done the rule against collateral attack applies, although in many, if not all of them, the elements of an estoppel will also be found to have been present.⁶⁶

trial Exposition v. Squires, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

The subscriber is not liable unless the corporation proves at least a substantial compliance with all the requirements of the statute. *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind. 242.

He may set up as a defense that the company has not been legally incorporated; as, for example, that it was incorporated before the required amount of stock was subscribed. *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Under the West Virginia statute, providing that an agreement for the formation of a corporation "shall be acknowledged by the several incorporators before a justice," it was held that, where such agreement was not acknowledged prior to the issue of the certificate of incorporation, the company did not obtain corporate existence as to those who, by such preliminary agreement, subscribed stock, and that they were not liable on such subscription. *Greenbrier Industrial Exposition v. Rodes*, 37 W.

Va. 738, 17 S. E. 305, followed in *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

⁶³ See § 599, *infra*.

⁶⁴ See § 649, *infra*.

⁶⁵ *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

A consolidated corporation must be one de jure in order to acquire the rights of a consolidating corporation in subscriptions to its stock, unless the subscriber has estopped himself by participating in the acts of the consolidating company as one of its stockholders. *Mansfield, C. & L. M. R. Co. v. Drinkwater*, 30 Mich. 124.

⁶⁶ The subscriber cannot question the organization of the corporation in an action on his subscription, or, at least, if it is a corporation de facto, the burden of showing want of organization is on him. *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

The corporate existence of the corporation cannot be collaterally attacked in an action on a subscription. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

Incorporators are liable for their subscriptions though only a de facto corporation is shown, and this is true as to one of them who did not per-

To render a subscription prior to incorporation binding, the corporation which is formed must be the corporation contemplated by the subscriber, for if an offer is made to take stock in a particular corporation to be formed, another and different corporation cannot accept the same. In such a case, no agreement at all is formed.⁶⁷

Money advanced to a promoter for stock in a proposed corporation may be recovered back if it becomes impossible to form such corporation,⁶⁸ or if for any reason it is not formed, unless the failure to organize it is due to the action of the subscriber himself, or unless

sonally participate to any extent in the operation of the company. The execution of the certificate of incorporation constitutes a contract to contribute to the capital stock. *McCarter v. Ketcham*, 74 N. J. L. 825, 67 Atl. 610. See also *McCarter v. Ketcham*, 74 N. J. L. 829, 69 Atl. 253, 72 N. J. L. 247, 62 Atl. 693.

In *Jones v. Dodge*, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828, which was an action by a receiver of an insolvent corporation to collect unpaid subscriptions made prior to incorporation, the court gives the rule against collateral attack as a reason why the defendants could not set up defects in the organization of the corporation as a defense, but it appears that the subscribers gave notes to the corporation as such after its organization, and also assisted in organizing it, and it is expressly held that they were estopped on the latter ground.

In *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145, it was said that the fact that fifty per cent. of the capital stock had not been paid in when the charter was issued was a matter of which the state alone could complain, and was no defense to an action on a subscription made prior to incorporation. But it is to be noted that the subscriber in this case assisted in procuring the charter and organizing the corpora-

tion, and was elected and acted as a director and vice president.

In *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 180 S. W. 899, it is held that where there is a de facto corporation it cannot be collaterally attacked by a subscriber in an action on his subscription, and it is said that, "A stockholder who subscribes for stock is not only estopped from setting up irregularities in the formation of the corporation, but he is also bound by the rule that the existence of a corporation cannot be inquired into except by direct proceedings in behalf of the state." The subscription in this case was made prior to incorporation, but the subscriber took part by proxy in the organization of the corporation, and subsequently dealt with it as such.

See also *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562; *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 211; *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93; *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569; *Centre & K. Turnpike Road Co. v. McConaby*, 16 Serg. & R. (Pa.) 140.

⁶⁷ See § 524, supra.

⁶⁸ *Watson v. Donald*, 142 Ill. App. 110.

he acquiesces in the expenditure of the money by the promoter notwithstanding such failure.⁶⁹

§ 588. — Organization of corporation after creation. When a corporation is created by a special act or under a general law, so that it has acquired corporate existence, but organization is necessary before it can enter upon the transaction of business, the organization must be effected before any action can be maintained on subscriptions for stock.⁷⁰ But the contrary is true where organization is not necessary to give it power to sue.⁷¹ And subscriptions are not rendered invalid by the fact that they were received before organization, or before the election of directors.⁷² And the statute may authorize the making and collection of assessments before organization.⁷³

Some courts hold that defects in the organization cannot be taken advantage of collaterally by the subscriber as a defense to an action on his subscription, but are available only in a direct proceeding by the state to forfeit the corporate charter.⁷⁴

It has been held that an informal antecedent subscription to the stock of a corporation subsequently to be formed is subject to the implied condition that the subscriber shall be given an opportunity to pay the initial statutory instalment of his subscription before organization and to participate in the first meeting of the stockholders held for the purpose of organization, and that his subscription cannot be enforced if no such opportunity is given to him.⁷⁵

As we shall hereafter see, failure of a corporation to comply with conditions subsequent⁷⁶ in the charter or enabling act, as conditions precedent to the right to do business, so that the state might proceed against it to forfeit its charter, cannot be set up by a subscriber to escape liability on his subscription.⁷⁷

⁶⁹ *Minor v. Gordon*, 170 Ky. 609, 186 S. W. 480.

⁷⁰ *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70; *Nemaha Coal & Mining Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *United States Wind-Engine & Pump Co. v. Davies*, 2 Kan. App. 611, 42 Pac. 590.

⁷¹ *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 302.

⁷² *Covington, C. C. & J. Plank Road Co. v. Moore*, 3 Ind. 510; *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43.

⁷³ *Oregon Cent. R. Co. v. Seoggins*, 3 Ore. 161.

⁷⁴ *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Gill's Adm'x v. Kentucky & C. Gold & Silver Min. Co.*, 7 Bush. (70 Ky.) 635; *Pittsburgh, W. & K. R. Co. v. Applegate & Son*, 21 W. Va. 172. See also *Wood v. Coosa & C. R. Co.*, 32 Ga. 273; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93.

⁷⁵ *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911.

⁷⁶ See § 186, *supra*.

⁷⁷ See § 601, *infra*.

A defect in the organization of a corporation may be cured by a subsequent curative act of the legislature, or by an act recognizing the corporation as having a legal existence, and in such a case persons who subscribed for stock prior to such act cannot afterwards set up the defect in the organization of the corporation to escape liability on their subscriptions.⁷⁸

§ 589. — Power to issue stock subscribed for. Power on the part of the corporation to issue stock to the subscribers in compliance with their contracts of subscription,⁷⁹ and of the character and par value subscribed for,⁸⁰ is an implied condition precedent to the validity and enforcement of the subscription. Hence a subscription cannot be enforced where the corporation is organized with a larger capital than that specified in the subscription contract,⁸¹ or where valid certificates for the full amount of the authorized capital stock have already been issued,⁸² or where the stock has been illegally increased to more than four times the amount the company was authorized to issue, and certificates therefor have been issued and are beyond the control of the corporation, and the illegal stock thus issued cannot be distinguished from the genuine.⁸³

⁷⁸ *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93; *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185, 5 *Thomp. & C. (N. Y.)* 659.

See also § 190, *supra*.

⁷⁹ *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; *Merrill v. Gamble*, 46 Iowa 615; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736.

Subscriptions "are made upon the implied condition that valid stock, such as will confer upon the subscriber all the rights and privileges of a stockholder, is to be issued." *Winters v. Armstrong*, 37 Fed. 508.

Before the corporation can recover in an action on a subscription, it must show that it is in a position to issue the stock subscribed for. That it has divested itself of power to do so is a good defense to an action on the sub-

scription. *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

⁸⁰ *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 52 Atl. 975.

That the subscriber cannot be compelled to accept stock of a different character or par value, see § 524, *supra*.

⁸¹ See § 524, *supra*.

⁸² *Georgia*. *Leigh v. Chattanooga, R. & C. R. Co.*, 104 Ga. 13, 30 S. E. 381.

Indiana. *McCord v. Ohio & M. R. Co.*, 13 Ind. 220.

New York. *Burrows v. Smith*, 10 N. Y. 550.

Ohio. *James v. Cincinnati, H. & D. R. Co.*, 2 Disn. 261.

Tennessee. *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

⁸³ *Merrill v. Gamble*, 46 Iowa 615.

Nor can a subscription to increased stock be enforced where the statute authorizing the increase is unconstitutional,⁸⁴ or the increase is otherwise void.⁸⁵ And where one subscribes to stock of a particular par value, and the charter does not authorize the corporation to issue stock of that value, an amendment authorizing it is essential to the validity and enforceability of the subscription.⁸⁶ Similarly, a subscriber cannot be compelled to accept in satisfaction of his subscription preferred stock which is in excess of the amount of that class of stock which the corporation is authorized to issue,⁸⁷ or which is invalid as to him because created without the consent of those then holding common stock.⁸⁸

§ 590. — Fixing amount of capital stock. “Before the payment of a subscription can be compelled, the capital to be employed must be fixed and certain.”⁸⁹

As a general rule, when the capital stock of a corporation is not fixed by its charter, it must be fixed by the stockholders or directors before any stockholder can be held liable on his subscription.⁹⁰

But there is authority to the contrary.⁹¹ And the rule has been

⁸⁴ *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

⁸⁵ *Winters v. Armstrong*, 37 Fed. 508; *Tschumi v. Hills*, 6 Kan. App. 549, 51 Pac. 619.

⁸⁶ *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 52 Atl. 975.

⁸⁷ *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

⁸⁸ *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

⁸⁹ *Nemaha Coal & Mining Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *United States Wind-Engine & Pump Co. v. Davies*, 2 Kan. App. 611, 42 Pac. 590.

⁹⁰ *Hendrix v. Academy of Music*, 73 Ga. 437; *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445; *Somerset R. Co. v. Clarke*, 61 Me. 379; *Somerset & K. R. Co. v. Cushing*, 45 Me. 524; *Worcester & N. R. Co. v. Hinds*, 8 Cush. (Mass.) 110; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray (Mass.) 244, 71 Am. Dec. 753; *Troy & G. R. Co. v. Newton*, 8

Gray (Mass.) 596; *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. (Mass.) 311.

But a failure to fix the amount of the capital stock at the first meeting held under the charter will not invalidate an assessment where it is fixed before the assessment is made. *City Hotel in Worcester v. Dickinson*, 6 Gray (Mass.) 686.

⁹¹ *Warwick R. Co. v. Cady*, 11 R. I. 131.

In *Kirksey v. Florida & G. Plank Road Co.*, 7 Fla. 23, 68 Am. Dec. 426, it was held that a subscription was enforceable though the amount of the capital stock was not prescribed or limited in the charter, or otherwise. See also *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, where the charter provided that the capital stock should not exceed a certain sum nor be less than a certain smaller sum, and a recovery was had although the amount of the capital was not otherwise fixed. In this case the necessity for fixing the capital was not discussed.

held not to apply where the charter fixes a maximum and minimum amount of capital and authorizes the corporation to make assessments as soon as the minimum amount has been subscribed,⁹² or where the charter of a railroad company merely prescribes a maximum and minimum capital and does not require the directors or the corporation to determine its amount within these limits, and the subscription contract provides that the corporation may be organized when a certain amount has been subscribed, but may not contract for the building of its line until a certain larger amount has been subscribed for.⁹³

Even where the capital is required to be fixed by the directors, it need not be done in any particular manner. Any act on the part of the directors which has the effect of fixing the amount of stock for the time being is sufficient. So it has been held that a vote of the directors to close the subscription books on a given day is in effect a vote fixing the number of shares at the number then actually subscribed for, as ascertained by the books, and is sufficient.⁹⁴ And also that it is sufficient where the directors, before the books are opened, limit the time during which they are to remain open, and they are closed at the time fixed and the corporation is then organized.⁹⁵

⁹² Where the charter of a corporation limited the capital stock to not less than five hundred nor more than ten thousand shares of the par value of one hundred dollars each, and authorized the directors to assess upon five hundred shares as soon as subscribed for, and from time to time to enlarge the capital stock up to the maximum limit, all the shares to be equally assessed, it was held not to be necessary for the corporation to determine and fix the ultimate amount of its capital stock within the maximum limit before making assessments upon the first five hundred shares subscribed. *White Mountain R. Co. v. Eastman*, 34 N. H. 124.

⁹³ Under such circumstances, assessments may be recovered when the conditions of the contract as to the amount of the subscriptions have been complied with although the amount of capital has never been fixed or limited by a vote of the directors or of the

corporation. *Penobscot & K. R. Co. v. Bartlett*, 12 Gray (Mass.) 244, 71 Am. Dec. 753.

⁹⁴ Where, by an act under which a corporation was formed, its capital stock was not to exceed two thousand shares, the number to be determined from time to time by the directors, and assessments on each share were not to exceed one hundred dollars, and the directors caused subscription books to be opened, and, after more than two hundred and fifty shares were subscribed for, voted to close the books, but passed no other vote fixing the number of shares, it was held that the vote in effect lawfully fixed the number of shares for the time being at the number subscribed for, so as to render assessments thereon valid. *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. (Mass.) 311. See also *Bucksport & B. R. Co. v. Buck*, 65 Me. 536.

⁹⁵ *Bucksport & B. R. Co. v. Buck*, 65 Me. 536.

§ 591. — **Subscription of entire capital stock or of a certain percentage thereof.** As we shall see at length in subsequent sections, it is an implied condition precedent to liability on a subscription, unless there is something to show a contrary intention, that the full amount of capital stock, or particular percentage thereof, fixed by the charter, enabling act, articles of association, contract of subscription, or by the directors or stockholders when they are given authority to settle the same, shall be subscribed in good faith and by competent persons. And until this condition is fulfilled, the corporation cannot levy assessments or otherwise enforce subscriptions, in the absence of a waiver or estoppel.⁹⁶

§ 592. — **Payments on subscriptions.** Payments on subscriptions are clearly not conditions precedent to liability thereon for the full amount, unless it is expressly so provided by the charter or enabling act, or by the contracts of subscription themselves. Even when the charter or enabling act expressly requires a certain percentage of subscriptions to be paid at the time of subscribing, or before commencement of business, the requirement is not to be construed as making such payments conditions precedent to liability on subscriptions, unless such an intention clearly appears.⁹⁷

§ 593. — **Issue or tender of certificate of stock—In general.** As is noted in a subsequent chapter, a certificate is merely evidence of the holder's ownership of stock, and is not at all necessary to make one a stockholder.⁹⁸ And it is well settled that the issue or tender of a certificate of stock⁹⁹ is not a condition precedent to the right of a corporation to levy assessments or maintain an action on a subscription

⁹⁶ See §§ 692-706, *infra*.

⁹⁷ See § 708, *infra*.

⁹⁸ See chapter on Stock and Stockholders, *infra*.

⁹⁹ **United States.** *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679. See also *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702; *In re Grand Rapids Furniture Agency*, 209 Fed. 483.

Alabama. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261. See also *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

California. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110. See also *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

Delaware. *Delaware R. Co. v. Tharp*, 1 Houst. 149.

Georgia. *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536; *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230;

for stock, unless it is expressly required by the contract of subscrip-

Fulgam v. Macon & B. R. Co., 44 Ga. 597.

Illinois. *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 413, 82 N. E. 891, aff'g 131 Ill. App. 66; *Wemple v. St. Louis, J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906; *Corwith v. Culver*, 69 Ill. 502; *Chandler v. Northern Cross R. Co.*, 18 Ill. 190; *Kelly v. Killian*, 133 Ill. App. 102. See also *Crowther v. Bell*, 190 Ill. App. 48.

Indiana. *Slipher v. Earhart*, 83 Ind. 173; *Drover v. Evans*, 59 Ind. 454; *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174; *McCord v. Ohio & M. R. Co.*, 13 Ind. 220; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337. See also *Butler University v. Schoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642; *Hardy v. Merriweather*, 14 Ind. 203.

Kentucky. *Bullock v. Falmouth & C. H. Turnpike Road Co.*, 85 Ky. 184, 3 S. W. 129, overruling *Mt. Sterling Coal Road Co. v. Little*, 14 Bush 429; *Smith v. Gower*, 2 Duv. 17; *Shelbyville Trustees v. Shelbyville & E. Turnpike Co.*, 1 Metc. 54.

Maine. *Barron v. Burrill*, 86 Me. 66, 29 Atl. 939; *Chaffin v. Cummings*, 37 Me. 76; *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Massachusetts. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Brigham v. Mead*, 10 Allen 245.

Minnesota. *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149, 57 Minn. 456, 59 N. W. 532; *Walter*

A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; *Marson v. Deither*, 49 Minn. 423, 52 N. W. 33 (overruling *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439, and *Minneapolis Harvester Works v. Libby*, 24 Minn. 327, in so far as they apply the contrary rule to subscriptions for other than preferred stock); *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Missouri. *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409; *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439.

Nebraska. *Nebraska Expos. Ass'n v. Townley*, 46 Neb. 893, 65 N. W. 1062.

New Jersey. *Robson v. C. E. Feniman Co.*, 83 N. J. L. 453, 85 Atl. 356; *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160.

New York. *Wheeler v. Millar*, 90 N. Y. 353; *Rutter v. Kilpatrick*, 63 N. Y. 604; *Stevens v. Episcopal Church History Co.*, 140 App. Div. 570, 125 N. Y. Supp. 573; *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031; *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 513. See also *Wheeler v. Millar*, 90 N. Y. 353, aff'g 24 Hun 541; *Burr v. Wilcox*, 22 N. Y. 551; *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 N. Y. 336; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635.

Oregon. *Astoria & S. C. Ry. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379.

Pennsylvania. *Buffington v. Turnpike Co.*, 3 Penr. & W. 71.

South Carolina. See *Glenn v. Rosborough*, 43 S. C. 272, 26 S. E. 611.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *Pa-*

tion,¹ for otherwise such delivery or tender is not due until the subscription price is paid.² And especially is this true where the subscriber has not demanded a certificate;³ or where the subscriber refuses to perform on his part;⁴ or where it appears that a tender would have been wholly useless;⁵ or where a recovery is sought for less than the full amount of the subscription and it does not appear that the balance has been paid;⁶ or where the action is brought by a receiver of the corporation in behalf of its creditors.⁷

ducah & M. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247; *Horn Bros. v. Baker*, — Tex. Civ. App. —, 173 S. W. 474; *McCord v. Southwestern Sundries Co.*, — Tex. Civ. App. —, 158 S. W. 226; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015; *Dallas Cotton & Woolen Mills v. Clancy*, — Tex. App. —, 15 S. W. 194.

Utah. *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

Washington. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

Wisconsin. *Milwaukee Smelting & Refining Co. v. Lindenberger*, 142 Wis. 273, 124 N. W. 272.

This is true both as to subscriptions to stock of a corporation already organized and subscriptions made prior to and for the purpose of organization. *Marson v. Deither*, 49 Minn. 423, 427, 52 N. W. 38.

If a tender is made, it need not be kept good by having the stock tendered in court. *Farmers' Mut. Tel. Co. v. Howell*, 132 Iowa 22, 109 N. W. 294.

¹ See § 595, *infra*.

² **California.** *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Missouri. *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409.

Nebraska. *Nebraska Expos. Ass'n v. Townley*, 46 Neb. 893, 65 N. W. 1062.

New Jersey. *Robson v. C. E. Fen-niman Co.*, 83 N. J. L. 453, 85 Atl. 356.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

³ *Chandler v. Northern Cross R. Co.*, 18 Ill. 190; *Shelbyville Trustees v. Shelbyville & E. Turnpike Co.*, 1 Mete. (Ky.) 54; *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

Failure to deliver the certificate is no defense to an action on a note given for the amount of the subscription under such circumstances. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261.

⁴ Where the proper town officers on demand refuse to issue bonds voted to pay a subscription to railroad stock, a tender of certificates of stock by the company to the town is not necessary, but a readiness to deliver them is sufficient. *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313.

⁵ *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

⁶ *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317; *Marson v. Deither*, 49 Minn. 423, 427, 52 N. W. 38; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327.

A refusal to issue a certificate until the full amount of the subscription has been paid is no defense. *Shelbyville Trustees v. Shelbyville & E. Turnpike Co.*, 1 Mete. (Ky.) 54.

⁷ Even if a tender of the certificate is necessary in an action by the corporation on the express promise of the

Similarly one cannot escape liability on his subscription on the ground that the stock certificate issued to him does not comply with the requirements of the statute.⁸ Nor is one who has been recognized by the corporation as a stockholder and who, because of his participation as a stockholder in corporate meetings, is estopped to deny that he is a stockholder, entitled to rescind his subscription and recover back what he has paid, on the ground that no certificate has been issued to him.⁹

But the corporation, before it can require payment in full, must be ready and willing and able to deliver the stock subscribed for, and, in actions to recover the full amount subscribed, or to enforce payment of the final instalment of a subscription, this must be alleged, and proved if denied.¹⁰

There can be no recovery on a subscription if valid certificates for the entire authorized capital have already been issued.¹¹ Nor can a subscriber to stock of one corporation be compelled to accept stock

subscriber to pay, it is not necessary in an action by a trustee in bankruptcy, since such an action is not based on his contract but on his general liability as a subscriber to pay for his stock whenever it is needed to pay the liabilities of the corporation, and since a certificate is not needed to perfect the subscription. *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179.

“In such case the action is not founded upon his special agreement, but in behalf of the creditors of the company on his liability as subscriber to pay for his stock. And, as no certificate was requisite to perfect his subscription, its delivery or tender is not necessary to the maintenance of the action. He, on payment, will have his remedy against the company for a certificate, if desired by him.” *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031.

⁸ *Ferrochem Co. of Pennsylvania v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

⁹ *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509.

¹⁰ *Georgia*. *Lehigh v. Chattanooga, R. & C. R. Co.*, 104 Ga. 13, 30 S. E. 381.

Indiana. *McCord v. Ohio & M. R. Co.*, 13 Ind. 220. See also *Crooks v. State (Ind.)*, 4 N. E. 589.

Minnesota. *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149, 57 Minn. 456, 59 N. W. 532.

Missouri. *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142.

Ohio. *James v. Cincinnati, H. & D. R. Co.*, 2 Disn. 261.

Tennessee. *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

Wisconsin. See *Milwaukee Smelting & Refining Co. v. Lindenberger*, 142 Wis. 273, 124 N. W. 272.

In *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577, it was held that it sufficiently appeared that the corporation had in its possession a sufficient amount of stock to supply the defendant with the amount for which he subscribed.

¹¹ See § 589, *supra*.

of another corporation,¹² or stock of a different character from that for which he subscribed.¹³

§ 594. — Rule in respect to sales and subscriptions distinguished. A different rule in this regard applies to a sale of stock, as distinguished from a subscription. In such a case, issue or tender of a certificate is a condition precedent to the right to maintain an action for the price.¹⁴

Whether one becomes a stockholder by payment or subscription, he is entitled to a certificate upon making payment, but in the case of a purchase from the company the delivery of the certificate and payment are intended to be concurrent acts, while in the case of a subscription such is not the condition upon which payment may be required.¹⁵

§ 595. — Effect of provisions of contract or charter. Of course, the contract of subscription may make the issue or tender of a certificate of stock a condition precedent to the right of the corporation to enforce payment.¹⁶ So it has been held to be necessary where the corporation undertakes to issue a certificate simultaneously with the final

¹² See § 524, *supra*.

¹³ See § 572, *supra*.

¹⁴ *Fulgum v. Macon & B. R. Co.*, 44 Ga. 597; *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38; *Security Title & Trust Co. of York v. Stewart*, 154 N. Y. App. Div. 434, 139 N. Y. Supp. 74; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

¹⁵ *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031; *Astoria & S. C. R. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379.

¹⁶ *Hedge v. Gibson*, 58 Iowa 656, 12 N. W. 713; *Lawrence v. Smith*, 50 Iowa 703; *Cooper v. McKee*, 49 Iowa 286; *Courtright v. Deeds*, 37 Iowa 503. See also *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 18 S. W. 842.

"It is undoubtedly true that parties may contract that the stock shall not be paid for until the certificate there-

for has been issued and delivered or tendered.'" *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38.

Where the contract provided that as soon as the subscription was accepted by the corporation it should issue a certificate to the subscriber, and a certificate was issued in his name but was retained by the corporation as security for a note given for part of the price of the stock, and there was no request for delivery of the certificate to the subscriber and no refusal to deliver it, it was held that its nondelivery did not constitute a defense to an action on the note. *Georgia Life Ins. Co. v. Lasseter*, 17 Ga. App. 621, 87 S. E. 922.

See *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351, and *Northwestern Trust Co. v. Fox*, 33 N. D. 482, 157 N. W. 472, where the evidence was held insufficient to show such an agreement.

payment by the subscriber,¹⁷ or the contract provides that a certificate shall be issued to the subscriber "upon" payment of his subscription,¹⁸ on the ground that such provisions make the payment of the money and the issuance of the certificate concurrent acts.

But there is authority to the effect that a previous tender is not necessary even under such circumstances.¹⁹ And it has been held that even if delivery of the stock and payment of subscription notes are to be concurrent acts, the corporation is only bound to conditionally tender the stock before suing on the notes, and not actually to deliver it.²⁰

If the charter provides that a certificate shall be issued to each subscriber paying a certain sum, a subscriber has no right to claim a certificate until he has paid that amount, and nondelivery of a certificate to him is no defense to an action by the corporation to recover the amount of a call where it does not appear that he has made such payment.²¹

§ 596. — Subscriptions to preferred stock. In the case of preferred stock,²² especially where it is authorized and issued after the organization of the corporation,²³ it has been held that while the subscription constitutes a valid contract on the part of the company

¹⁷ In *re Hall*, 206 Fed. 850, holding that a purchaser of the subscription contract stands in no better position in this regard than the corporation.

¹⁸ *Summers v. Sleeth*, 45 Ind. 598. See also *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51.

In such case there are mutual and dependent covenants, neither of which can be enforced without performance or tender of performance of the other. *Courtright v. Deeds*, 37 Iowa 503.

¹⁹ *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 18 S. W. 842.

²⁰ *Hardy v. Merriweather*, 14 Ind. 203.

²¹ *Sinkler v. Turnpike Co.*, 3 Penr. & W. (Pa.) 149.

²² See *Snodgrass v. Zander & Co.*, 106 Ark. 462, 154 S. W. 212.

²³ *St. Paul, S. & T. F. R. Co. v. Robbins*, 28 Minn. 439.

In *Marson v. Deither*, 49 Minn. 423, 427, 52 N. W. 38, the court limits the application of the rule laid down in *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439, to subscriptions to preferred stock, and overrules that case in so far as it attempts to apply the same rule to subscriptions generally. In this connection the court says: "If the so-called 'preferred stock' in that case was, as is often the fact, the obligations of the corporation, or merely pledges of its revenues, of course it stood on the same footing as any other purchase."

In *Astoria & S. C. R. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379, and *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031, the *Robbins* case, *supra*, was referred to and distinguished on the ground that the subscription was for preferred stock.

to issue the stock to the subscriber upon his paying for it, and, on his part, to receive and pay for it, it does not give him an interest in the company, nor vest in him the title to the stock; that it can be sustained as a contract only on the implied promise of the company to issue the stock to the subscriber; that these promises on the part of the subscriber and the company are concurrent and dependent so that neither party can compel performance by the other without performing or offering to perform on his part; and hence that an action by the corporation to recover the amount of such a subscription is prematurely brought where it has neither issued nor offered to issue the stock.²⁴

§ 597. — Subscriptions by municipal corporations. In the case of subscriptions by municipal and quasi municipal corporations, it has been held that the stock certificates may be demanded as a condition to the payment of the money.²⁵

§ 598. Waiver of conditions by subscriber. When a person makes a contract to pay money or perform any other act upon the performance of a condition precedent, he may expressly or impliedly waive the performance of the condition at any time, and thereby render his promise absolute. Having once waived the condition, he cannot afterwards insist upon its performance, or claim a discharge by reason of its nonperformance. This principle applies with full force to subscriptions to the stock of a corporation.²⁶

²⁴ This is sometimes stated as an exception to the general rule that issuance and tender of a certificate are not a condition precedent to the corporation's right of action (see *Snodgrass v. Zander & Co.*, 106 Ark. 462, 154 S. W. 212), but it would seem to be merely an application of the rule that the corporation, before it can require payment, must be ready and willing to deliver the stock, and must allege such readiness in an action on the subscription, and prove it if denied. It will be noted that in *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439, it was not even alleged that the corporation was ready and willing to issue stock certificates on payment of the subscription.

²⁵ *Board Com'rs Hamilton Co. v.*

State, 115 Ind. 64, 17 N. E. 855, followed in *Pope v. Board Com'rs Lake Co.*, 51 Fed. 769.

²⁶ **United States.** *Graves v. Saline County*, 161 U. S. 359, 40 L. Ed. 732; *Wyman v. Bowman*, 127 Fed. 257. See also *Hollander v. Heaslip*, 222 Fed. 808.

California. *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

Connecticut. *Lane v. Brainerd*, 30 Conn. 565.

Indiana. *Slipher v. Earhart*, 83 Ind. 173; *Evansville, I. & C. Straight Line R. Co. v. Dunn*, 17 Ind. 603; *O'Donald v. Evansville, I. & C. Straight Line R. Co.*, 14 Ind. 259; *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355.

Iowa. *Des Moines Valley R. Co. v.*

A waiver of a condition precedent may be implied from any act on the part of the subscriber, with knowledge that the condition has not been performed, which is inconsistent with an intention to insist upon performance of the condition, and it will always be implied, as a matter of law, and irrespective of the actual intention, from any act, with such knowledge, which the subscriber could not lawfully do if he intended to insist upon the condition.²⁷ A waiver will generally be implied, for example, if a subscriber takes part in stockholders' meetings, or otherwise acts as a stockholder, before the condition is performed, for a conditional subscription does not make the subscriber a stockholder until performance of the condition.²⁸ There is also a

Graff, 27 Iowa 99, 1 Am. Rep. 256; **Burlington & M. River R. Co. v. Boester**, 15 Iowa 555.

Massachusetts. **Central Turnpike Corporation v. Valentine**, 10 Pick. 142.

Minnesota. **Seymour v. Jefferson**, 74 N. W. 149.

New York. **Hutchins v. Smith**, 46 Barb. 235.

Ohio. **Chamberlain v. Painesville & H. R. Co.**, 15 Ohio St. 225.

Oregon. **Lee v. Imbrie**, 13 Ore. 510, 11 Pac. 270.

Pennsylvania. **Cornell's Appeal**, 114 Pa. St. 153, 6 Atl. 258; **Hanover Junction & S. R. Co. v. Grubb**, 82 Pa. St. 36; **Livingston v. Pittsburgh & S. R. Co.**, 2 Grant's Cas. 219.

Texas. **Commonwealth Bonding & Casualty Ins. Co. v. Barrington**, — Tex. Civ. App. —, 180 S. W. 936; **Panhandle Packing Co. v. Stringfellow**, — Tex. Civ. App. —, 180 S. W. 145.

Vermont. **Montpelier & W. River R. Co. v. Langdon**, 45 Vt. 137.

Virginia. **Wright v. Agelasto**, 104 Va. 159, 51 S. E. 191.

As to waiver of conditions requiring subscription to the full amount of the capital stock, or a certain percentage thereof, see § 704, *infra*.

²⁷ **Connecticut**. **Lane v. Brainerd**, 30 Conn. 565.

Indiana. **Parks v. Evansville, I. &**

C. Straight Line R. Co., 23 Ind. 567; **McAllister v. Indianapolis & C. R. Co.**, 15 Ind. 11.

Minnesota. **Seymour v. Jefferson**, 74 N. W. 149.

New Hampshire. **New Hampshire Cent. R. Co. v. Johnson**, 30 N. H. 390, 64 Am. Dec. 300.

Texas. **Panhandle Packing Co. v. Stringfellow**, — Tex. Civ. App. —, 180 S. W. 145.

And see the cases cited in the following notes.

A subscriber waives a condition that a certain amount of stock shall be subscribed by making contracts and incurring liabilities on behalf of the corporation, with knowledge that the required amount has not been subscribed. **Hutchins v. Smith**, 46 Barb. (N. Y.) 235.

²⁸ **United States**. **Wyman v. Bowman**, 127 Fed. 257.

Connecticut. **Lane v. Brainerd**, 30 Conn. 565.

Indiana. **McAllister v. Indianapolis & C. R. Co.**, 15 Ind. 11.

New Hampshire. **New Hampshire Cent. R. Co. v. Johnson**, 30 N. H. 390, 64 Am. Dec. 300.

Ohio. **Dayton & C. R. Co. v. Hatch**, 1 Disn. 84.

Pennsylvania. **Pittsburgh & S. R. Co. v. Proudft**, 2 Pittsb. R. 85.

As where he assists in the organization and management of the company

waiver of conditions in a subscription where the subscriber acts as a director or other officer of the corporation, when his right to do so depends upon his being a stockholder.²⁹

The acceptance, use and sale of the stock in the face of a non-compliance with the condition will ordinarily constitute a waiver.³⁰

Payment of a subscription, or of a part thereof, with knowledge of nonperformance of a condition precedent to liability to make the payment, will be held a waiver of the condition, unless there is something to show that a waiver was not intended.³¹ But part payment will not constitute a waiver, if it appears from the circumstances or otherwise that there was no such intention.³²

and is elected and acts as director and vice president. *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145.

Compare *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375, where it was held that a subscriber to stock in a railroad company on condition that no more than a two per cent. assessment should be made until the sum estimated to be necessary to build the road should be subscribed did not waive the condition by soliciting other subscriptions, taking part in meetings of stockholders, accepting office as a director, and taking part in directors' meetings, or by being present at meetings at which the making of construction contracts was announced and assessments voted, it not appearing that he took part in such meeting.

Merely being present at a meeting as a spectator, without taking any part therein, does not show a waiver of conditions precedent. *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

²⁹ *Lane v. Brainerd*, 30 Conn. 565; *Dayton & C. R. Co. v. Hatch*, 1 Disn. (Ohio) 84; *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145. Compare *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375. See also *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138.

³⁰ There is a waiver where the sub-

scriber accepts the stock, pays fifty per cent. of his subscription, secures the remainder by his note, holds and votes his stock for four years, and then sells it to bona fide purchasers. *Wyman v. Bowman*, 127 Fed. 257.

³¹ **Alabama.** *Lehman, Durr & Co. v. Warner*, 61 Ala. 455.

Indiana. *Parks v. Evansville, I. & C. Straight Line R. Co.*, 23 Ind. 567.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

Ohio. *Dayton & C. R. Co. v. Hatch*, 1 Disn. 84.

Pennsylvania. *Mack's Appeal* (Pa.), 7 Atl. 481; *Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258; *Livingston v. Pittsburgh & S. R. Co.*, 2 Grant's Cas. 219.

See also *Hollander v. Heaslip*, 222 Fed. 808; *Wyman v. Bowman*, 127 Fed. 257; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138.

A person who subscribes conditionally for stock of a railroad company, the subscription being payable in land, waives the condition by making an absolute conveyance of the land to the company, and receiving his stock. *Parks v. Evansville, I. & C. Straight Line R. Co.*, 23 Ind. 567.

³² *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Pittsburgh & C. R.*

Giving an absolute note in payment of a conditional subscription is a waiver,³³ unless the circumstances are such as to show that the parties did not so intend. In the latter case, there is no waiver.³⁴

Of course, a condition precedent upon which a subscription has been made may be expressly waived by agreement or stipulation, either in writing or oral; and it is waived by subsequently entering into an agreement or stipulation which is inconsistent with perform-

Co. v. Stewart, 41 Pa. St. 54; Johnson v. Schar, 9 S. D. 536, 70 N. W. 838.

Where notes for stock in a creamery to be erected were given on the express written agreement that they should be void if the creamery was not satisfactory to the subscriber, it was held that part payment of the same did not amount to a waiver of the condition or prevent the subscriber from setting up the fact that he had expressed his dissatisfaction as a defense to an action for the balance. Sherrod v. Duffy, 160 Mich. 488, 136 Am. St. Rep. 451, 125 N. W. 366.

³³ Slipher v. Earhart, 83 Ind. 173; Evansville, I. & C. Straight Line R. Co. v. Dunn, 17 Ind. 603; Taylor v. Fletcher, 15 Ind. 80; McDaniel v. Evansville, I. & C. Straight Line R. Co., 14 Ind. 464; Williams v. Evansville, I. & C. Straight Line R. Co., 14 Ind. 428; Anderson v. Evansville, I. & C. Straight Line R. Co., 14 Ind. 388; O'Donald v. Evansville, I. & C. Straight Line R. Co., 14 Ind. 259; Keller v. Johnson, 11 Ind. 337, 71 Am. Dec. 355; Henderson & N. R. Co. v. Moss, 2 Duv. (Ky.) 242. See also Wyman v. Bowman, 127 Fed. 257.

Giving a note for the balance of a conditional subscription, and taking a receipt from the company stipulating that the amount of the note, when paid, shall be applied on the stock, is prima facie a waiver of the condition. Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225.

Where notes were given for the amount subscribed on the representation that the company was about to

perform the condition on which the subscription was made, and that it was necessary for it to have the notes to enable it to do so, it was held that performance of the condition was not intended to precede the payment of the notes, and nonperformance was no defense to an action thereon. Keller v. Johnson, 11 Ind. 337, 71 Am. Dec. 355.

³⁴ Where a subscription for stock in a railroad company was made on condition that the road should be located over a certain route, and notes for the subscription were given, payable at such times as the instalments fell due, it was held that the fact that the notes were unconditional did not make the giving of them a waiver of the right to have the road located as stipulated before being called upon to pay the notes. Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385.

A note given by a subscriber in payment of his subscription, on the false representation by an agent of the corporation that a condition precedent has been complied with, is not a waiver, and may be avoided for the fraud. Taylor v. Fletcher, 15 Ind. 80.

But a defense setting up that it was falsely represented to the subscriber, at the time the note was executed, that the condition had been performed is bad where it does not show who made the representations, or that the subscriber was thereby induced to execute the note. O'Donald v. Evansville, I. & C. Straight Line R. Co., 14 Ind. 259.

ance of the condition, whether the condition is expressly referred to or not.³⁵

Acts of a subscriber which would otherwise constitute a waiver of conditions will not have this effect if he does not know at the time that the conditions have not been performed, but supposes that they have. Thus, a stockholder who subscribes on condition that a certain amount of stock shall be taken, and who, without knowledge that the required amount has not been subscribed, waives notice of a stockholders' meeting, and votes by proxy at a special meeting,³⁶ or who is named as one of the incorporators of the company, participates in the proceedings of its stockholders, and acts as a director of the company,³⁷ or who makes part payments on the stock,³⁸ does not thereby waive performance of the condition, unless by so doing he intends to be bound by the subscription in any event and regardless of whether or not the condition has been performed.³⁹ Nor will part payment constitute a waiver when made in reliance in good faith on a false representation that the condition has been performed.⁴⁰

³⁵ *Hall v. Owensboro Wagon Co.*, 15 Ky. L. Rep. 782 (abstract); *Henderson & N. R. Co. v. Moss*, 2 Duv. (Ky.) 242; *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36; *Montpelier & W. River R. Co. v. Langdon*, 45 Vt. 137.

A condition that bonds shall be issued as a bonus to subscribers for stock is waived by the voluntary acceptance of corporate notes in lieu of the bonds. *Hughes Manufacturing & Lumber Co. v. Wileox*, 13 Cal. App. 22, 108 Pac. 871.

³⁶ *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688; *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643; *Denny Hotel Co. of Seattle v. Gilmore*, 6 Wash. 152, 32 Pac. 1004.

³⁷ *Wright v. Agelasto*, 104 Va. 159, 51 S. E. 191.

³⁸ *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838.

As where he accepts a certificate and makes payments on the assumption that the condition has been complied with. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

³⁹ Defendant subscribed to stock on condition that the corporation obtain fifteen thousand dollars bona fide subscriptions. Defendant applied for the corporate charter, became one of the incorporators and a director, and took part in the corporate proceedings. An instruction was asked that if defendant did not know that valid subscriptions to the said amount had not been obtained in good faith, his acts referred to could not be deemed a waiver of the condition on which his subscription was made. This request was held properly refused inasmuch as it should have been subject to the qualification that the defendant did not intend that such acts on his part should constitute a waiver of such condition. Clearly a condition of the nature stated may be waived, and hence the propriety of such qualification. *Wright v. Agelasto*, 104 Va. 159, 51 S. E. 191.

⁴⁰ *Hollander v. Heaslip*, 222 Fed. 808.

Whether or not conditions have been waived is ordinarily a question of fact.⁴¹

§ 599. Estoppel of subscriber. Aside from any question of intentional waiver, a subscriber may be estopped by his conduct from saying that his subscription was conditional,⁴² or from relying on the nonperformance of the condition to escape liability thereon.⁴³ And he will be so estopped if, with knowledge that the condition has not been performed, he has participated in stockholders' meetings, and in voting for spending money or making contracts, or in any other acts which could not be properly done except upon the assumption that performance of the condition would not be required.⁴⁴

Subscribers who acquiesce in the filing of a certificate of increase of stock with the secretary of state, or who know the contents of a certificate so filed, are estopped, as against subsequent creditors, to deny liability on the ground that the subscription was a qualified one on the part of all of the subscribers.⁴⁵

Where a commissioner appointed to receive subscriptions recites, in the certificate showing that the requisite number of shares have been subscribed to entitle the company to incorporation, that he has

⁴¹ *Hanover Junction & S. R. Co. v. E. Haldeman & Co.*, 2 Chest. Co. Rep. (Pa.) 256; *Livingston v. Pittsburgh & S. R. Co.*, 2 Grant's Cas. (Pa.) 219.

⁴² *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358; *Hanover Junction & S. R. Co. v. E. Haldeman & Co.*, 2 Chest. Co. Rep. (Pa.) 256.

One who holds himself out and acts as a stockholder, and takes part in the affairs of the corporation, cannot question his liability as a stockholder on the ground that his written subscription was subject to an oral condition. *Iyell Ave. Lumber Co. v. Lighthouse*, 137 N. Y. App. Div. 422, 121 N. Y. Supp. 802.

As to estoppel to set up that a subscription was delivered subject to an oral condition, see § 600, *infra*.

⁴³ *Wright v. Agelasto*, 104 Va. 159, 51 S. E. 191. See also *Hollander v. Heaslip*, 222 Fed. 808.

As to estoppel of a subscriber to

set up nonperformance of an express or implied condition that the full amount of the capital stock or a certain percentage thereof shall be subscribed before he shall become liable on his subscription, see § 704, *infra*.

As to the estoppel of subscribers to deny the validity of their subscriptions generally, see § 716, *infra*.

⁴⁴ *Connecticut*. *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536.

Maryland. *Hager v. Cleveland*, 36 Md. 476.

Michigan. *Detroit Driving Club v. Fitzgerald*, 109 Mich. 670, 67 N. W. 899; *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344.

Minnesota. *Duluth Inv. Co. v. Witt*, 63 Minn. 538, 65 N. W. 956.

New Hampshire. *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

⁴⁵ *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

personally subscribed for a number of shares, he is estopped to afterwards set up that his subscriptions were conditional.⁴⁶

The fact that a subscriber was present at a meeting of stockholders does not estop him from insisting upon performance of conditions precedent, or claiming a discharge because of nonperformance, where he was merely a spectator, and took no part in the meeting, and all his acts showed an intention not to pay his subscription.⁴⁷

To constitute an estoppel, the person relying on it must have in some way altered his position for the worse in reliance upon something the subscriber has done or omitted to do.⁴⁸

§ 600. Conditional delivery of subscriptions. It is a settled general principle in most jurisdictions that it may be shown that a written agreement, including contracts of subscription, was delivered with the understanding that it should not take effect until the performance or fulfillment of an oral condition, even though the delivery may have been to an agent or even a director of the corporation, the evidence being admitted in such a case, not for the purpose of adding a condition to the contract or agreement, but for the purpose of showing that as yet there has been no contract or agreement at all.⁴⁹

This doctrine, however, is to be applied only in "cases strictly

⁴⁶ *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

⁴⁷ *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

⁴⁸ *Hollander v. Heaslip*, 222 Fed. 808.

⁴⁹ *Arkansas. Pickler v. Arkansas Packing Co.*, 112 Ark. 33, 164 S. W. 764.

Illinois. Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, 40 N. E. 318, aff'g 51 Ill. App. 447; *Ottawa, O. & F. River Valley R. Co. v. Hall*, 1 Ill. App. 612. See also *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246.

Iowa. See Guthrie Ice Co. v. Selby, 166 Iowa 474, 147 N. W. 923.

Michigan. Davis v. Kneale, 97 Mich. 72, 56 N. W. 220.

Minnesota. Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255. See also *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R.

A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026.

Missouri. See Louisiana Purchase Expos. Co. v. Schnurmacher, 160 Mo. App. 611, 140 S. W. 1198, 151 Mo. App. 601, 132 S. W. 326.

New York. Benton v. Martin, 52 N. Y. 570; *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334, 51 N. Y. Supp. 969.

Oregon. Portland Public Market v. Woodworth, 67 Ore. 327, 135 Pac. 529.

Pennsylvania. Cass v. Pittsburg, V. & C. Ry. Co., 80 Pa. St. 31.

Rhode Island. Sweet v. Stevens, 7 R. I. 375.

Texas. See Bivins v. Panhandle Packing Co., — Tex. Civ. App. —, 140 S. W. 523.

Wisconsin. Gilman v. Gross, 97 Wis. 224, 72 N. W. 885.

England. Pym v. Campbell, 6 El. & Bl. 370.

See also *Turner's Case*, 7 Ont. 448.

It may be shown that a subscription

between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery.”⁵⁰ Nor does it apply to a case where the agent of the subscriber violates his instructions not to deliver it until certain conditions have been performed.⁵¹

A subscriber may be estopped to show that his subscription was delivered conditionally, under the principle that a person who, by his words or conduct, wilfully causes another to believe in the existence of a certain state of facts, and thereby induces him to act on that belief so as to alter his previous condition, is estopped to deny the existence of those facts to the other's prejudice. This principle was applied in a Minnesota case in which the defendant had delivered a subscription to the stock of a proposed corporation to its promoter, subject to an oral condition, and other persons, without any notice of the condition, had also subscribed for stock, and paid in a large part of their subscriptions, and the corporation had been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of the subscriptions, and in ignorance of the condition attached to that of the defendant. Under these circumstances, it was held that the defendant was estopped to set up the condition for the purpose of defeating an action on his subscription.⁵²

paper was delivered to the soliciting agent with instructions not to deliver it to the corporation until the subscriber had made certain investigations, and should direct such delivery to be made if they proved satisfactory. *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261, 40 N. E. 318, aff'g 51 Ill. App. 447. Or that the subscriber signed on the understanding that he might consult a third person, to whom he had been referred, and might withdraw his subscription if the latter did not state certain facts to be as they were represented, since such evidence does not vary the terms of the contract, but rather tends to show that no contract ever existed. *Ada Dairy Ass'n v. Mears*, 123 Mich. 470, 82 N. W. 258.

A stipulation in the application against alterations, changes or erasures, does not change the rule. *Pick-*

ler v. Arkansas Packing Co., 112 Ark. 33, 164 S. W. 764.

⁵⁰ *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026. And see *Benton v. Martin*, 52 N. Y. 570; *Sweet v. Stevens*, 7 R. I. 375.

⁵¹ In *Bivins v. Panhandle Packing Co.*, — Tex. Civ. App. —, 140 S. W. 523, the person obtaining the subscription was held to be the agent of a citizens' soliciting committee and of the subscriber, and not the agent of the promoter or of the proposed corporation, so that the corporation was not chargeable with his violation of his instructions as to delivery.

⁵² *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026.

A subscriber who receives and de-

The doctrine permitting proof of conditional delivery has been criticised as "founded more on refinement of logic than upon sound practical grounds,"⁵³ and repudiated altogether in some jurisdictions. So it has been held that the doctrine permitting delivery of a writing in escrow to be delivered to the other party on the happening of a condition not expressed in the writing can have no application where the subscription is delivered to the commissioners appointed to receive subscriptions, since to make a writing an escrow it must be placed in the hands of a third person, and that under such circumstances the condition is void and the undertaking absolute.⁵⁴ And the same has been said to be true where delivery is made to a promoter, in a state where the subscription agreement is regarded as a contract between the subscribers and the promoter as the agent of the subscribers as a body.⁵⁵

Under a statute requiring all the original stockholders in a banking corporation to sign the certificate of incorporation and making the subscription an executed contract when the certificate is filed, it has been held that such a certificate, when executed and filed, must be given full effect according to its terms, against those who execute the same, although its filing may have occurred in contravention of the understanding and directions of some of them.⁵⁶ This holding, however, destroys a note previously given by him to the corporation cannot be heard to say that a new note executed by him in lieu thereof was given to an agent of the corporation to be delivered by him to the corporation only on the performance of a condition which was not performed, and hence that a delivery to it was unauthorized, especially where after such delivery he acts as secretary of the corporation and makes a voluntary payment on the new note. *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138.

⁵³ *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026.

⁵⁴ *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

⁵⁵ See *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L. R. A. 796, 12 Am. St. Rep. 701, 41 N. W. 1026, where it is said that the subscription agreement is a contract between the subscribers; that a promo-

ter of the corporation who obtains the subscriptions is the agent of the subscribers to hold the subscriptions until the corporation is formed and then turn them over to it without any further act of delivery on the part of the subscribers; and hence that a delivery to the promoter is a complete and valid delivery, the same as where a contract is delivered by the obligor to the obligee, and cannot be regarded as a delivery to a third party in escrow. It is to be noted, however, that in this case the subscriber was held to be estopped to set up that the delivery of his subscription was conditional.

⁵⁶ As where the certificate is signed by two members of a firm on the understanding that it shall not bind them unless a third member signs it, but it is filed though he refuses to sign. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

"This is on the ground of estoppel,

ever, was based on grounds of public policy, in view of the semipublic character of banks, the necessity for protecting depositors and avoiding the loss of confidence and general business disturbance which result from the failure of a bank.⁵⁷

Whether delivery was made in escrow or on condition is generally a question of fact.⁵⁸

III. SUBSCRIPTIONS UPON SPECIAL TERMS

§ 601. Definition and effect. As was shown in a former section, subscriptions upon special terms—sometimes called subscriptions upon conditions subsequent, and sometimes incorrectly called conditional subscriptions—are very different from subscriptions upon conditions precedent, or conditional subscriptions in the proper sense. A subscription upon condition precedent, or conditional subscription, is a subscription which, while it is a binding contract, does not make the subscriber a stockholder, or render him liable to pay the amount thereof, until the performance or fulfillment of some condition.⁵⁹

A subscription upon special terms, or upon condition subsequent, on the other hand, is an absolute and unconditional subscription. It makes the subscriber a stockholder, and renders him absolutely liable to pay the amount thereof according to its terms, from the time it is accepted, but contains special terms limiting the liability of the subscriber, or imposing particular obligations upon the corporation. In the latter case, performance of the stipulations by the corporation is not a condition precedent to liability on the part of the subscriber, but is an independent or collateral agreement, for a breach of which the corporation will be liable in damages,⁶⁰ although a failure to

but estoppel quoad the state, the benefit of which extends to all those who deal with the corporation on the faith of its status as such." *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

⁵⁷ *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

⁵⁸ *Louisiana Purchase Expos. Co. v. Schnurmacher*, 160 Mo. App. 611, 140 S. W. 1198, 151 Mo. App. 601, 132 S. W. 326.

⁵⁹ See § 573, *supra*.

⁶⁰ *Connecticut. Lane v. Brainerd*, 30 Conn. 565.

Georgia. Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536; *Johnson v.*

Georgia Midland & G. R. Co., 81 Ga. 725, 8 S. E. 531.

Iowa. Bobzin v. Gould Balancee Valve Co., 140 Iowa 744, 118 N. W. 40.

Kentucky. Henderson & N. R. Co. v. Leavell, 16 B. Mon. 358; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181.

Maine. Bucksport & B. R. Co. v. Inhabitants of Brewer, 67 Me. 295; *Belfast & M. L. R. Co. v. Inhabitants of Brooks*, 60 Me. 568; *Belfast & M. L. Ry. Co. v. Moore*, 60 Me. 561.

Michigan. Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

perform it may discharge the subscriber, except as against creditors, on the ground of a failure of consideration.⁶¹ Thus, an absolute and unconditional subscription to stock in a railroad company may stipulate, not as a condition precedent, but as a special term or collateral contract, that the company shall construct its road along a certain route, or that it shall establish a depot at a certain point. Performance of the stipulation is not necessary to render the subscriber liable on his subscription, and entitle the corporation to make and collect calls. Nor is it a condition precedent to the subscriber's becoming a stockholder. It is an absolute subscription for these purposes. Failure of the corporation to perform the stipulation merely gives the subscriber a right of action against it.⁶²

Stipulations, not amounting to conditions precedent, as to the time,

Minnesota. *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112, 1 N. W. 827.

Missouri. *North Missouri R. Co. v. Winkler*, 29 Mo. 318; *McGinnis v. Kortkamp*, 24 Mo. App. 378.

Nebraska. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 57 N. W. 493.

North Carolina. *Warren County Co-op. Ass'n v. Boyd*, 171 N. C. 184, 88 S. E. 153.

Ohio. *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Stunt v. Newark Weldless Tube & Steel Co.*, 22 Ohio Cir. Ct. 120.

Pennsylvania. *Miller v. Pittsburgh & C. R. Co.*, 40 Pa. St. 237, 80 Am. Dec. 570; *Pittsburgh & S. R. Co. v. Woodrow*, 3 Phila. 271.

Tennessee. *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732; *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842.

Vermont. *Connecticut & P. River R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

"A subscription on a condition subsequent," says Mr. Cook, "contains a contract between the corporation and the subscriber, whereby the corporation agrees to do some act,

thereby combining two contracts, one the contract of subscription, the other an ordinary contract of the corporation to perform certain specified acts. The subscription is valid and enforceable, whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy." *Cook, Stock & Stockholders*, § 78, quoted with approval in *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

A condition subsequent does not affect the subscriber's liability to take and pay for the stock, but merely gives him a right of action in case the condition is not complied with. *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40.

Noncompliance by the corporation does not invalidate the subscription, but merely gives the subscriber a cause of action against it. *Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258.

⁶¹ See § 646, *infra*.

⁶² *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 18 S. W. 842, and other cases cited in the note preceding.

or medium of payment, make the subscriber a stockholder as soon as accepted, although, of course, if the stipulations are valid, they fix the extent of the subscriber's liability.⁶³

A threatened violation of a condition subsequent may be enjoined in a proper case at the instance of the subscriber. So where a subscription is conditioned that the corporation will locate its plant at a certain place for a specified length of time, the subscriber may enjoin it from removing its plant from such place during such time.⁶⁴ And if a subscription to stock in a railroad corporation provides that the money shall be expended upon a certain part of the line, the corporation has no right to devote it to other purposes, and may be restrained from so doing.⁶⁵ Nor can a general creditor of the corporation divert it to other purposes by garnishment proceedings against the subscriber.⁶⁶

Special terms in a subscription may, as in the case of any other contract, be abrogated by a subsequent agreement between the subscriber and the corporation, and after the new agreement they cannot longer be enforced. Thus a special agreement between a subscriber and the corporation that the stock shall be paid for by crediting dividends is abrogated or rescinded by a new agreement under which the subscriber gives a stock note for the amount of his subscription, and he cannot set up the original agreement to defeat an action on the note.⁶⁷

Even where the articles permit the board of directors to receive subscriptions from municipal or quasi municipal corporations upon such terms as may be agreed upon, the presumption is that such subscriptions were made under the usual provisions of the articles and subject to the usual conditions, and the burden is upon the subscriber claiming the benefit of a contract varying such provisions or modifying such conditions to establish the existence of such exceptional contract and its terms.⁶⁸

⁶³ Under a subscription for a certain amount of stock, which provides that a certain percentage only shall be payable in any one year, the subscriber becomes a stockholder at once, in the absence of a provision to the contrary. *Attorney General v. Cape Fear Nav. Co.*, 2 Ired. Eq. (N. C.) 444.

⁶⁴ *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40.

⁶⁵ *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445.

⁶⁶ *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445.

⁶⁷ *McDowell v. Chicago Steel Works*, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854, aff'g 22 Ill. App. 405.

⁶⁸ *Wapello County v. Burlington & M. R. R. Co.*, 44 Iowa 585.

§ 602. Power to accept subscriptions upon special terms, and validity thereof—In general. In the absence of restrictions in its charter, a corporation, under its general power to contract, has the power to accept subscriptions upon any special terms not prohibited by positive law, or contrary to public policy, provided they are not such as to require the performance of acts which are beyond the powers conferred upon the corporation by its charter, and provided they do not constitute a fraud upon other subscribers or stockholders, or upon persons who are or may become creditors of the corporation.⁶⁹

Subject to the limitations above stated, a subscription for stock may contain special terms as to the time, mode or medium of payment;⁷⁰ as, for example, that it shall be payable in instalments,⁷¹ or that notes taken in payment of the stock shall be met wholly out of dividends.⁷²

Where a corporation is authorized by its charter to collect instalments on subscriptions at such times as may be required by the president and directors, it may accept subscriptions containing special terms as to the calls for instalments.⁷³ As we shall see in another chapter, there is nothing, in the absence of constitutional or statutory restrictions, to prevent a corporation from accepting subscriptions for stock under a special agreement by which they are to be paid in property, labor or services, provided the agreement is free from fraud, and the property, labor or services are of such value as to be a fair equivalent for the stock, and provided it is within the general powers of the corporation to contract therefor.⁷⁴

⁶⁹ *Georgia*. *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536.

Iowa. *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40.

Kentucky. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358.

Mississippi. *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373.

North Carolina. *Warren County Co-op. Ass'n v. Boyd*, 171 N. C. 184, 88 S. E. 153.

Tennessee. *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 18 S. W. 842.

A condition subsequent is a valid consideration for a stock subscription. *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40.

⁷⁰ *Attorney General v. Cape Fear Nav. Co.*, 2 Fred. Eq. (N. C.) 444.

After organization, the company may stipulate with subscribers that they may pay in any manner mutually agreed upon, and then is precluded from enforcing the subscription in any other manner. *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256.

⁷¹ *Columbus Institute of Milwaukee v. Conohan*, — Wis. —, 159 N. W. 720.

⁷² Such a collateral agreement is valid as between the parties, and constitutes, as between them, a full defense to an action on the notes. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72.

⁷³ *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373.

⁷⁴ *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86. Compare, however,

A subscription for stock in a railroad company may stipulate that the road shall be constructed along a certain route,⁷⁵ that the money paid upon the subscription shall be expended upon a certain part of the road,⁷⁶ that a depot shall be established and maintained at a certain point,⁷⁷ that it shall be operated under certain conditions,⁷⁸ or that it shall expend a certain sum within a specified time in the construction of its road.⁷⁹

A provision in a subscription to the stock of a manufacturing company that it will locate its plant at a certain place and maintain it there for a specified length of time is valid.⁸⁰

§ 603. — Violation of charter, statutory or constitutional provisions. A corporation clearly has no power to agree with subscribers

Henry v. Vermillion & A. R. Co., 17 Ohio 187. See also Southern Trust & Deposit Co. v. Yeatman, 134 Fed. 810, aff'g 130 Fed. 798.

Where the articles give subscribers the right to pay in grading and material, subscribers who do not offer to take jobs on the day fixed for letting contracts cannot afterwards claim the right to pay in that manner. Johnson v. Crawfordsville, F., K. & Ft. W. R. Co., 11 Ind. 280.

See chapter on Stock and Stockholders, *infra*.

⁷⁵ McMillan v. Maysville & L. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; Belfast & M. L. R. Co. v. Inhabitants of Brooks, 60 Me. 568; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

That when the road is located it shall touch or pass near a certain point. Henderson & N. R. Co. v. Leavell, 16 B. Mon. (Ky.) 358.

As to whether the subscriber is discharged by a failure to construct along such route or by a change in the route, see § 646, *infra*.

⁷⁶ Lane v. Brainerd, 30 Conn. 565; Hanover Junction & S. R. Co. v. Grubb, 82 Pa. St. 36; Milwaukee & N. I. R. Co. v. Field, 12 Wis. 340. See also Pike v. Bangor & C. S. L. R. Co., 68 Me. 445.

A stipulation that the money is to

be used in the construction of the road in a certain county is valid. Henderson & N. R. Co. v. Leavell, 16 B. Mon. (Ky.) 358.

Where a county subscribed to railroad stock upon the condition that money was to be spent "when found necessary" in procuring right of way, grading and masonry work, within the county, it was held that it was for the road to decide what part of the fund should be used for the purposes specified, it being bound to exercise reasonable judgment in the matter, and that it was at liberty to use the remainder of the fund for purposes as it needed it. Marion County v. Louisville & N. R. Co., 25 Ky. L. Rep. 1600, 78 S. W. 437.

But a subscription is void where it is conditioned that the avails shall be used in the construction of the road in a county in which the company has no right to construct a road. People ex rel. Averill v. Adirondack Co., 57 Barb. (N. Y.) 656.

⁷⁷ Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 18 S. W. 842.

⁷⁸ Johnson v. Georgia Midland & G. R. Co., 81 Ga. 725, 8 S. E. 531.

⁷⁹ Connecticut & P. Rivers R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181.

⁸⁰ Bobzin v. Gould Balance Valve Co., 140 Iowa 744, 118 N. W. 40.

upon special terms which are in violation of express charter, statutory or constitutional provisions. If it does so, the special terms, as a general rule, are void, not only as against subsequent creditors, but also as against the corporation itself, and they cannot be set up either to defeat an action upon the subscriptions, or as the foundation of an action against the corporation.⁸¹ This principle has frequently been applied to special agreements, by which subscriptions are to be paid in part only, or by which the money paid thereon is to be returned directly or indirectly to the subscribers, where the charter of the corporation or general statutory or constitutional provisions require payment in full.⁸²

An agreement that payment of a subscription shall be delayed beyond the time within which the charter requires it to be paid is void for want of power on the part of the corporation to make it.⁸³

A stipulation that a subscription may be paid in property, labor or services is void if the charter requires payment in money.⁸⁴

If possible, the agreement will be construed in such a way as to render the special terms valid rather than contrary to law.⁸⁵

⁸¹ *Indiana*. *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395.

Mississippi. *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347.

Nebraska. *Clarke v. Omaha & S. W. R. R.*, 4 Neb. 458.

Ohio. *Noble v. Callender*, 20 Ohio St. 199.

Tennessee. *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 37 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

An unauthorized limitation of the power to call in stock conferred on the directors by the statute is void. *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297.

⁸² *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 37 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495. In this case, where subscriptions were required by statute to be paid in full at their par value, it was held that a stipulation in a contract with a subscriber that he should receive, in addition to his shares of stock, interest-bearing bonds to an equal amount, se-

cured by a mortgage on the company's plant, was absolutely void, both as against creditors, and as between the subscriber and the corporation, and that failure of the corporation to carry out the stipulation did not release him from liability on his subscription. See also *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578; *Mann v. Cooke*, 20 Conn. 178; *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347.

⁸³ *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347.

⁸⁴ *Baile v. Calvert College Educational Society*, 47 Md. 117; *Clarke v. Omaha & S. W. R. R.*, 4 Neb. 458; *Noble v. Callender*, 20 Ohio St. 199.

As to the right to pay in property or services, see § 602, *supra*.

⁸⁵ In *Skillin v. Magnus*, 162 Fed. 689, it was held that a provision in a subscription to preferred stock that the subscribers should receive a certain amount of common stock as a "bonus" did not necessarily mean that such common stock was to be issued without consideration and

§ 604. — Agreements for surrender or repurchase of stock. Where a corporation sells stock, it may do so on special terms not prohibited by its charter or by statute, and not in fraud of creditors. According to the weight of authority, an agreement by which a purchaser of stock may, at his option, at the end of a certain time, return the stock and receive back the price, or whereby the company agrees to repurchase it at an agreed price after a certain time, is in the nature of a conditional sale with an option to the purchaser to rescind, and is valid,⁸⁶ provided there is a sufficient consideration which supports

hence in violation of the statute, and that it would not be so construed, since it was possible to validly issue such stock in such a way that the subscribers could get one share of each kind for the par price of one kind.

86 United States. Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829.

California. Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582; Tidewater Southern Ry. Co. v. Vance, — Cal. App. —, 160 Pac. 1097; Dickinson v. Zubiarte Min. Co., 11 Cal. App. 656, 106 Pac. 123. See also Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580.

Colorado. Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596.

District of Columbia. Royal Glue Co. v. Lange, 40 App. Cas. 9.

Georgia. Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536.

Illinois. Roush v. Illinois Oil Co., 180 Ill. App. 346. See also Chicago, P. & S. W. R. Co. v. Town of Marseilles, 84 Ill. 643.

Iowa. Wisconsin Lumber Co. v. Greene & W. Tel. Co., 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742; Iowa Lumber Co. v. Foster, 49 Iowa 25, 31 Am. Rep. 140.

Kansas. See Sarbach v. Kansas Fiscal Agency Co., 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113.

Minnesota. Vent v. Duluth Coffee & Spice Co., 64 Minn. 307, 67 N. W.

70; Browne v. St. Paul Plow Works, 62 Minn. 90, 64 N. W. 66.

Montana. Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

Nebraska. Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376.

Such a provision is enforceable where it does not appear that the stock was a part of the original stock which had never been subscribed for, or that there are any creditors. Hesse Envelope Co. of Texas v. Addison, — Tex. Civ. App. —, 166 S. W. 898.

An agreement making the purchaser the corporation's agent, and agreeing to repurchase the stock at the termination of the agency, is not ultra vires where there is nothing in the charter on the statute prohibiting it. Fleitmann v. John M. Stone Cotton Mills, 186 Fed. 466.

An agreement whereby one solicited to purchase stock after the organization of the corporation is given a certain time in which to determine whether he will take it or not, and pursuant to which he gives a note providing that the certificate of stock issued to him, but left with the corporation, shall be received in discharge of the note, is binding on the corporation and on the stockholders who were in no manner misled by it. Jones v. Johnson, 86 Ky. 530, 6 S. W. 582.

An agreement to buy back stock at par subscribed for by an employee

it,⁸⁷ and there is no fraudulent invasion of the rights of creditors or of the other stockholders.⁸⁸

A reason sometimes given for sustaining such agreements is that the contract is entire and indivisible, and that the sale cannot be sustained unless the contract to repurchase can be enforced; nor can the corporation be heard to say that the latter provision is ultra vires without rescinding the sale and returning the purchase money.⁸⁹

Especially are such agreements upheld where the corporation has power to purchase or deal in its own stock.⁹⁰ And according to the

on his leaving the employ of the corporation is not necessarily void under all circumstances. *Strodl v. Farish-Stafford Co.*, 145 N. Y. App. Div. 406, 130 N. Y. Supp. 35, rev'g 67 N. Y. Misc. 402, 122 N. Y. Supp. 609.

Such an agreement is not within the statute of frauds where it has been fully performed by the purchaser. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

An agreement to pay interest on the purchase price so returned is valid. *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829.

In *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742, it was held that an agreement in a contract for sale of corporate stock that the purchasers should receive privileges specified as dividends on the several shares, was separable in its character from an additional agreement that the corporation would repurchase the stock should it sell its franchises, and that if the latter contract was valid it would be enforced, irrespective of the question of the validity of the former agreement.

If such a contract is void under the laws of another state, or is unenforceable because the corporation has no surplus profits with which to make the purchase, these are matters of defense to be pleaded and proved by the corporation in an action against it to enforce such con-

tract. *Strodl v. Farish-Stafford Co.*, 145 N. Y. App. Div. 406, 130 N. Y. Supp. 35, rev'g 67 N. Y. Misc. 402, 122 N. Y. Supp. 609.

Where the evidence as to the existence of such an agreement is conflicting, the question is one of fact for the jury. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

⁸⁷ *In Ophir Consol. Mines v. Brynteson*, 143 Fed. 829, the consideration was held to be sufficient.

⁸⁸ See § 607, *infra*.

⁸⁹ *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582; *Tidewater Southern Ry. Co. v. Vance*, — Cal. App. —, 160 Pac. 1097; *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N. W. 70; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

The corporation cannot plead that the provision is ultra vires while it retains the benefits of the contract. *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

⁹⁰ *Illinois*. *Roush v. Illinois Oil Co.*, 180 Ill. App. 346.

Iowa. *Iowa Lumber Co. v. Foster*, 49 Iowa 25, 31 Am. Rep. 140.

Montana. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

Nebraska. *Fremont Carriage Mfg.*

weight of authority, they do not violate statutory provisions prohibiting corporations from purchasing their own stock,⁹¹ though there is authority to the contrary.⁹²

Some courts have held that such agreements do not violate statutes prohibiting the reduction of the capital stock except in a prescribed manner,⁹³ while others hold to the contrary where the agreement relates to an original issue of stock, as distinguished from a sale of treasury stock.⁹⁴ Where the latter rule obtains, it has been held that since such an agreement is forbidden by law and contrary to the charter powers of the corporation, and not merely in excess of them,

Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376.

Texas. Hesse Envelope Co. of Texas v. Addison, — Tex. Civ. App. —, 166 S. W. 898.

⁹¹ Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829; Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582; Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596; Royal Glue Co. v. Lange, 40 App. Cas. (D. C.) 9. See Vent v. Duluth Coffee & Spice Co., 64 Minn. 307, 67 N. W. 70.

If the option is exercised there is no sale, and no purchase or repurchase arises upon the part of the corporation by the return of the unsold stock. Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829.

⁹² Where the statute prohibits the corporation from purchasing its own stock except out of surplus profits, such a contract may be enforced if, when the time for performance arrives, the corporation has sufficient surplus with which to repay the subscriber, but not otherwise. In other words, the contract is legal, subject to the statutory limitation on its enforceability. In defending itself against the subscriber's attempt to enforce the contract, the burden is on the corporation to show that it would be illegal to do so, for there is no presumption one way or the other as to the existence of a sur-

plus. Richards v. Ernst Weiner Co., 207 N. Y. 59, 100 N. E. 592, aff'g 145 N. Y. App. Div. 353, 129 N. Y. Supp. 951.

In re Tichenor-Grand Co., 203 Fed. 720, holds that an agreement to repurchase made at the time of the subscription is invalid under such a statute as against the trustee in bankruptcy of the corporation, where the stock is actually issued to the subscriber and paid for, and he is carried upon the books of the corporation as a stockholder.

⁹³ Royal Glue Co. v. Lange, 40 App. Cas. (D. C.) 9; Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

⁹⁴ Such a contract in relation to stock of the original issue violates Mo. Rev. St. 1909, § 3354. Wilson v. Torchon Lace & Mercantile Co., 167 Mo. App. 305, 149 S. W. 1156.

Such a contract violates Rem. & Bal. Code, § 3697, providing that it shall be unlawful for the trustees to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, or to reduce the same except in the manner prescribed by the statute, articles of incorporation, or by-laws, and is not enforceable even though the rights of creditors are not involved. Kom v. Cody Detective Agency, 76 Wash. 540, 50 L. R. A. (N. S.) 1073, 136 Pac. 1155.

the defense of ultra vires may be interposed so as to prevent its enforcement.⁹⁵ And that in any event the contract cannot be regarded as an executed one so as to render the plea of ultra vires unavailable, where the corporation has not taken back the stock and returned the money, but, on the contrary, refuses to do so.⁹⁶

It has also been held that to sustain such agreements would destroy the force of statutes requiring a certain amount of bona fide subscriptions as a condition precedent to incorporation, or to the validity of an increase of stock.⁹⁷ And also that such an agreement cannot be sustained on the theory of a conditional purchase where the person with whom it is made is so completely the owner of the stock that he receives and appropriates the dividends paid thereon and retains them while seeking to enforce the contract to repurchase.⁹⁸

The validity of such an agreement cannot be made to depend upon the amount to be paid by the corporation on the return of the stock, and it is immaterial whether it is equal to, or more or less than the original price.⁹⁹

In order that the corporation may be bound by such an agreement in any case, it must of course be shown that it is the contract of the corporation.¹

The corporation has no interest in an agreement by a promoter or other person to repurchase the stock of a subscriber, to which it is not a party.² An agreement of this character is in no way binding upon

⁹⁵ *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156.

⁹⁶ *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156.

⁹⁷ Such an agreement is invalid under the statutes of Michigan. *Allen v. Commercial Nat. Bank of Detroit*, 191 Fed. 97.

⁹⁸ *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156.

⁹⁹ *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582.

¹ Such an agreement cannot be enforced against the corporation, where it is not regularly executed by the president and secretary with the corporate seal attached, and it does not

appear that the directors knew of its existence. *Dox v. R. E. Lomax Co.*, 29 Cal. App. 718, 156 Pac. 874.

Such a contract is not admissible in evidence against the corporation where it is not under the seal of the corporation and there is no proof that the purported signatures of corporate officers thereto are genuine nor that they were authorized to make the contract. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580.

² See, in this connection, § 150.

Where a subscriber, pursuant to a right claimed under an agreement with a promoter, tendered back to the latter his stock and demanded payment of the amount he had paid in thereon, it was held no defense to the action that he had not paid his assessments when made as his contract provided, where the corpora-

the corporation,³ unless it ratifies it and adopts it as its own,⁴ and it is not a defense to an action by the corporation on the subscription.⁵

If the agreement is in writing and on its face is the individual obligation of the signers, it cannot be shown that it was intended that the corporation should be bound thereby.⁶

In construing such a contract, it must be interpreted as a whole.⁷

If the obligation to take back the stock is conditional, the purchaser must show compliance with the conditions precedent on his part.⁸ So he must return or offer to return the stock,⁹ and the dividends received by him on the same, unless under the terms of the contract he is entitled to retain them.¹⁰

tion, assuming that time was of the essence of the contract, had accepted payment after due, thereby waiving the provisions of the contract in that respect. *Holliday v. Wright*, 134 Mich. 608, 96 N. W. 949.

³ *Russell v. Broadus Cotton Mills* (Ala.), 39 So. 712; *Castleman-Blake-more Co. v. Brucker*, 167 Ky. 269, 180 S. W. 360; *Drucklieb v. Harris*, 209 N. Y. 211, 102 N. E. 599, rev'g 155 N. Y. App. Div. 83, 140 N. Y. Supp. 60; *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

⁴ *Malcomson v. Monaton Realty Investing Corporation*, 154 N. Y. App. Div. 694, 139 N. Y. Supp. 405, aff'd 214 N. Y. 677, 108 N. E. 1100. See also *McComb v. Barcelona Apartment Ass'n*, 134 N. Y. 598, 31 N. E. 613. See §§ 152-156.

⁵ *Huster v. Newkirk Creamery & Ice Co.*, 42 Okla. 440, L. R. A. 1915 A 390, 141 Pac. 790; *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

⁶ *Russell v. Broadus Cotton Mills* (Ala.), 39 So. 712.

⁷ *Royal Glue Co. v. Lange*, 40 App. Cas. (D. C.) 9.

⁸ *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760.

⁹ *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742. See also *Dickinson v. Zu-*

biate Min. Co., 11 Cal. App. 656, 106 Pac. 123.

Where the subscriber is given the option to return his stock and receive back his money in case the corporation does not do certain things by a certain date, he must tender back the stock and demand such repayment. *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467.

Where the contract provides that if the purchaser is discharged as an employee of the corporation, the corporation will, at his option, and within six months after his discharge, "take redelivery" of the stock and repay the par value thereof, the option can only be exercised by an actual redelivery or tender of redelivery within the time prescribed, and a mere notification within that time of an election to redeliver is insufficient. *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

A mere allegation that he is ready and willing to return it is not enough. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569; 74 Pac. 938.

¹⁰ If he retains the dividends and does not even offer to return them, he is not entitled to enforce the agreement to repurchase because he does not come into equity with clean hands. *Wilson v. Torchon Lace &*

If the contract provides that the stock may be returned at the expiration of a specified time from the date of the sale, the corporation is not obligated to take it back and refund the money until after the expiration of the agreed period.¹¹ And the option to return it must be exercised within a reasonable time after the expiration of such period.¹²

If no time is fixed within which a rescission may be demanded, the subscriber must exercise his right within a reasonable time,¹³ especially as against sureties for the performance of the provision by the corporation.¹⁴

Acceptance of dividends by the purchaser does not estop him from rescinding within the time prescribed.¹⁵

Mercantile Co., 167 Mo. App. 305, 149 S. W. 1156.

¹¹ Where a party enters into contract with a corporation for the purchase of a portion of its stock under agreement that if after a specified time he shall become dissatisfied with the status of the corporation and its dividend earning power, he may return the same and take back the purchase price, the corporation is under no obligation to take back the stock and refund the purchase money until after the expiration of the agreed period, and a return of the stock and demand for the purchase money prior to the expiration of the stated period is premature and of no avail. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

Generally no action can be maintained for breach of the agreement until the day fixed for performance has arrived. But this rule does not apply where prior to that time the corporation voluntarily does that which makes performance on its part impossible. The doing of such an act constitutes a breach of the contract for which an action may be brought at once. So where the corporation agrees to return the purchaser's note on a certain day if he elects to re-

turn the stock on that day, but voluntarily transfers the note, it cannot complain that suit for breach of the agreement was commenced four days before the day fixed for performance. *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596.

¹² A provision in a contract of sale of stock by a corporation that the purchaser can return it "after six months," if dissatisfied, requires that the option to return it shall be exercised, if at all, within a reasonable time after expiration of the six months. *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760.

¹³ *Roush v. Illinois Oil Co.*, 180 Ill. App. 346.

As where the contract provides that he may, at any time, upon investigation of the corporation, receive back his money on demand. A delay of more than ten months was held unreasonable under the circumstances. *Odden v. Jamison*, 129 Minn. 489, 152 N. W. 871.

What is a reasonable time is a question of law for the court where the facts are not in dispute. *Roush v. Illinois Oil Co.*, 180 Ill. App. 346.

¹⁴ *Odden v. Jamison*, 129 Minn. 489, 152 N. W. 871.

¹⁵ *Royal Glue Co. v. Lange*, 40 App. Cas. (D. C.) 9.

§ 605. — Agreements to pay interest. A corporation may stipulate to pay subscribers interest on sums paid in by them on their subscriptions before the time when they are bound to pay by the terms of their contract, or prior to the commencement of regular business, provided such an agreement is not prohibited by the charter or general law, and provided creditors and other stockholders are not prejudiced,¹⁶ but it cannot do so in violation of charter or statutory provisions, or in fraud of some of the stockholders, or to the prejudice of creditors.¹⁷

Subscriptions for stock in a gas company, after providing that the subscriptions shall be payable in certain instalments, may permit payments in full at any time, and stipulate for payment of interest on anticipated payments.¹⁸

A railroad company has the power to stipulate that each stockholder shall be entitled to interest on sums paid on stock subscriptions while its road is in process of construction, until it is completed and goes into operation, the interest being payable whenever the surplus earnings shall enable the company to make the payments, for such an

¹⁶ **Massachusetts.** *Wright v. Vermont & M. R. Corporation*, 12 Cush. 68.

Michigan. *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100.

Ohio. *Ohio v. Cleveland & T. R. Co.*, 6 Ohio St. 489.

Pennsylvania. *Porter v. Beacon Const. Co.*, 154 Pa. St. 8, 26 Atl. 216; *Hetfield v. Addicks*, 154 Pa. St. 1, 26 Atl. 215.

Vermont. *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613.

England. *Lock v. Queensland Investment & Land Mortg. Co.*, [1896] A. C. 461, aff'g [1896] 1 Ch. 397. Compare *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

Interest is sometimes expressly provided for by the charter or enabling act. See *Hardin County v. Louisville & N. R. Co.*, 92 Ky. 412, 17 S. W. 860.

A provision that the stock subscribed shall bear interest until the company shall pay dividends is valid. *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395.

A stockholder cannot be compelled

to accept a bond instead of money for interest due. *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100.

As to the mode of payment where the legislature authorized a corporation to issue additional stock to enable it to "provide for and pay interest" on instalments paid in, see *Manice v. Hudson River R. Co.*, 3 Duer (N. Y.) 426; *Attorney General v. New York*, 3 Duer (N. Y.) 119.

One who signs a subscription paper recommending the payment of interest is estopped to claim that payment thereof is illegal. *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29.

¹⁷ *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806, 24 L. Ed. 324, 4 Cliff. 212, Fed. Cas. No. 13,596; *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534; *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

¹⁸ *Porter v. Beacon Const. Co.*, 154 Pa. St. 8, 26 Atl. 216; *Hetfield v. Addicks*, 154 Pa. St. 1, 26 Atl. 215.

agreement does not interfere with the rights of creditors, and is not contrary to public policy.¹⁹ Agreements to pay interest by way of dividends are elsewhere considered.²⁰

§ 606. — Subscriptions constituting a fraud upon other stockholders or creditors—In general. A corporation has no authority to accept subscriptions upon special terms, where the terms are such as to constitute a fraud upon the other subscribers, or upon persons who may become creditors of the corporation in reliance upon a bona fide and regular subscription of the authorized capital stock. In such a case, however, the subscription is not void. The fraudulent and unauthorized stipulations are void, and the subscriber is liable on his subscription as if no such stipulations had been inserted.²¹ It has

¹⁹ *Ryan v. Miami Valley Ry. Co.*, 6 Ohio Dec. (Reprint) 1071, 10 Am. L. Rec. 263; *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613. Compare *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

Under a stipulation that all subscribers for stock in a railroad company shall "be allowed interest on all sums paid by them up to the time when the road shall be completed and put in operation," the interest is not payable until the road is completed and put in operation. *Wright v. Vermont & M. R. Corporation*, 12 Cush. (Mass.) 68; *Waterman v. Troy & G. R. Co.*, 8 Gray (Mass.) 433.

Under particular statutes, see *Hardin County v. Louisville & N. R. Co.*, 92 Ky. 412, 17 S. W. 860; *Manice v. Hudson River R. Co.*, 3 Duer (N. Y.) 426; *Attorney General v. New York*, 3 Duer (N. Y.) 119; *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

²⁰ See § 616, *infra*.

²¹ *United States v. Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Allen v. Commercial Nat. Bank*, of Detroit, 191 Fed. 97.

Arkansas. *Jones v. Dodge*, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828.

California. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582.

Connecticut. *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86.

Georgia. *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536.

Idaho. *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Corwith v. Culver*, 69 Ill. 502. See also *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762, rev'g 14 Ill. App. 327 (where the rule was applied in the case of a subscription to bonds).

Indiana. *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Fleece v. Indiana & I. Cent. R. Co.*, 8 Ind. 460.

Kansas. *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113.

Missouri. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

New Hampshire. *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *White Mountains R. R. v. Eastman*, 34 N. H. 124.

New York. *Meyer v. Blair*, 109 N.

been held, therefore, in many cases, that any secret agreement between

Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635; *Yonkers Gazette Co. v. Jones*, 30 App. Div. 316, 51 N. Y. Supp. 973; *Armstrong v. Danahy*, 75 Hun 405, 27 N. Y. Supp. 60.

North Carolina. *Warren County Co-operative Ass'n v. Boyd*, 171 N. C. 184, 88 S. E. 153.

Ohio. *Stunt v. Newark Weldless Tube & Steel Co.*, 22 Ohio Cir. Ct. 120.

Pennsylvania. *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349; *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. St. 334, 72 Am. Dec. 792.

Tennessee. See *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

Virginia. *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 130 S. E. 492; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Washington. *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

Wisconsin. *Downie v. White*, 12 Wis. 176, 78 Am. Dec. 731.

And see the cases in the note following.

The void stipulation does not invalidate a note given for the amount of the subscription. *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

A secret agreement entered into between the directors of a railroad company and a subscriber for shares therein, that he may, within a certain time, reduce the number of shares subscribed for, the subscription being held out as bona fide for the full amount in order to induce others to subscribe, is void as a fraud upon the other subscribers, and the subscription may be enforced for the

full amount by the corporation. *White Mountains R. R. v. Eastman*, 34 N. H. 124.

An agreement that repayment of part of the amount of subscriptions to the capital stock of a corporation shall be secured by a mortgage to be given by the corporation to the subscribers is void, as a fraud upon creditors. *Boney v. Williams*, 55 N. J. Eq. 691, 38 Atl. 189.

A guaranty given by a corporation to subscribers to its stock, that they shall not be called on to pay more than a certain per cent. on the par value, cannot be enforced by the subscribers as against creditors of the corporation who had no notice of the agreement when their debts were contracted. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

A note given for a subscription to stock in an insurance company, for the purpose of increasing the subscriptions to the amount required by statute as a condition precedent to organization, is payable absolutely, notwithstanding a private agreement that, after passing the examination of the commissioners provided for by law for the purpose of ascertaining the fact of subscription of the required amount of capital, it shall be surrendered, and a note for a less amount substituted. The private agreement is a fraud upon the law, and the maker of the note remains liable, although the note has been surrendered and destroyed. *Tuckerman v. Brown*, 33 N. Y. 297, 88 Am. Dec. 386.

A secret and collateral agreement by a promoter with a subscriber, made to induce him to subscribe, is not valid as against the corporation, even if enforceable against the promoter. *National Bank v. Amoss*, 144 Ga. 425, 87 S. E. 406.

a subscriber for stock in a corporation and the corporation or its agents or promoters, by which he is allowed to subscribe upon different terms than other subscribers, since it is a fraud upon the latter, and any secret agreement by which he is to be released in whole or in part from liability on his subscription, since it is a fraud both upon the other subscribers and upon persons who afterwards become creditors of the corporation, is void, and the subscription may be enforced by the corporation, or by or for the benefit of creditors, as if no such agreement had been made.²²

See also the cases cited in the following note.

22 United States. See *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Burke v. Smith*, 16 Wall. 390, 21 L. Ed. 361.

Alabama. *Floyd v. State*, 177 Ala. 169, 59 So. 280.

Arkansas. *Jones v. Dodge*, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828.

California. *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648. See also *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582.

Connecticut. *Northrop v. Bushnell*, 38 Conn. 498; *Mann v. Cooke*, 20 Conn. 178.

Georgia. *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406; *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536; *Fouche v. Merchants Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256; *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

Idaho. *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; *Hickling v. Wilson*, 104 Ill. 54;

Jewell v. Rock River Paper Co., 101 Ill. 57; *Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Corwith v. Culver*, 69 Ill. 502; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Great Western Tel. Co. v. Haight*, 49 Ill. App. 633; *Howe v. Illinois Agr. Works*, 46 Ill. App. 85; *Kern v. Chicago Co-operative Brewing Ass'n*, 40 Ill. App. 356, aff'd 140 Ill. 371; *Fey v. Peoria Watch Co.*, 32 Ill. App. 618; *Turner Bros. v. Alabama Min. & Mfg. Co.*, 25 Ill. App. 144. See also *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762, rev'g 14 Ill. App. 327.

Indiana. *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384; *Anderson v. Newcastle & R. R. Co.*, 12 Ind. 376, 74 Am. Dec. 218; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187.

Iowa. *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764; *Osgood & Moss v. King*, 42 Iowa 478; *Burnham & Van Shaick v. Northwestern Ins. Co.*, 36 Iowa 632.

Kansas. *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113.

Louisiana. *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

Massachusetts. *Nickerson v. English*, 142 Mass. 267, 8 N. E. 45.

Michigan. *Zabel v. New State Tel. Co.*, 127 Mich. 402, 86 N. W. 949.

The reason for the rule, in so far as it relates to the other sub-

Minnesota. *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963.

Missouri. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *La Grange & M. Plank Road Co. v. Mays*, 29 Mo. 64; *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172; *Haskell v. Sells*, 14 Mo. App. 91.

Nebraska. *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141; *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440; *Clarke v. Omaha & S. W. R. Co.*, 4 Neb. 458.

New Hampshire. *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

New Jersey. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 6 Hun 293; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635; *Armstrong v. Danahy*, 75 Hun 405, 27 N. Y. Supp. 60. See also *Tuckerman v. Brown*, 33 N. Y. 297, 88 Am. Dec. 386.

North Carolina. *Boushall v. Stornach*, — N. C. —, 90 S. E. 198; *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680.

Ohio. *Henry v. Vermilion & A. R. Co.*, 17 Ohio 187; *Bates v. Lewis*, 3 Ohio St. 459; *Stunt v. Newark Weldless Tube & Steel Co.*, 22 Ohio Cir. Ct. 120.

Oklahoma. *Huster v. Newkirk Creamery & Ice Co.*, 42 Okla. 440, L. R. A. 1915 A 390, 141 Pac. 790. See also *Gast v. King*, 27 Okla. 554, 112 Pac. 997.

Oregon. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

Pennsylvania. *Harvey v. Weitzenkorn*, 232 Pa. 447, 81 Atl. 447; *Marles*

Carved Moulding Co. v. Stulb, 215 Pa. 91, 64 Atl. 431; *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349; *Allibone v. Hager*, 46 Pa. St. 48; *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. St. 334, 72 Am. Dec. 792. See also *Real Estate Trust Co. of Philadelphia v. Riter-Conley Mfg. Co.*, 223 Pa. 350, 72 Atl. 695; *Greater Pittsburg Real Estate Co. v. Riley*, 210 Pa. 283, 59 Atl. 1068.

Tennessee. See *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

Texas. *McWhirter v. First State Bank of Amarillo*, — Tex. Civ. App. —, 182 S. W. 682.

Vermont. *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Blodgett v. Morrill*, 20 Vt. 509.

Virginia. *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

Washington. *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402. See also *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033.

Wisconsin. *Downie v. White*, 12 Wis. 176, 78 Am. Dec. 731.

The rule applies to an agreement to the effect that "the sum prescribed, or the number of shares taken, will be left to his time, and when he feels so disposed in paying his part." *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316, 51 N. Y. Supp. 973.

And to a secret collateral agreement which provides that he shall not be bound by his subscription or which substantially varies its ostensible terms. *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316, 51 N. Y. Supp. 973.

Under the express terms of Va. Code 1904, § 1103a, a subscriber can-

scribers, is that the action of each of the subscribers in making his subscription "may be supposed to be influenced by that of others, and every subscription to be based upon the ground that the others are what upon their face they purport to be."²³

To hold that the invalid special terms make the entire contract void would be to give full effect to the fraud and thus release the sub-

not set up an agreement on the part of the corporation not to assess the face value of the stock subscribed as a defense to an action by an assignee, receiver or trustee in insolvency to enforce his subscription, where such agreement was unknown to the creditor at the date of his contract. A guaranty by the company that those who subscribe for its stock will not be called upon to pay more than thirty per cent. of the stock subscribed for is not binding as to creditors unless they had notice of the guaranty when their debts were contracted. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Subscribers who agree to pay the par value of the stock and an additional amount per share to be credited to surplus are estopped, as against creditors, to set up a secret agreement that the latter amount should never be paid. *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

A subscriber cannot show that the agent who obtained his subscription represented that he never would be called upon to pay it, and that he subscribed under this condition, since such a secret parol agreement is a fraud on the other stockholders. *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431, 434.

In *Real Estate Trust Co. of Philadelphia v. Riter-Conley Mfg. Co.*, 223 Pa. 350, 72 Atl. 695, it was held that a subscriber to an underwriting agreement for the purchase of corporate bonds could set up a secret parol agreement as a defense where, if he was not bound, all the other

subscribers would be released because the required amount would not then have been subscribed, and hence the agreement would not operate as a fraud on them.

²³ *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113. This view is also supported by the following decisions:

California. *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

Illinois. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

Michigan. *Zabel v. New State Tel. Co.*, 127 Mich. 402, 86 N. W. 949.

Missouri. *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

New Hampshire. *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *White Mountains R. R. v. Eastman*, 34 N. H. 124.

New York. *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228; *Yonkers Gazette Co. v. Jones*, 30 App. Div. 316, 51 N. Y. Supp. 973.

Oregon. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

Pennsylvania. *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431, 434; *Miller v. Hanover Junction & S. R. Co.*, 87 Pa. St. 95, 30 Am. Rep. 349.

But stockholders seeking to have money withdrawn under such an agreement need not show that they were in fact influenced in subscribing by the subscription in question. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

scriber and throw upon the other subscribers that part of the common burden which he held out to them he had assumed,²⁴ while by holding that the secret agreement alone is void, the contemplated fraud is defeated and justice is done to the other subscribers and no wrong is done to the parties to the contract of which either has reason to complain.²⁵

The fraud consists, not in the making of the collateral agreement, but in suppressing the fact that it exists, and in holding out to others as the contract between the parties one which is substantially different from that which in fact they made.²⁶ "By 'secrecy in the agreement' is meant that it is kept from the knowledge of the body of subscribers,"²⁷ or from the knowledge of persons who subsequently become creditors of the corporation.²⁸ And such an agreement made by a promoter is equally invalid though it is known to and approved by the officers of the corporation, since it would be invalid if made by the corporation.²⁹

A stipulation in a contract of subscription that it shall be payable only on the call of the directors is valid as between the stockholders, but will not prevent enforcement of the subscription to pay debts of the corporation.³⁰

Of course, stipulations in a subscription, as a stipulation that the whole or a part of it need not be paid, or will be returned, cannot constitute a fraud upon the other stockholders if they consent. Such a stipulation, therefore, is valid as between the subscriber and the

²⁴ *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648; *White Mountains R. R. v. Eastman*, 34 N. H. 124.

To so hold would be to perpetrate the very fraud to avoid which is the only logical ground for the argument that the condition is ultra vires. *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

²⁵ *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648; *White Mountains R. R. v. Eastman*, 34 N. H. 124.

²⁶ *White Mountains R. R. v. Eastman*, 34 N. H. 124.

²⁷ *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316, 51 N. Y. Supp. 973.

The special terms are equally invalid though contained in the sub-

scription contract where the certificates of stock issued to the subscriber are in the usual form and neither they nor the books of the company show that the subscription is conditional. Subscribers and creditors are entitled to rely upon the books and certificates as showing the character of the stock taken, and are not bound to go back of them and take notice of an antecedent individual contract existing between the directors and the takers of the shares. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

²⁸ *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

²⁹ *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316, 51 N. Y. Supp. 973.

³⁰ *Curry v. Woodward*, 53 Ala. 371.

corporation, in the absence of charter or statutory restrictions, if all the stockholders know of it, and expressly or impliedly consent,³¹ or where a similar agreement is made with all of them.³² It has been held, therefore, that where a person subscribes to the capital stock of a corporation solely for the purpose of enabling it to obtain a certificate of organization, under an agreement, consented to by all the other subscribers, that he is not to be liable on the stock, or be required to pay assessments thereon, he is not liable to an assessment on the stock, as against the other subscribers, until an assessment becomes necessary in order to pay the debts of the corporation. "In most of the cases," said the court in such a case, "where subscriptions to the capital stock of corporations have been condemned, as being conditional, or accompanied by secret or qualifying agreements, the rights of creditors or stockholders have been prejudiced. Creditors are entitled to look to the stock as it appears upon the face of the subscription list. Each stockholder has a vested right in the contract for subscription of every other stockholder. In the case at bar, no creditor is injured, and no creditor is complaining. The appellant stockholders cannot object to the release of stock which they permitted to be subscribed for with the understanding that so far as they themselves were concerned, it should be released."³³ Nor does such an agreement constitute a fraud upon existing creditors of the corporation, where there is no withdrawal of assets, nor upon persons who subsequently become creditors with notice, and they cannot complain.³⁴ It is void, however, notwithstanding the consent of all

³¹ *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, aff'g 27 Ill. App. 546.

An agreement that a subscriber shall only be required to take so much of the stock subscribed for as could be paid for by certain commissions earned by his son is not a fraud on the other subscribers if the terms of the subscription are announced publicly at the time when the subscription is made. *Zabel v. New State Tel. Co.*, 127 Mich. 402, 86 N. W. 949.

"A contract entered into by a corporation with the unanimous consent of all the remaining stockholders that a particular stockholder need

pay but a specified portion of the face value of the stock is binding on the corporation, although it may be declared void in favor of creditors who become such without notice of the agreement." *Courtney v. Georger*, 228 Fed. 859, aff'g 221 Fed. 505.

See also § 604, *supra*.

³² *Beal v. Dillon*, 5 Kan. App. 27, 47 Pac. 317.

³³ *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, aff'g 27 Ill. App. 546. See also *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Traphagen v. Sagar*, 63 Minn. 317, 65 N. W. 633.

³⁴ If the existing indebtedness was all created prior to the date of the subscription, no creditor has any

the stockholders, as against persons who subsequently become creditors of the corporation without notice, and in reliance, which will be presumed in the absence of evidence to the contrary, upon the full amount of the capital stock being paid or secured.³⁵

A provision that the subscriber is to receive certain bonus stock will not invalidate his subscription where it is to be given him by a third person who has paid full value for it to the corporation.³⁶

One who is permitted to subscribe on more favorable terms than the other subscribers cannot avoid his subscription on the ground that the other subscribers were thereby defrauded.³⁷

§ 607. — — Agreements for surrender or repurchase of stock.

While, as we have seen, agreements whereby a corporation undertakes to repurchase stock sold by it, or to permit a subscriber at his option to return his stock and receive back what he has paid, may be valid as between the subscriber or purchaser and the corporation,³⁸ they will not be upheld if they operate as a fraud upon the rights of other stockholders or subscribers,³⁹ nor will they be permitted to affect

cause to complain. *Beal v. Dillon*, 5 Kan. App. 27, 47 Pac. 317.

The rule does not apply so as to invalidate an agreement by a creditor waiving his right to collect as against stockholders. *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384.

The creditors can only be estopped to insist upon payment in full by clear proof that they had actual knowledge of the agreement that payment in full should not be required. *Johns v. Clother*, 78 Wash. 602, 139 Pac. 755.

The burden of showing that the creditors had knowledge of the agreement is on the subscriber. *Johns v. Clother*, 78 Wash. 602, 139 Pac. 755.

The recording of a deed to a corporation reciting that the consideration therefor is a certain number of shares of its capital stock is not constructive notice to subsequent creditors that such stock has been paid for by the conveyance of the land so as to preclude them from setting up that such land was taken at an

overvaluation. *Osgood & Moss v. King*, 42 Iowa 478.

See also § 604, *supra*.

³⁵ *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. And see § 604, *supra*.

³⁶ *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431.

³⁷ *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395.

³⁸ See § 604, *supra*.

³⁹ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113. See also *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582.

In *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582, where an agreement to repurchase was upheld, it was said that the case did not present the question of the invalidity of secret agreements limiting the apparent liability of subscribers, since no fact was alleged which would justify the inference that any fraudulent invasion of

the rights of corporate creditors.⁴⁰ The subscriber will not be permitted to exercise his option and enforce the promise, after the corporation has become insolvent,⁴¹ but under such circumstances the creditors may hold him as a stockholder and subject the amount of his subscription to the payment of the corporate debts.⁴² Nor where

the rights of other stockholders had been attempted or would result. And see *Tidewater Southern Ry. Co. v. Vance*, — Cal. App. —, 160 Pac. 1097, to the same effect.

40 United States. *Fleitmann v. John M. Stone Cotton Mills*, 186 Fed. 466; *Ophir Consol. Mines v. Brynteson*, 143 Fed. 829.

California. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582; *Tidewater Southern R. Co. v. Vance*, — Cal. App. —, 160 Pac. 1097.

Illinois. *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287. See also *Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129.

Iowa. *Iowa Lumber Co. v. Foster*, 49 Iowa 25, 31 Am. Rep. 140.

Kansas. *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113.

Missouri. *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156; *Boley v. Sonora Development Co.*, 126 Mo. App. 116, 103 S. W. 975.

Nebraska. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

Texas. *Hesse Envelope Co. of Texas v. Addison*, — Tex. Civ. App. —, 166 S. W. 898.

Such an agreement with a subscriber to increased stock is void as to creditors in Michigan in view of the statutes requiring stock to be subscribed and paid for at par; forbidding an increase in stock to become effective until at least one-half there-

of has been taken by good faith subscriptions; and requiring corporations to file annual reports showing the names of the stockholders and the amount of stock held by each. *Allen v. Commercial Nat. Bank of Detroit*, 191 Fed. 97.

A secret agreement between a corporation and a subscriber for stock, that the corporation will buy the stock back at any time after two years at a premium, besides paying a dividend in the meantime, is illegal and void as against creditors. *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287.

Where the corporation is solvent, such an agreement is not invalid on the ground that it will result in withdrawing from the trust fund of the company that which belongs to the creditors. *Royal Glue Co. v. Lange*, 40 App. Cas. (D. C.) 9.

41 McIntyre v. E. Bement's Sons, 146 Mich. 74, 10 Ann. Cas. 143, 13 Det. Leg. N. 674, 109 N. W. 45.

He cannot do so after a receiver has been appointed for the corporation. *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287; *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113; *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963.

42 Allen v. Commercial Nat. Bank of Detroit, 191 Fed. 97; *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582; *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287.

A secret agreement that the pur-

the contract is invalid as to creditors can the subscriber, as against them, recover back what he has paid for the stock, on the ground that the consideration for his purchase or subscription has failed, since to permit him to do so would be to accomplish by indirection what could not be done directly.⁴³

There seems to be some conflict of authority as to whether the doctrine invalidating secret agreements whereby a subscriber is to be released in whole or in part from his subscription⁴⁴ applies to agreements of the character under discussion. On the one hand it has been held not to apply where by the transaction the person taking the stock becomes the bona fide owner of it as fully paid, and not a subscriber, so that there can be nothing due to the company from him as a subscriber,⁴⁵ or where the stock has been subscribed and paid for, and certificates therefor have been issued to the subscriber and are owned and held by him before the collateral agreement is made;⁴⁶ or where the stock is not a part of the original stock which has not been subscribed for, but has once been issued and then subsequently acquired by the corporation.⁴⁷ Under such circumstances it is said that the question is not whether the corporation may release the subscriber from paying for the stock subscribed, but whether it has power to purchase its own stock which has been issued and paid for.⁴⁸

It has also been held that an agreement that the purchaser of treasury stock may return the same and receive back his money is not fraudulent as to other stockholders and creditors for the reason that the transaction is not an absolute sale but a contract of sale or return, under which the title passes subject to the right of the purchaser to rescind, and pursuant to which the right and title of the corporation is restored to its original status and no sale is effected

chaser of stock could exchange it for his note given for the purchase price when the same became due is no defense to an action on the note by the receiver of the corporation. *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963.

⁴³ *Allen v. Commercial Nat. Bank of Detroit*, 191 Fed. 97.

If the provision for a repurchase is void, the sale is absolute, and the purchaser cannot recover back what he has paid. *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

⁴⁴ See § 604, *supra*.

⁴⁵ *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

⁴⁶ *Chicago, P. & C. W. R. Co. v. Town of Marseilles*, 84 Ill. 145, 643.

⁴⁷ *Hesse Envelope Co. of Texas v. Addison*, — Tex. Civ. App. —, 166 S. W. 898.

⁴⁸ *Chicago, P. & S. W. R. Co. v. Town of Marseilles*, 84 Ill. 145, 643; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

if he does rescind, and hence the return of the money under such circumstances is not a diversion of corporate funds.⁴⁹

On the other hand, it has been held that an independent collateral agreement with a subscriber to repurchase his stock, which is not known to or consented to by the other subscribers, is a fraud on them, and will not be enforced at their expense or upheld to their detriment after the company has become insolvent.⁵⁰ And it has also been held that such an agreement is a release of the purchaser or subscriber from his responsibility as a stockholder, and hence cannot be made without the consent of the other stockholders,⁵¹ and that it is a detriment to them even though its enforcement would take away but a small part of the company's surplus.⁵²

The length of the option period is unimportant and cannot be considered in determining the validity of the agreement.⁵³

The doctrine invalidating secret agreements between the officers of a corporation and a subscriber, by which the latter is to be released in whole or in part from liability on his subscription, does not apply to agreements between the promoters or particular stockholders of a corporation and a subscriber, by which the former are to buy back his stock so as to let him out, for such an agreement as this is between the parties only, and does not affect the subscriber's liability on his

⁴⁹ *Ophir Consol. Mines v. Brynteson*, 143 Fed. 829; *Royal Glue Co. v. Lange*, 40 App. Cas. (D. C.) 9.

The rule invalidating agreements whereby one subscriber obtains an advantage over the others has no application to a conditional sale of treasury stock which the company has power to dispose of on such terms as it sees fit. *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596.

⁵⁰ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, Ann. Cas. 1913 C 415, 122 Pac. 113; *Latulippe v. New England Inv. Co.*, 77 N. H. 81, 86 Atl. 361.

⁵¹ This is true where the stock is not treasury stock, but an original issue. *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156.

An agreement by the directors that

the corporation, at the election of the purchaser, will buy back the stock for the amount paid is a fraud on the other stockholders and unenforceable unless it is made with their consent. *Boley v. Sonora Development Co.*, 126 Mo. App. 116, 103 S. W. 975.

It is immaterial that none of the stockholders complain of the agreement or seek to prevent its enforcement where the corporation itself does so, since in such case it represents and speaks for them. *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156. See also *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

⁵² *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156.

As, for example, that it continues for only thirty days.

⁵³ *Allen v. Commercial Nat. Bank of Detroit*, 191 Fed. 97.

subscription. Such an agreement is not a fraud upon other subscribers or creditors.⁵⁴

§ 608. — Authority of agents receiving subscriptions. The validity and effect of subscriptions upon special terms turn sometimes upon the extent of the authority of the officer or agent by whom they are received. If the stockholders or the directors or other managing officers of a corporation appoint an agent to solicit or receive subscriptions to the stock of the corporation, the agent has no authority to make special terms with subscribers, and if he undertakes to do so, the special terms are not binding upon the corporation unless they are subsequently ratified by the stockholders or managing officers. In the absence of a ratification, the subscription may be enforced without regard to the special terms.⁵⁵ The same is true of commissioners

⁵⁴ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961. See also *Broadus v. Russell*, 160 Ala. 353, 49 So. 327; *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

An agreement between the promoters of a corporation and a subscriber that the former will take the latter's shares and refund his money if he shall demand it within a certain time is valid as between the parties, where there is no design to deceive or defraud any one, although none of the subscriptions are to be paid until all the stock is reliably subscribed, and other subscribers neither have such an agreement as to their stock nor are aware of the agreement in question. *Morgan v. Struthers*, 131 U. S. 246, 33 L. Ed. 132; *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228.

Where subscribers who had paid for their stock in order to induce subscribers who had repudiated their subscriptions to take the stock subscribed for agreed with one of the latter, without the knowledge of the others, that, if he would take the stock subscribed for by him, they would take it and give him a note for the price, it was held that the agreement was not a

fraud upon the other repudiating subscribers, and that the note given in pursuance thereof was valid. *Traphagen v. Sagar*, 63 Minn. 317, 65 N. W. 633.

Where the corporation and certain of its directors join in an agreement to take back the stock, their liability is several, and though the agreement is invalid as to the corporation, it is valid as to the directors and may be enforced against them individually. *Allen v. Commercial Nat. Bank of Detroit*, 191 Fed. 97.

There are instances in which an agreement by a promoter to resell a subscriber's stock and thereby relieve him from liability would be enforceable against the promoter, but this would not affect the subscriber's liability upon his subscription. *Huster v. Newkirk Creamery & Ice Co.*, 42 Okla. 440, L. R. A. 1915 A 390, 141 Pac. 790.

⁵⁵ *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969; *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. (N. Y.) 450; *Philadelphia & D. C. R. Co. v. Conway*, 177 Pa. St. 364, 35 Atl. 716; *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256; *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. St. 334,

appointed by or under a statute to receive subscriptions preliminary to the organization of a corporation. In the absence of express authority, special terms agreed to by them on receiving a subscription will not bind the corporation unless ratified.⁵⁶

Of course, as in the case of any other contract made by an agent of a corporation without authority, a subscription upon special terms, received by an agent without authority, may be ratified by the corporation, or by its directors or other managing officers, if the terms are such that they could have been authorized; and if the corporation, through its directors or managing officers, receives payments upon a subscription, with knowledge of special terms or conditions upon which it was made, agreed to by the agent receiving the subscription, although without authority, it thereby ratifies and is bound by the special terms or conditions.⁵⁷

§ 609. — Oral stipulations—Other writings. The general rule excluding parol evidence to add to or vary a written contract prevents a subscriber from adding to or varying a complete and unambiguous written contract of subscription by proof of prior or contemporaneous oral stipulations or agreements, unless they were omitted from the writing by fraud or mistake.⁵⁸ So where the subscription binds the

72 Am. Dec. 792. See *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138. Compare *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

A promoter of a corporation cannot bind it by a contract made with a subscriber to its stock before incorporation, in order to induce the subscription. *Joy v. Manion*, 28 Mo. App. 55; *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969.

See also § 604, *supra*.

⁵⁶ *North Carolina R. Co. v. Leach*, 4 Jones L. (N. C.) 340.

See *Russell v. Broadus Cotton Mills* (Ala.), 39 So. 712, holding that the fact that two of the signers of an agreement to refund a subscription under certain circumstances were commissioners did not make the corporation liable on the contract, which did not purport to be the contract of the

corporation, but on its face was clearly that of the individuals signing it.

See also § 558, *supra*.

⁵⁷ *Frankfort & S. Turnpike Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159. And see *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40.

⁵⁸ *Alabama*. *Wurtzbarger v. Anniston Rolling Mills*, 94 Ala. 640, 10 So. 129; *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

Arkansas. *Snodgrass v. E. A. Zander & Co.*, 106 Ark. 462, 154 S. W. 212; *Mississippi*, *O. & R. River R. Co. v. Cross*, 20 Ark. 443.

Connecticut. *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86.

Florida. *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299; *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713.

Georgia. *Dotson v. Savannah Pure*

subscriber to pay in money, he will not be permitted to show a parol

Food Canning Co., 140 Ga. 161, 78 S. E. 801; **Chattanooga, R. & C. R. Co. v. Warthen**, 98 Ga. 599, 25 S. E. 988; **Hendrix v. Academy of Music**, 73 Ga. 437; **Bunn v. Farmers' Warehouse Co.**, — Ga. App. —, 90 S. E. 78.

Idaho. **Meholin v. Carlson**, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. **Jewell v. Rock River Paper Co.**, 101 Ill. 57; **Corwith v. Culver**, 69 Ill. 502; **Hays v. Ottawa, O. & F. R. V. R. Co.**, 61 Ill. 422; **Dill v. Wabash Valley R. Co.**, 21 Ill. 91; **Briggs v. Reynolds**, 176 Ill. App. 420; **Newman v. Sexton**, 156 Ill. App. 517; **Stone v. Vandalia Coal & Coke Co.**, 59 Ill. App. 536.

Indiana. **Low v. Studabaker**, 110 Ind. 57, 10 N. E. 301; **Cincinnati, U. & Ft. W. R. Co. v. Pearce**, 28 Ind. 502; **Brownlee v. Ohio, I. & I. R. Co.**, 18 Ind. 68; **McAllister v. Indianapolis & C. R. Co.**, 15 Ind. 11; **Eakright v. Logansport & N. I. R. Co.**, 13 Ind. 404; **Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.**, 11 Ind. 280; **Evansville, I. & C. Straight Line R. Co. v. Shearer**, 10 Ind. 244; **New Albany & S. R. Co. v. Fields**, 10 Ind. 187.

Iowa. **Tabor & N. Ry. Co. v. McCormick**, 90 Iowa 446, 57 N. W. 949; **Blair v. Buttolph**, 72 Iowa 31, 33 N. W. 349; **Wapello County v. Burlington & M. River R. Co.**, 44 Iowa 585; **Gelpcke, Winslow & Co. v. Blake**, 19 Iowa 263, 15 Iowa 387; 83 Am. Dec. 418; **Jack v. Naber**, 15 Iowa 450.

Kansas. **Topeka Mfg. Co. v. Hale**, 39 Kan. 23, 17 Pac. 601.

Kentucky. **Tanner v. Nichols**, 25 Ky. L. Rep. 2191, 80 S. W. 225; **Wight v. Shelby R. Co.**, 16 B. Mon. 4, 63 Am. Dec. 522.

Louisiana. **Vicksburg, S. & T. R. Co. v. McKeen**, 12 La. Ann. 638.

Maine. **Kennebec & P. R. Co. v. Waters**, 34 Me. 369.

Maryland. **Scarlett v. Academy of Music**, 46 Md. 132.

Minnesota. **Masonic Temple Ass'n of Minneapolis v. Channell**, 43 Minn. 353, 45 N. W. 716.

Mississippi. **Thigpen v. Mississippi Cent. R. Co.**, 32 Miss. 347.

Missouri. **La Grange & M. Plank Road Co. v. Mays**, 29 Mo. 64; **Newland Hotel Co. v. Wright**, 73 Mo. App. 240; **Ollesheimer v. Thompson Mfg. Co.**, 44 Mo. App. 172.

Nebraska. **Nebraska Expos. Ass'n v. Townley**, 46 Neb. 893, 65 N. W. 1062.

New Hampshire. **Shattuck v. Robins**, 68 N. H. 565, 44 Atl. 694; **Libby v. Mt. Monadnock Mineral Spring & Land Co.**, 68 N. H. 444, 44 Atl. 602; **Piscataqua Ferry Co. v. Jones**, 39 N. H. 491.

New Jersey. **Grosse Isle Hotel Co. v. I'Anson's Ex'rs**, 43 N. J. L. 442.

New York. **Phoenix Warehousing Co. v. Badger**, 67 N. Y. 294, 6 Hun 293; **Kelsey v. Northern Light Oil Co.**, 45 N. Y. 505; **Beals v. Buffalo Expanded Metal Const. Co.**, 49 App. Div. 589, 63 N. Y. Supp. 635.

North Carolina. **Boushall v. Stronach**, — N. C. —, 90 S. E. 198; **Marshall Foundry Co. v. Killian**, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680.

Ohio. **Noble v. Callender**, 20 Ohio St. 199.

Oklahoma. **Huster v. Newkirk Creamery & Ice Co.**, 42 Okla. 440, L. R. A. 1915 A 390, 141 Pac. 790; **Chicago Bldg. & Mfg. Co. v. Lyon**, 10 Okla. 704, 64 Pac. 6.

Pennsylvania. **Philadelphia & D. C. R. Co. v. Conway**, 177 Pa. St. 364, 35 Atl. 716.

Vermont. **Connecticut & P. Rivers R. Co. v. Bailey**, 24 Vt. 465, 58 Am. Dec. 181; **Blodgett v. Morrill**, 20 Vt. 509.

understanding that he was to be permitted to pay in property.⁵⁹ Nor is it permissible to plead or prove that it was intended that the corporation should be bound by an agreement to refund, on certain conditions, the amount of a subscription, where such agreement does not purport to bind the corporation but on its face is clearly the individual obligation of the signers.⁶⁰

It has been held, very properly, that when a written subscription is unambiguous and complete on its face, special terms which would operate as a fraud on other subscribers or creditors cannot be proved by a separate contemporaneous written instrument.⁶¹

This, however, cannot be true except where the special terms are secret, so that to allow such proof would operate as a fraud upon other subscribers or creditors. A letter accompanying a contract of subscription has been held admissible to show that the subscription was upon special terms.⁶² And where a written subscription contract

Washington. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

West Virginia. *Clarksburg Board of Trade Land Co. v. Davis*, — W. Va. —, 86 S. E. 929.

Wisconsin. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

This is especially true where the contract provides that "This agreement cannot be altered, changed or modified in any manner whatsoever by any agent." *Philadelphia & G. Steamship Co. v. Pechin*, 23 Dist. Rep. (Pa.) 518, 519. Or that no conditions, representations or agreements other than those contained therein shall be binding on the company. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, — Tex. Civ. App. —, 180 S. W. 936.

Where suit is brought against a stockholder in a college corporation, after its insolvency, for tuition due the college, the stockholder will not be permitted to show a parol agreement, made at the time of the subscription, that the stock should be returned in payment thereof. *Roach v. Burgess* (Tex. Civ. App.), 62 S. W. 803.

This rule does not apply to the full

extent in Pennsylvania. See § 577, *supra*, and cases there cited.

⁵⁹ *Newland Hotel Co. v. Wright*, 73 Mo. App. 240.

So of a provision for payment in articles other than money, and at times and in instalments different from those provided for in the written contract. *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499.

⁶⁰ *Russell v. Broadus Cotton Mills* (Ala.), 39 So. 712.

⁶¹ *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68. And see *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Boushall v. Stronach*, — N. C. —, 90 S. E. 198.

A corporation cannot be held liable on an agreement to refund the amount of a subscription, which does not purport to be the obligation of the corporation, but only of the individuals who sign it, by reason of the fact that it was executed contemporaneously with the contract of subscription. *Russell v. Broadus Cotton Mills* (Ala.), 39 So. 712.

⁶² *Elliott v. New York Endowment Co.*, 73 Hun (N. Y.) 519, 26 N. Y. Supp. 107.

is silent on the subject of the location of the corporation's plant, a parol agreement to locate it at a particular place for a specified time may be shown.⁶³

The rule presupposes the due execution and delivery of the written contract in a way to bind both parties to its terms, and has no application when the execution of the writing is the subject of inquiry.⁶⁴ Nor does it exclude evidence of oral agreements or understandings waiving or modifying the provisions of the written contract where they have been acted upon.⁶⁵

If the writing is ambiguous or incomplete on its face, parol evidence is admissible to explain it and supply omissions.⁶⁶ And such evidence is also admissible to give effect to the written instrument by applying it to the subject-matter on proving the circumstances under which it was made, when otherwise the application could not be made,⁶⁷ or to show fraud.⁶⁸

Its admissibility to show that a written subscription was on conditions precedent has already been considered.⁶⁹

According to the weight of authority, the maker of an unconditional negotiable note given for stock cannot set up as a defense to an action thereon an independent collateral agreement limiting or exempting him from liability thereon.⁷⁰

IV. FRAUD IN PROCURING SUBSCRIPTIONS

§ 610. Effect of fraud in general. Except as explained in the sections following, a subscription for stock in a corporation, or sale of stock, is governed, in so far as the effect of fraud is concerned, by the same rules as govern other contracts. If a person is induced to subscribe for or purchase stock by fraud on the part of the managing officers of the corporation, or on the part of any other agent for whose fraud the corporation is responsible,⁷¹ the subscription is generally voidable at his option, on discovery of the fraud, or within a reasonable time afterwards, or else entitles him to maintain an action for deceit, or both.⁷²

⁶³ Such an agreement does not vary the terms of the writing. *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 774, 118 N. W. 40.

⁶⁴ On that issue what was said and done at the time may be shown. *White v. Kahn*, 103 Ala. 308, 15 So. 595.

⁶⁵ *Guthrie Ice Co. v. Selby*, 166 Iowa 474, 147 N. W. 923.

⁶⁶ See § 577, *supra*.

⁶⁷ *Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244.

⁶⁸ See § 610, *infra*.

⁶⁹ See § 577, *supra*.

⁷⁰ *Van Tassel v. McGrail*, — Wash. —, 160 Pac. 1053. See works on negotiable instruments.

⁷¹ See § 611, *infra*.

⁷² *United States v. Tyler v. Savage*,

“Contracts of this description between an individual and a com-

143 U. S. 79, 36 L. Ed. 82; Manning v. Berdan, 135 Fed. 159; Stern v. Kirby Lumber Co., 134 Fed. 509; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800.

Alabama. Wiseola Co. of U. S. A. v. Moore, 187 Ala. 163, 65 So. 398; Southern States Fire & Casualty Ins. Co. v. Cromartie, 181 Ala. 295, 61 So. 907; Southern States Fire & Casualty Ins. Co. v. Tanner, 180 Ala. 30, 60 So. 81; Southern States Fire & Casualty Ins. Co. v. Wilmer Stores Co., 180 Ala. 1, 60 So. 98; Southern States Fire & Casualty Ins. Co. v. Whatley, 173 Ala. 101, 55 So. 620; Alabama Foundry & Machine Works v. Dallas, 127 Ala. 513, 29 So. 459; Montgomery Southern Ry. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60.

Arizona. People's Nat. Bank v. Taylor, 17 Ariz. 215, 149 Pac. 763.

Colorado. Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Connecticut. Ashmead v. Colby, 26 Conn. 287.

Delaware. Kent County R. Co. v. Wilson, 5 Houst. 49.

Georgia. Weems v. Georgia Midland & G. R. Co., 88 Ga. 303, 14 S. E. 583, 84 Ga. 356, 11 S. E. 503; Atlanta & W. P. R. Co. v. Hodnett, 36 Ga. 669; Southern Tobacco Co. v. Armstrong, 11 Ga. App. 501, 75 S. E. 828.

Illinois. Melendy v. Keen, 89 Ill. 395; Hays v. Ottawa, O. & F. R. Val. R. Co., 61 Ill. 422.

Indiana. Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; Wert v. Crawfordsville & A. Turnpike Co., 19 Ind. 242.

Iowa. Seeley v. Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961; State Bank of Indiana v. Cook, 125 Iowa 111, 100 N. W. 72; Coles v. Kennedy, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088.

Kansas. Beal v. Dillon, 5 Kan. App. 27, 47 Pac. 317.

Kentucky. Kentucky Mut. Inv. Co.'s Assignee v. Schaefer, 120 Ky. 227, 85 S. W. 1098.

Maryland. Fear v. Bartlett, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

Massachusetts. See Bradley v. Poole, 98 Mass. 169, 93 Am. Dec. 144.

Michigan. Dieterle v. Ann Arbor Paint & Enamel Co., 143 Mich. 416, 107 N. W. 79; Hamilton v. American Hulled Bean Co., 143 Mich. 277, 106 N. W. 731; Sherman v. American Stove Co., 85 Mich. 169, 48 N. W. 537.

Minnesota. See Columbia Elec. Co. v. Dixon, 46 Minn. 463, 49 N. W. 244.

Mississippi. Water Valley Mfg. Co. v. Seaman, 53 Miss. 655; Selina, M. & M. R. Co. v. Anderson, 51 Miss. 829; Walker v. Mobile & O. R. Co., 34 Miss. 245.

Missouri. Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719; Union Nat. Bank v. Hunt, 76 Mo. 439.

Nevada. Foulks Accelerating Air Motor Co. v. Thies, 26 Nev. 158, 99 Am. St. Rep. 684, 65 Pac. 373.

New Hampshire. Anderson v. Scott, 70 N. H. 350, 47 Atl. 607.

New Jersey. Audenried v. East Coast Mill Co., 68 N. J. Eq. 450, 59 Atl. 577; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651. And see Garrison v. Technic Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741.

New York. Mack v. Latta, 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97, rev'g 83 App. Div. 242, 82 N. Y. Supp. 130; Bosley v. National Mach. Co., 123 N. Y. 550, 25 N. E. 990; Kelsey v. Northern Light Oil Co., 45 N. Y. 505; Mead v. Bunn, 32 N. Y. 275; Dunn v. Candee, 98 App. Div. 317, 96 N. Y. Supp. 674; Walker v. Anglo-

pany, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual."⁷³

This doctrine has repeatedly been applied in the case of false representations contained in the prospectus of a corporation, issued by it or its officers for the purpose of setting forth facts which will induce persons to subscribe for its stock.⁷⁴ But it applies equally to oral

American Mortgage & Trust Co., 72 Hun 334, 25 N. Y. Supp. 432.

North Carolina. Queen City Printing & Paper Co. v. McAden, 131 N. C. 178, 42 S. E. 575.

Pennsylvania. Spellier Elec. Time Co. v. Leedom, 149 Pa. St. 185, 24 Atl. 197.

South Dakota. National Bank of Dakota v. Taylor, 5 S. D. 99, 58 N. W. 297.

Tennessee. State v. Jefferson Turnpike Co., 3 Humph. 305.

Texas. Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762; Byers Bros. v. Maxwell (Tex. Civ. App.), 73 S. W. 437; Park v. Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905; Strong v. S. W. Bridge & Iron Co. (Tex. Civ. App.), 38 S. W. 546; Robinson v. Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499.

Utah. Campbell v. Zion's Co-operative Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Virginia. Jordan & Davis v. Annex Corporation, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050; Snead's Adm'r v. Ivanhoe Land & Improvement Co., 96 Va. 124, 30 S. E. 450; Wilson v. Hundley, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492; Carey v. Coffee-Stemming Mach. Co., 20 S. E. 778; Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; Boshier v. Richmond & H. Land Co., 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; Crump v. United States

Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

West Virginia. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494; West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182.

Wisconsin. McClellan v. Scott, 24 Wis. 81; Waldo v. Chicago, St. P. & F. R. Co., 14 Wis. 575.

England. Aaron's Reefs v. Twiss, [1896] A. C. 273; In re Metropolitan Coal Consumers' Ass'n, [1892] 3 Ch. 1; Ross v. Estates Inv. Co., 3 Ch. App. 682; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64; Oakes v. Turquand, L. R. 2 H. L. 325; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99.

"The principal of law that fraud vitiates a contract applies to subscription contracts, and they are voidable at the option of the defrauded person." Bohn v. Burton-Lingo Co., — Tex. Civ. App. —, 175 S. W. 173.

As to the various remedies of the subscriber under such circumstances, see § 627, *infra*.

⁷³ Per Lord Romilly, in Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99, 125, quoted with approval in Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

⁷⁴ United States. Manning v. Berdan, 135 Fed. 159.

Maryland. Fear v. Bartlett, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; Sav-

representations made by the agents of the corporation in soliciting subscriptions, for the rule excluding evidence of prior or contemporaneous oral stipulations or agreements to add to or vary a written contract of subscription⁷⁵ does not apply to the proof of false and fraudulent representations by which the subscriber was induced to enter into the contract.⁷⁶

It is not essential that the representations should have been made directly to the subscriber in order to entitle him to rely on them and to complain of their falsity. So where they are made by the agent of the corporation to a third person in the presence of the subscriber, and attract his attention and interest him in the stock and he immediately afterwards subscribes through the same agent, who knows that he was present and heard the false statements, such statements are, to all intents and purposes, made to the subscriber. Under such circumstances it is the positive duty of the agent to inform him of the true facts, and if he fails to do so his wrong is morally and legally the same as if he had originally made such statements to the

age v. Bartlett, 78 Md. 561, 28 Atl. 414.

Michigan. Chatfield v. Sintz-Wallin Co., 182 Mich. 689, 148 N. W. 797.

New York. Lehman-Charley v. Bartlett, 135 App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125. And see Benedict v. Guardian Trust Co., 58 App. Div. 302, 68 N. Y. Supp. 1082.

Utah. Campbell v. Zion's Co-operative Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Virginia. Boshier v. Richmond & H. Land Co., 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; Crump v. United States Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

West Virginia. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

England. In re Metropolitan Coal Consumers' Ass'n, [1892] 3 Ch. 1; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64; Oakes v. Turquand, L. R. 2 H. L. 325.

⁷⁵ See §§ 577, 609, *supra*.

⁷⁶ **Arkansas.** Collins v. Southern Brick Co., 92 Ark. 504, 135 Am. St.

Rep. 197, 19 Ann. Cas. 882, 123 S. W. 652.

California. Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542.

Illinois. Briggs v. Reynolds, 176 Ill. App. 420.

Iowa. Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Missouri. Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79.

New Hampshire. Anderson v. Scott, 70 N. H. 350, 47 Atl. 607.

New York. New York Exchange Co. v. De Wolf, 31 N. Y. 273.

Texas. General Bonding & Casualty Ins. Co. v. Mount, — Tex. Civ. App. —, 183 S. W. 783; Commonwealth Bonding & Casualty Ins. Co. v. Barrington, — Tex. Civ. App. —, 180 S. W. 936; Le Master v. Hailey, — Tex. Civ. App. —, 176 S. W. 818; Commonwealth Bonding & Casualty Ins. Co. v. Cator, — Tex. Civ. App. —, 175 S. W. 1074; Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App. —, 169 S. W. 1060; Gough Mill

subscriber, and his conduct amounts in fact to a reaffirmation of them.⁷⁷

False and fraudulent representations as to the financial condition of a corporation, contained in reports issued by it to its stockholders, will constitute fraud if either they or others rely thereon in afterwards subscribing for stock.⁷⁸ And the same is true of false representations in public statements concerning its assets and liabilities issued by the corporation for the purpose of inducing subscriptions.⁷⁹ And one who subscribes in reliance on false reports made to a commercial agency may be entitled to rescind, since such a report must be deemed to be addressed to all persons to whom the agency may communicate it, or to whom the information therein contained may rightfully come.⁸⁰

Since the principles which determine what constitutes fraud, and the effect of fraud, with respect to subscriptions for stock in corporations, are substantially the same as in the case of other contracts, it is obvious that cases arising with reference to other contracts are applicable where the contract involved is a subscription for stock.

To sustain an action for deceit or to justify a rescission of the contract on the ground of fraud, it must appear, of course, that the alleged misrepresentations were actually made.⁸¹ It need not appear that they were actually made by the defendant in an action of deceit, but it is sufficient if he authorized and caused them to be made.⁸²

The burden of showing fraud is on the subscriber,⁸³ and he must

& Gin Co. v. Looney, — Tex. Civ. App. —, 112 S. W. 782.

⁷⁷ Southern States Fire & Casualty Ins. Co. v. Cromartie, 181 Ala. 295, 61 So. 907.

⁷⁸ New Brunswick & C. Railway & Land Co. v. Conybeare, 9 H. L. Cas. 711; Western Bank of Scotland v. Adie, L. R. 1 H. L. Sc. 145.

⁷⁹ Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37; Keeler v. Seaman, 47 N. Y. Misc. 292, 95 N. Y. Supp. 920.

⁸⁰ Davis v. Louisville Trust Co., 181 Fed. 10, 30 L. R. A. (N. S.) 1011.

⁸¹ United States. Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105.

Alabama. Southern States Fire & Casualty Ins. Co. v. De Long, 178 Ala. 110, 59 So. 61.

Illinois. Hutchinson Furnace &

Smoke Consuming Co. v. Lyford, 123 Ill. 300, 13 N. E. 844, aff'g 22 Ill. App. 461.

Missouri. Tinker v. Kier, 195 Mo. 183, 94 S. W. 501.

Ohio. See Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

Texas. See also Medlin v. Commonwealth Bonding & Casualty Ins. Co., — Tex. Civ. App. —, 180 S. W. 899.

Utah. Campbell v. Zion's Co-operative Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Washington. Johns v. Clothier, 78 Wash. 602, 139 Pac. 755.

West Virginia. Reiniger v. Piercy, — W. Va. —, 86 S. E. 926.

⁸² Keeler v. Seaman, 47 N. Y. Misc. 292, 95 N. Y. Supp. 920.

⁸³ United States. In re American Nat. Beverage Co., 193 Fed. 772.

produce testimony which will reasonably satisfy the court that the false representations were made and acted upon.⁸⁴ Whether or not a subscription was induced by fraud is generally a question of fact.⁸⁵

§ 611. Want of authority on part of person making representation.

A corporation is clearly not responsible for false and fraudulent representations inducing a subscription to its stock, if made by a stranger without any authority from the corporation or its officers and if not ratified by the corporation, and such representations, therefore, cannot give the subscriber a right to rescind or to sue the corporation for damages.⁸⁶

Alabama. *Southern States Fire & Casualty Ins. Co. v. De Long*, 178 Ala. 110, 59 So. 61.

Oklahoma. *King v. Howeth & Co.*, 42 Okla. 178, 140 Pac. 1182.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, — Tex. Civ. App. —, 180 S. W. 936.

Washington. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

West Virginia. *Reiniger v. Piercy*, — W. Va. —, 86 S. E. 926.

⁸⁴ *Southern States Fire & Casualty Ins. Co. v. De Long*, 178 Ala. 110, 59 So. 61.

⁸⁵ *Savage v. Bartlett*, 78 Ind. 561, 28 Atl. 414; *Austin v. Murdock*, 127 N. C. 454, 37 S. E. 478.

Whether alleged oral misrepresentations were actually made is a question of fact. *Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501; *Cattlemen's Trust Co. v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Campbell v. Zion's Co-operative Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401. See also *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

In *Brainerd v. Kydd*, 26 Cal. App. 655, 148 Pac. 221, and *Yenawine v. Tycrete-Concrete Products Co.*, 160 Ky. 198, 169 S. W. 594, the evidence was held to show that there was no fraud.

⁸⁶ **United States.** *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105.

Alabama. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

California. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542.

Indiana. *Ft. Wayne & B. Turnpike Co. v. Deam*, 10 Ind. 563.

Maryland. *Scarlett v. Academy of Music*, 46 Md. 132.

Minnesota. *See Nichols v. Atwood*, 127 Minn. 425, 149 N. W. 672.

Ohio. *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601.

Tennessee. *Cunningham v. Edgefield & K. R. Co.*, 2 Head 23.

England. *Duranty's Case*, 26 Beav. 268. And see *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178.

A corporation is not responsible for false representations by a mere stockholder, not acting as its agent, by which another was induced to subscribe. *Canal Bank v. Holland*, 5 La. Ann. 363.

The fact that the holder of the stock paid third persons a bonus to procure it for him will not relieve the corporation from liability on the theory that they sold it to him, where his contract of subscription was made directly with the company, which received assessments paid by him, the certificates were issued directly to him, and it does not appear that the

Nor is a corporation responsible for false and fraudulent representations made by its president or other officers to induce a subscription, if they were not acting for the corporation, or if they had no authority to make the representations, or to solicit or receive subscriptions, unless their act has been ratified by it.⁸⁷ But as is elsewhere shown, it is well settled that a corporation is responsible for false and fraudulent representations made by its officers and agents within the scope of their employment, although such representations may not have been expressly authorized by the corporation or its stockholders. It is enough if they were made by the officer or agent while acting within the scope of his employment.⁸⁸ And this principle applies to the full extent when subscriptions to the stock of a corporation are induced by false or fraudulent representations.⁸⁹ So, if particular officers or agents are authorized to solicit or receive subscriptions to stock, and they make false and fraudulent representations to induce a person

stock in question had ever been subscribed to by any other persons and transferred by them to him, it being a fair and just inference under such circumstances that the persons to whom the bonus was paid were the agents of the company. *McClanahan v. Ivanhoe Land & Improvement Co.*, 96 Va. 124, 30 S. E. 450.

⁸⁷ *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650; *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92; *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352, 56 Am. Dec. 116. See also *Hutchinson Furnace & Smoke Consuming Co. v. Lyford*, 123 Ill. 300, 13 N. E. 844, aff'g 22 Ill. App. 461; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240.

The corporation is not liable for false representations in a letter written by its manager, if the letter was not specifically authorized by its directors nor within the general scope of the manager's authority. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

Representations as to the future

location of a railroad by officers who have not the power to fix its location are not binding on the company. *Carlisle v. Evansville, I. & C. Straight Line R. Co.*, 13 Ind. 477; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

"A director has no power, unless specially authorized, to bind the corporation by false and fraudulent representations, or even by an express promise." And the burden is on the subscriber, setting up false representations by a single director as a defense to his subscription, or by way of counterclaim in an action thereon, to show that such director had such authority. *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

⁸⁸ See Chap. 42, *infra*.

⁸⁹ *King v. Livingston Mfg. Co.*, — Ala. —, 68 So. 897, 180 Ala. 118, 60 So. 143.

An allegation that a letter containing false representations was from the company, and signed by its manager, sufficiently shows it to be the act of the company. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

to subscribe, the corporation is responsible for the fraud, whether the representations were authorized or not,⁹⁰ and regardless of any secret limitations on the agent's authority.⁹¹

"The foregoing is true because the corporation can act only through its agents, and the acts of the agents in and about its business are the acts of the principal. Likewise the company is bound by such representations, because they are within the apparent scope of the author-

⁹⁰ **United States.** *Tyler v. Savage*, 143 U. S. 79, 36 L. Ed. 82; *Jones v. Bankers' Trust Co.*, 235 Fed. 649.

Alabama. *Alabama Foundry & Machine Works v. Dallas*, 127 Ala. 513, 29 So. 459; *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Rives v. Montgomery South Plank Road Co.*, 30 Ala. 92.

California. *Dox v. R. E. Lomax Co.*, 29 Cal. App. 718, 156 Pac. 874; *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542.

Colorado. *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Illinois. *Melendy v. Keen*, 89 Ill. 395; *Rutz v. Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83.

Indiana. *Wm. B. Joyce & Co. v. Eifert*, 56 Ind. App. 190, 105 N. E. 59.

Kentucky. *Southern Ins. Co. v. Miligan*, 154 Ky. 216, 157 S. W. 37; *Weisinger Tobacco Co. v. Van Buren*, 135 Ky. 759, 135 Am. St. Rep. 502, 123 S. W. 289.

New Jersey. *Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 37 Atl. 741; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

New York. *New York Exch. Co. v. DeWolf*, 31 N. Y. 273.

Tennessee. *Madison Trust Co. v. Stahlman*, 134 Tenn. 402, 183 S. W. 1012.

Texas. *Peerless Fire Ins. Co. v. Riveire*, — Tex. Civ. App. —, 188 S. W. 254; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074. See also *Davis v. Burns*, — Tex. Civ. App. —,

173 S. W. 476; *Commonwealth Bonding & Casualty Ins. Co. v. Bomar*, — Tex. Civ. App. —, 169 S. W. 1060.

Utah. *Campbell v. Zion's Co-operative Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

Virginia. *McClanahan v. Ivanhoe Land & Improvement Co.*, 96 Va. 124, 30 S. E. 450; *Crump v. United States Min. Co.*, 7 Gratt. 352, 56 Am. Dec. 116.

West Virginia. *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

Wisconsin. *Waldo v. Chicago, St. P. & F. R. Co.*, 14 Wis. 575.

England. *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 72; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145.

As to the rule in Pennsylvania, see *Custar v. Titusville Gas & Water Co.*, 63 Pa. St. 381.

In England it was at one time held that a corporation was not responsible for the false and fraudulent representations made by its agents in procuring subscriptions, and there are some early decisions to this effect in this country. *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864; *Ayre's Case*, 25 Beav. 513; *Mixer's Case*, 4 De Gex & J. 575; *Dodgson's Case*, 3 De Gex & S. 85. But the doctrine has long ago been repudiated, and the doctrine stated in the text established. See the English and federal cases at the beginning of this note.

⁹¹ *Jones v. Bankers' Trust Co.*, 235 Fed. 649.

ity of the agent selling, and because the company by accepting the fruits of the agency will not be heard to deny the authority of the agents in the use of means to secure such fruits.”⁹²

There seems to be a conflict of authority as to the effect in this regard of provisions in the contract that no representations or statements made by the person taking the subscription shall be binding on the company unless embodied in the written contract. Some courts hold that such a provision will prevent a rescission for false representations made by the agent which are not embodied in the contract, on the theory that it is a limitation on the power of the agent which is known to the subscriber and hence is binding on him,⁹³ while others take the view that it does not prevent the subscriber from showing that he was induced to sign the contract by reason of the false representations of the agent.⁹⁴

It is also well settled that a corporation may become responsible for the fraud of a person by ratification of the fraud, or by ratification of the transaction in the course of which the fraud was perpetrated. If a corporation accepts a subscription to its capital stock procured by a person without authority, it not only ratifies the act of such person in receiving the subscription, but also impliedly ratifies and becomes responsible for any false and fraudulent representations which he may have made to induce the subscription,⁹⁵ at least if at the time of

⁹² *Jones v. Bankers' Trust Co.*, 235 Fed. 649.

⁹³ *Jones v. Bankers' Trust Co.*, 235 Fed. 649; *Campbell v. Eastern Building & Loan Ass'n*, 98 Va. 729, 37 S. E. 350. See also *Chicago Bldg. & Mfg. Co. v. Summerour*, 101 Ga. 820, 29 S. E. 291.

⁹⁴ *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, — Tex. Civ. App. —, 180 S. W. 936; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

The foregoing Texas decisions are based on the holding in *United States Gypsum Co. v. Shields*, 101 Tex. 473, 108 S. W. 1165, aff'g — Tex. Civ. App. —, 106 S. W. 725 (not a case involving a stock subscription).

In *Jones v. Bankers' Trust Co.*, 235 Fed. 649, it is said that, “The contract dealt with in the *Shields* case was

practically an embodiment of the principle that all antecedent oral agreements are merged into the written instrument, and cannot be received to vary the terms thereof. The representations sought to be proved in that case did not vary the terms, but were simply inducements to sign. They were thus not excluded by the terms of the contract.” And it is also pointed out that the supreme court did not consider this question in that case, but affirmed the decision of the court of appeals solely upon the question whether the proof of fraud was sufficient to sustain the verdict.

⁹⁵ *Colorado. Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Mississippi. Walker v. Mobile & O. R. Co., 34 Miss. 245.

New Jersey. Garrison v. Technic

such acceptance it had notice of the fraud.⁹⁶ And the same is true if, with knowledge of the facts, it accepts or retains money paid by the subscriber on his subscription,⁹⁷ though it has been held that a failure to restore money so received on demand will not constitute a ratification where the corporation has not the present ability to restore it, or, in other words, where restitution is impossible at the time.⁹⁸

Even if a corporation is not responsible, in the absence of a ratification, for false representations contained in a prospectus issued by its promoters prior to its formation, it becomes responsible if it subsequently approves or otherwise ratifies the prospectus.⁹⁹

Commissioners appointed by the charter or enabling act to receive subscriptions have no authority to bind the corporations by representations or special stipulations, and as subscribers are chargeable with notice of their want of authority, if they rely on false representations made by the commissioners, they cannot hold the corporation responsible.¹

A corporation is not responsible for the false and fraudulent repre-

Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741.

New York. Talmadge v. Sanitary Security Co., 31 App. Div. 498, 52 N. Y. Supp. 139; Cawthra v. Stewart, 59 Misc. 38, 109 N. Y. Supp. 770.

Virginia. Crump v. United States Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

England. Lynde v. Anglo-Italian Hemp Spinning Co., [1896] 1 Ch. 178.

See also Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497.

Fraudulent representations of an unauthorized agent will avoid the contract, for the principal cannot avail himself of a contract so made. *Chartiers Ry. Co. v. Hodgins*, 85 Pa. St. 501.

It cannot accept the benefits of his fraud without assuming the representations which produced them. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542.

The bringing of an action upon a subscription obtained by him is a ratification. *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

⁹⁶ Acceptance of the subscription by the corporation under such circumstances will not support a rescission unless it has such notice. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

⁹⁷ *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143; *Cawthra v. Stewart*, 59 N. Y. Misc. 38, 109 N. Y. Supp. 770.

⁹⁸ *King v. Livingston Mfg. Co.*, — Ala. —, 68 So. 897, 180 Ala. 118, 60 So. 143.

⁹⁹ *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352, 56 Am. Dec. 116; *In re Metropolitan Coal Consumers' Ass'n*, [1892] 3 Ch. 1.

¹ *Rutz v. Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Nippenose Mfg. Co. v. Station*, 68 Pa. St. 256; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

See also § 558, *supra*.

sentations of a promoter which induced one to subscribe for stock, where the promoter, in making the representations, was acting for himself, and not for the corporation, or where the corporation has not in any way become a party to the fraud.² So it has been held that false representations of the promoters are not ground for rescission if, at the time when they accept the subscription, the managing officers of the corporation have no knowledge of the fraud.³ But it is otherwise if the corporation is a party to the fraud;⁴ as, for example, where its managing officers accept the subscription with knowledge that it was procured by false representations.⁵ And according to some of the cases, if the promoter was acting for the corporation, it is liable, on the ground that the corporation, in accepting the benefit of the subscription, assumes responsibility for the false representations by means of which it was obtained.⁶ So it has been held in a number

2 Indiana. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

Kentucky. *Oldham v. Mt. Sterling Improvement Co.*, 103 Ky. 529, 20 Ky. L. Rep. 207, 45 S. W. 779. See also *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 35 S. W. 643.

West Virginia. *Kimmins v. Wilson*, 8 W. Va. 584.

Wisconsin. *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81.

England. *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178. See generally § 166.

A corporation cannot make false representations through its promoters or agents as to the purpose for which it is to be organized. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

Acts and statements of the promoters of a corporation tending to show that its real object was illegal, but which have not been adopted or acted upon by the corporation, do not entitle a subscriber to avoid his subscription. *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729, aff'g 67 Hun (N. Y.) 356, 22 N. Y. Supp. 407.

A promoter of a railroad company cannot bind the corporation by rep-

resentations as to where the road will be located. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51.

Where the contract of subscription is severable, one part being in favor of the corporation and the other in favor of the promoters, on rescission the corporation is not liable for the return of the money received by the promoters under their part. *American Home Life Ins. Co. v. Jenkins*, — Tex. Civ. App. —, 138 S. W. 424.

3 Commonwealth Bonding & Casualty Ins. Co. v. Cator, — Tex. Civ. App. —, 175 S. W. 1074. See also *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681.

4 Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

5 Commonwealth Bonding & Casualty Ins. Co. v. Cator, — Tex. Civ. App. —, 175 S. W. 1074. See also *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681.

6 McDermott v. Harrison, 56 Hun (N. Y.) 640, 9 N. Y. Supp. 184; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81. Compare *Miller v. Wild Cat*

of cases that a subscriber may rescind because of secret advantages or profits made by the promoter by whom his subscription was obtained.⁷ The promoters are, of course, personally liable in damages for false representations made by them.⁸

It has been held that a corporation is not responsible for representations made without authority by a committee appointed prior to its formation for the purpose of procuring subscriptions.⁹

By the weight of authority, a corporation is not responsible for representations made by officers of the corporation or others at a public meeting held for the purpose of advertising the undertaking, and inducing subscriptions for stock, unless such representations were made by authority of the corporation.¹⁰

Whether representations were authorized by the corporation, or subsequently ratified by it, is a question for the jury, unless the admitted circumstances are such as to render the corporation responsible as a matter of law, under the rules above stated.¹¹

§ 612. What amounts to fraud in procuring subscriptions—In general. In determining whether a fraud has been committed in procuring a subscription to stock, the same principles are to be applied as in the case of any other contract.¹² It may be laid down as a general rule, therefore, that any false representation of a material fact, made by a person for whose representations the corporation is responsible, with knowledge that it is false, or recklessly and without any knowledge as to its truth or falsity, if relied upon by a person to whom it is made in subscribing for shares, is such fraud as entitles him to rescind his subscription, or maintain an action for damages.¹³

Gravel Road Co., 57 Ind. 241; Oldham v. Mt. Sterling Improvement Co., 20 Ky. L. Rep. 207, 45 S. W. 779.

⁷ See § 627, *infra*.

⁸ Goodwin v. Wilbur, 104 Ill. App. 45; Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494. See also § 166, *supra*.

⁹ St. Johns Mfg. Co. v. Munger, 106 Mich. 90, 29 L. R. A. 63, 58 Am. St. Rep. 468, 64 N. W. 3.

¹⁰ Smith v. Tallassee Branch of Central Plank Road Co., 30 Ala. 650; Mississippi, O. & R. River R. Co. v. Cross, 20 Ark. 443; First Nat. Bank of Cedar Rapids v. Hurford, 29 Iowa 579; Buf-

falo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336. See also Vicksburg, S. & T. R. Co. v. McKean, 12 La. Ann. 638. Contra, Atlanta & W. P. R. Co. v. Hodnett, 36 Ga. 669; McClellan v. Scott, 24 Wis. 81.

¹¹ Weems v. Georgia Midland & G. R. Co., 88 Ga. 303, 14 S. E. 583; Kelsey v. Northern Light Oil Co., 45 N. Y. 505; Crump v. United States Min. Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

¹² Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99, 125.

¹³ Illinois. Melendy v. Keen, 89 Ill. 395.

To sustain an action for deceit or to warrant a rescission the statement relied on must have been as to a fact material to the question of subscription.¹⁴

§ 613. — **Representations as to property or assets.** Among the representations which have been held to be material false representations of fact constituting fraud are representations that the corporation has purchased or owns certain property or rights,¹⁵ that

Iowa. Coles v. Kennedy, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088.

Maryland. Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

Michigan. Dieterle v. Ann Arbor Paint & Enamel Co., 143 Mich. 416, 107 N. W. 79; Sherman v. American Stove Co., 85 Mich. 169, 48 N. W. 537.

Mississippi. Water Valley Mfg. Co. v. Seaman, 53 Miss. 655; Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829.

Missouri. Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719.

New Hampshire. Anderson v. Scott, 70 N. H. 534, 49 Atl. 568.

North Carolina. Queen City Printing & Paper Co. v. McAden, 131 N. C. 178, 42 S. E. 575.

Ohio. See Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

Texas. Peerless Fire Ins. Co. v. Riveire, — Tex. Civ. App. —, 188 S. W. 254; Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762.

Wisconsin. McClellan v. Scott, 24 Wis. 81.

England. Ranger v. Great Western Ry. Co., 5 H. L. Cas. 72; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99.

See also other cases in the notes following.

¹⁴ **United States.** National Leather Co. v. Roberts, 221 Fed. 922; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800.

Indiana. Andrews v. Ohio & M. R. Co., 14 Ind. 169.

Kentucky. Chicago Bldg. & Mfg. Co. v. Beaven, 149 Ky. 267, 148 S. W. 37.

Maryland. Hughes v. Antietam Mfg. Co., 34 Md. 316.

Mississippi. Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829.

Missouri. Tinker v. Kier, 195 Mo. 183, 94 S. W. 501.

Ohio. Armstrong v. Karshner, 47 Ohio St. 271, 24 N. E. 897.

Oklahoma. King v. Howeth & Co., 42 Okla. 178, 140 Pac. 1182.

Texas. Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681; Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App. —, 169 S. W. 1060.

Utah. Campbell v. Zion's Co-op. Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Virginia. Reed & McCormick v. Gold, 102 Va. 37, 45 S. E. 868.

A representation that no one but members of a certain order could subscribe for stock or hold office in a corporation was held not to be material, it not appearing that any persons other than members ever did so. Columbus Institute v. Conohan, — Wis. —, 159 N. W. 720.

See also the cases cited in the following notes.

¹⁵ Savage v. Bartlett, 78 Md. 561, 28 Atl. 414; Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719; Waldo

property owned by it is free from incumbrance,¹⁶ that land owned by it contains valuable mines in profitable operation,¹⁷ that abstract books owned or to be acquired by the company contain complete and perfect abstracts and descriptions of title of all the real estate in a certain county,¹⁸ that certain patents had been granted as originally applied for, where the patents were granted, in fact, with certain material amendments,¹⁹ and false representations as to the condition

v. Chicago, St. P. & F. R. Co., 14 Wis. 575; *Ross v. Estates Inv. Co.*, 3 Ch. App. 682. And see *Metropolitan Lead & Zinc Min. Co. v. Webster*, 193 Mo. 351, 92 S. W. 79; *Foulks Accelerating Air Motor Co. v. Thies*, 26 Nev. 158, 99 Am. St. Rep. 684, 65 Pac. 373; *Lehman-Charley v. Bartlett*, 135 N. Y. App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125; *Cunningham v. Morris*, 56 Wash. 341, 105 Pac. 839; *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

Such as false representations in regard to its property and assets. *Georgia Portland Cement & Slate Co. v. Jackson*, 143 Ga. 84, 84 S. E. 461; *Farmers' & Merchants' State Bank v. Shaffer*, — Iowa —, 147 N. W. 851; *Cawthra v. Stewart*, 109 N. Y. Supp. 770.

That it has machinery to operate. *In re National Pressed Brick Co.*, 212 Fed. 878.

That it owns certain property when it in fact has only an option to purchase it. *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

That it had acquired and then owned another company, when in fact it had merely purchased a majority of its stock, and had borrowed the money to pay for it, pledging the stock as security. *Mack v. Latta*, 83 N. Y. App. Div. 242, 82 N. Y. Supp. 130, rev'd on other grounds 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97.

That a stone company had purchased a certain lease and had paid a cer-

tain sum for it, where it had not been paid for and it was not intended that anything should ever be paid for it. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

Representations that an existing newspaper had been secured for a proposed newspaper corporation and the associated press reports secured for the paper are material representations of past occurrences, and ground for rescission if false. *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

Where a corporation had neither capital nor property and had never attempted to do business, existing as a matter of fact merely on paper, no subscribers ever having paid over anything to the corporation, the court held the corporation without power to enforce a subscription contract obtained by false representation that it owned certain property. The court called the corporation a "sham" and an "abortion" and said that it was without standing to enforce payment for its stock. *Metropolitan Lead & Zinc Min. Co. v. Webster*, 193 Mo. 351, 92 S. W. 79.

¹⁶ *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655; *McClellan v. Scott*, 24 Wis. 81.

¹⁷ *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64.

¹⁸ *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440.

¹⁹ *Foulks Accelerating Air Motor Co. v. Thies*, 26 Nev. 158, 99 Am. St. Rep. 684, 65 Pac. 373.

of machinery to be acquired by it,²⁰ or as to the quality of clay deposits on land which it owns.²¹

Representations as to the value of the corporate property or assets are generally mere expressions of opinion, and hence not actionable.²² But under certain circumstances fraud may be predicated upon assertions of present value,²³ as, for example, upon representations as to the quantity and value of the corporate assets.²⁴ And false representations as to the cost of corporate property may also form the basis for a charge of fraud.²⁵

§ 614. — Representations as to financial conditions. False representations as to the financial condition of the corporation may constitute actionable fraud, as, for example, representations that it is in a solvent and prosperous condition,²⁶ that it is not incumbered with

²⁰ Misrepresentations as to the condition of secondhand ice machinery to be sold to a corporation to be formed to manufacture ice were held to be a good defense to a note given to the person making them for the purchase price of stock of such corporation. *Huson Ice & Coal Co. v. Thornton*, 143 Ga. 297, 84 S. E. 969.

²¹ As to the quality of such deposits on the land of a brick and tile company. *Drake v. Fairmont Drain, Tile & Brick Co.*, 129 Minn. 145, 151 N. W. 914.

²² See § 618, *infra*.

²³ *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

²⁴ *People's Nat. Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 763; *Byers Bros. v. Maxwell* (Tex. Civ. App.), 73 S. W. 437.

²⁵ *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; *Martin v. Veana Food Co.*, 153 Mich. 282, 116 N. W. 978; *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440; *Capel v. Sim's Ships Composition Co.*, 58 L. T. R. (N. S.) 807. See also *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, *aff'g* 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

As, for example, representations that the net cost of property claimed

to have been purchased by the corporation was a certain sum. *Lehman-Charley v. Bartlett*, 135 N. Y. App. Div. 674, 120 N. Y. Supp. 501, *aff'd* 202 N. Y. 524, 95 N. E. 1125. Or that it has paid a certain sum for a plant. *Weissinger Tobacco Co. v. Van Buren*, 135 Ky. 759, 135 Am. St. Rep. 502, 123 S. W. 289. Or that certain persons had bought certain property for the corporation and had paid a specified sum therefor, when they had not paid nearly that much for it. *Alabama Foundry & Machine Works v. Dallas*, 127 Ala. 513, 29 So. 459.

²⁶ *United States*. *Tyler v. Savage*, 143 U. S. 79, 36 L. Ed. 82; *Newbegin v. Newton Nat. Bank of Newton*, 66 Fed. 701. See also *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679.

California. See *People v. California Safe Deposit & Trust Co.*, 19 Cal. App. 414, 126 Pac. 516.

Georgia. *Empire Life Ins. Co. v. Brown*, 145 Ga. 818, 89 S. E. 1085.

Illinois. *Melendy v. Keen*, 89 Ill. 395.

Indiana. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

Iowa. *Farnsworth v. Muscatine Produce & Pure Ice Co.*, 161 Iowa 170,

any debt,²⁷ that it has sufficient capital to operate,²⁸ that it has not lost any money,²⁹ that it has a surplus fund of a certain amount,³⁰ or that it has arranged to obtain all the money it wants at a specified rate.³¹

§ 615. — Representations as to capital stock. False representations that the capital stock of a proposed corporation is to be a certain

141 N. W. 940; *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

Kentucky. *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37; *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1876, 72 S. W. 768, 24 Ky. L. Rep. 1110, 70 S. W. 868.

Massachusetts. *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427.

Michigan. *Chatfield v. Sintz-Wal-lin Co.*, 182 Mich. 689, 148 N. W. 797; *Martin v. Veana Food Co.*, 153 Mich. 282, 116 N. W. 978; *Getchell v. Dusen-bury*, 145 Mich. 197, 108 N. W. 723; *Sherman v. American Stove Co.*, 85 Mich. 169, 48 N. W. 537.

Missouri. *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Brolaski v. Carr*, 127 Mo. App. 279, 105 S. W. 284.

New Jersey. *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577.

New York. *Keeler v. Seaman*, 47 Misc. 292, 95 N. Y. Supp. 920.

Tennessee. *Madison Trust Co. v. Stahlman*, 134 Tenn. 402, 183 S. W. 1012.

Washington. *Cunningham v. Morris*, 56 Wash. 341, 105 Pac. 839.

Wisconsin. *Waldo v. Chicago, St. P. & F. R. Co.*, 14 Wis. 575.

England. *Bell's Case*, 22 Beav. 35.

Representations as to the condition, assets, liabilities, surplus and hold-ings of the corporation. *Dunn v. Candee*, 98 N. Y. App. Div. 317, 90 N. Y. Supp. 674.

Such as false representations that the corporation is solvent. *Reid v. Owensboro Sav. Bank & Trust Co.*, 141 Ky. 444, 132 S. W. 1026; *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

Or representations as to its solvency and the condition of its property and business. *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa 294, 103 N. W. 961.

Or that it is doing a large and lucrative business and is earning a large profit on its invested capital, when it is in fact insolvent. *Dox v. R. E. Lomax Co.*, 29 Cal. App. 718, 156 Pac. 874.

Or that the company is a going concern and that its stock is a fine investment, when in fact it is insolvent. *Peerless Fire Ins. Co. v. Riveire*, — Tex. Civ. App. —, 188 S. W. 254.

Or as to its assets, debts and busi-ness. *Krisch v. Inter-State Fisheries Co.*, 39 Wash. 381, 81 Pac. 855.

But not exaggerated representa-tions as to the value, present and prospective, of the assets and stock of the company, which from their na-ture are necessarily speculative. See § 618, *infra*.

²⁷ *Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501.

²⁸ *In re National Pressed Brick Co.*, 212 Fed. 878.

²⁹ Such a representation is the statement of an existing fact. *National Leather Co. v. Roberts*, 221 Fed. 922.

³⁰ *Castleman-Blakemore Co. v. Brucker*, 167 Ky. 269, 180 S. W. 360. See also *Southern Ins. Co. v. Milli-gan*, 154 Ky. 216, 157 S. W. 37.

³¹ *Commonwealth Bonding & Casu-alty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681. See also *Commonwealth Bonding & Casualty Ins. Co. v. Bomar*, — Tex. Civ. App. —, 169 S. W. 1060.

sum,³² or that all or a certain amount of the capital stock of a corporation has been subscribed for,³³ may constitute actionable fraud. And the same is generally held to be true of false representations that certain named persons have subscribed for stock,³⁴ although

³² *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

³³ *National Leather Co. v. Roberts*, 221 Fed. 922; *Talmadge v. Sanitary Security Co.*, 31 N. Y. App. Div. 498, 52 N. Y. Supp. 139; *Ross v. Estates Inv. Co.*, L. R. 3 Ch. App. 682; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Arnison v. Smith*, 59 L. T. R. (N. S.) 627. See also *Spellier Elec. Time Co. v. Leedom*, 149 Pa. St. 185, 24 Atl. 197.

A representation that all of the stock had been subscribed, was held not to be ground for rescission where all but ten per cent. had been subscribed, and the balance was taken and paid for before there was any occasion to use the money, since neither the corporation nor the subscriber was injured by its falsity. *National Leather Co. v. Roberts*, 221 Fed. 922.

In *Jones-Thompson Inv. Co. v. Cascade Steel Foundry Co.*, 59 Wash. 601, 110 Pac. 417, the evidence was held not to warrant a holding that there was such a want of ability to pay on the part of certain subscribers, and knowledge thereof on the part of the officers of the corporation, as would support a charge of fraud in representing that the full amount of stock was subscribed.

A representation that the stock has been wholly subscribed by responsible persons is only material where the subscriber contends that his subscription is void in toto, and is immaterial where he admits that the company was solvent and, in effect, that his subscription was valid, and merely raises an issue as to the price agreed to be paid for the stock. *Johns v. Clother*, 78 Wash. 602, 139 Pac. 755.

The rule stated in the text does not apply, however, to a mere statement that a railroad company or other corporation has enough stock subscribed to construct its road or carry out the enterprise successfully. This is mere expression of opinion. *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240; *Parker v. Thomas*, 19 Ind. 213, 87 Am. Dec. 385; *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68; *Bish v. Bradford*, 17 Ind. 490; *Hardy v. Merriweather*, 14 Ind. 203.

³⁴ *United States*. See *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105; *National Leather Co. v. Roberts*, 221 Fed. 922.

Alabama. *Southern States Fire & Casualty Ins. Co. v. Tanner*, 180 Ala. 30, 60 So. 81.

Iowa. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72. See also *Coles v. Kennedy*, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088.

Kentucky. *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37.

Texas. *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

England. *Henderson v. Lacon*, L. R. 5 Eq. 249.

As, for example, a representation that a friend of the defendant was a large stockholder and that he had sent the person soliciting the subscription to the defendant. *Queen City Printing & Paper Co. v. McAden*, 131 N. C. 178, 42 S. E. 575. Or representations that certain well known persons had subscribed, when in fact their stock had been given to them. *Talmadge v. Sanitary Security Co.*,

in at least one jurisdiction there has been a holding to the contrary.³⁵

Representations that the subscriptions upon a list shown to the subscriber are all bona fide subscriptions, when some of them are not, have been held to constitute fraud,³⁶ as have representations that certain persons have subscribed for a certain amount of stock where there is a secret agreement that they shall not be required to pay for the same.³⁷

Representations that a certain amount of the capital has been actually paid in,³⁸ or that subscribers who have not yet signed notes for the amount of their subscriptions are ready and willing to do so, or to pay the same in cash,³⁹ have been held to be actionable. And the same has been held to be true of representations that the stock subscribed for is "fully paid";⁴⁰ or that it is treasury stock, when in fact it has been given to the promoter for property transferred to the company by him;⁴¹ or that the certificates of stock which would

31 N. Y. App. Div. 498, 52 N. Y. Supp. 139.

³⁵ A false representation that certain of the subscriber's friends and neighbors had subscribed, is not a defense to an action on the subscription, since it is not a representation of a fact essential to the success of the enterprise. Especially is this true where he could have learned the truth. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481. See also *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286.

³⁶ *Goodwin v. Wilbur*, 104 Ill. App. 45.

³⁷ See § 621, *infra*.

³⁸ *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719; *Cawthra v. Stewart*, 109 N. Y. Supp. 770; *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305; *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074; *Commonwealth Bonding & Casualty Ins. Co. v. Bomar*, — Tex. Civ. App. —, 169 S. W. 1060.

As, for example, a fraudulent misrepresentation as to the amount of

paid up stock. *Wiseola Co. v. Moore*, 187 Ala. 163, 65 So. 398.

Or that the stock was fully paid up. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

³⁹ *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949.

⁴⁰ *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, *aff'g* 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

⁴¹ Representations by the promoter that certain patents transferred to the company by him and others had been fully paid for by the issuance of a specified amount of common stock, and that a specified amount of common and preferred stock of the company remained in the treasury of the company, are ground for rescinding a subscription to preferred stock, where the promoter in fact has been given a part of the preferred stock for his patent in addition to the common stock, and it is a part of the stock so given to him which the subscriber receives. *Hamilton v. American Hulled Bean Co.*, 156 Mich. 609, 121 N. W. 731, 143 Mich. 277, 106 N. W. 731.

be issued to the subscriber would show on their face that the stock was a specified amount per share,⁴² or that no stock had been or would be sold at a lower price than that paid by the complainant,⁴³ or for less than par,⁴⁴ or that not more than a certain amount of stock and bonds will be issued, where a greater amount has already been issued.⁴⁵

As a rule representations as to the present or future value of the stock are not actionable.⁴⁶

But the contrary has been held to be true of representations that, the price at which the stock was offered to the subscriber was its par value,⁴⁷ that the actual and intrinsic value of the stock is a specified sum per share,⁴⁸ and that the stock is rapidly increasing in value.⁴⁹

§ 616. — Representations as to dividends. False representations that the company was paying a certain dividend at the time when the subscription was made may constitute actionable fraud;⁵⁰ and the same is true of representations that it has already declared a certain dividend in which the subscriber will share,⁵¹ or that it had earned a certain dividend the previous year,⁵² or that it had on hand sufficient money, property or assets to pay dividends at a certain rate for a specified length of time.⁵³ And declaring and paying dividends

⁴² *Southern States Fire & Casualty Ins. Co. v. Tanner*, 180 Ala. 30, 60 So. 81.

⁴³ *Briggs v. Reynolds*, 176 Ill. App. 420.

⁴⁴ *Hubbard v. International Mercantile Agency*, 68 N. J. Eq. 434, 59 Atl. 24.

⁴⁵ *Weems v. Georgia Midland & Gulf R. Co.*, 88 Ga. 303, 14 S. E. 583, 84 Ga. 356, 11 S. E. 503.

Setting forth in a prospectus of a corporation plans which would require that the whole amount of a proposed issue of preferred stock should be subscribed and paid for is not a representation, to one subscribing to such stock, that none will be issued until it is all taken, so as to entitle him to rescind for fraud if it is not all taken when his shares are issued to him. *Bartol v. Walton & Whann Co.*, 92 Fed. 13.

⁴⁶ See § 618, *infra*.

⁴⁷ *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. — 184 S. W. 716.

⁴⁸ That stock of the par value of fifty dollars was actually and intrinsically worth one hundred and twenty dollars, at which price the defendant took it. *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889.

⁴⁹ *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889.

⁵⁰ That it was paying twenty-seven per cent. of the investment. *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37.

⁵¹ *Southern States Fire & Casualty Ins. Co. v. Tanner*, 180 Ala. 30, 60 So. 81.

⁵² *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See also *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

⁵³ False representations that the corporation has on hand sufficient

which have not been earned is in itself fraudulent, especially when accompanied by positive statements that such dividends have been earned and are justified.⁵⁴

But representations as to future dividends are mere predictions or expressions of opinion, and hence are not actionable.⁵⁵

§ 617. — Further illustrations. False representations that the corporation is fully and legally organized,⁵⁶ or that the subscription is to stock in a corporation to be formed in the future by certain persons known by reputation to the subscriber, when in fact it has already been organized by other persons,⁵⁷ or that agreements have been completed for the consolidation of the corporation with other corporations,⁵⁸ have been held to constitute fraud. And the same has been held to be true of false representations that certain persons are directors or other officers of the corporation, or that they have agreed to act as such,⁵⁹ that there were no promoters' profits,⁶⁰ that the company would at any time upon request repurchase the stock of any stockholder who might desire to dispose of the same,⁶¹ representations as to the character of the business in which the corporation would engage,⁶² and representations by the agent taking the subscription that he has authority to make certain representations.⁶³

money, property or assets with which to pay eight per cent. dividends from the start, and for from three to five years, "without hurting the financial standing of the company," and though "it did not earn another cent," and false statements guaranteeing a present ability to pay dividends, are actionable. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

⁵⁴ *Keeler v. Seaman*, 47 N. Y. Misc. 292, 95 N. Y. Supp. 920; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

⁵⁵ See § 618, *infra*.

⁵⁶ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

⁵⁷ *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

⁵⁸ *Mack v. Latta*, 83 N. Y. App. Div. 242, 82 N. Y. Supp. 130, *rev'd* on other grounds 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97.

⁵⁹ *Blake's Case*, 34 Beav. 639; *In re Metropolitan Coal Consumers' Ass'n*, 64 L. T. R. (N. S.) 561, [1892] 3 Ch. 1, 62 L. T. R. (N. S.) 30.

⁶⁰ *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

⁶¹ *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

⁶² Representations that a fruit growers' association, when organized, would be strictly a mutual affair, and would limit its operations entirely to the shipment of fruit grown by its own stockholders, are a good defense to an action on a subscription note, where it in fact conducted a general commission business, and failed to ship defendant's fruit and confessed its inability to do so. *Divine v. Western Slope Fruit Growers' Ass'n*, 27 Colo. App. 368, 149 Pac. 841.

⁶³ *General Bonding & Casualty Ins. Co. v. Mount*, — Tex. Civ. App. —, 183 S. W. 783.

Where it is agreed that the money and notes received from subscribers shall be kept in the state until the corporation is licensed to do business in another state, sending it out of the state before that time, is a fraud on the subscribers.⁶⁴

§ 618. — Expression of opinion or prediction. As a general rule, a statement, to constitute a false and fraudulent representation, must be a representation of fact, and not a mere expression of opinion, belief, or prediction. On statements of the latter character persons have no right to rely, and if they do so, they cannot treat them as a fraud, either for the purpose of avoiding their contract, or for the purpose of an action of deceit.⁶⁵ Thus, subscriptions for shares in a

⁶⁴ *Briggs v. Reynolds*, 176 Ill. App. 420.

⁶⁵ *United States. Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105.

Alabama. *Southern States Fire & Casualty Ins. Co. v. De Long*, 178 Ala. 110, 59 So. 61; *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Lake v. Security Loan Ass'n*, 72 Ala. 207.

California. *Jefferson v. Hewitt*, 95 Cal. 535, 30 Pac. 772.

Florida. *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 So. 174.

Georgia. *Weston v. Columbus Southern Ry. Co.*, 90 Ga. 289, 15 S. E. 773; *Bell v. Americus P. & L. R. Co.*, 76 Ga. 754; *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

Indiana. *White v. Butler University*, 78 Ind. 585; *Bish v. Bradford*, 17 Ind. 490; *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174; *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653.

Iowa. *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019; *State Bank v. Mentzer*, 125 Iowa 101, 100 N. W. 69; *Davis v. Campbell*, 93 Iowa 524, 61 N. W. 1053.

Kentucky. *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37; *Chicago Bldg. & Mfg. Co. v. Beaven*,

149 Ky. 267, 148 S. W. 37; *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

Maryland. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Massachusetts. *Everett v. Foster*, 223 Mass. 553, 112 N. E. 239.

Michigan. *Getchell v. Dusenbury*, 145 Mich. 197, 108 N. W. 723; *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

Minnesota. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Mississippi. *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829; *Walker v. Mobile & O. R. Co.*, 34 Miss. 245.

Missouri. *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889.

New Hampshire. *Shattuck v. Robins*, 68 N. H. 565, 44 Atl. 694.

Ohio. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

Oregon. *Oregon Cent. R. Co. v. Scoggin*, 3 Ore. 161.

Pennsylvania. *Philadelphia & Gulf Steamship Co. v. Pechin*, 23 Pa. Dist. 518.

Tennessee. *Madison Trust Co. v. Stahlman*, 134 Tenn. 402, 183 S. W. 1012.

Texas. *Jackson v. Stockbridge*, 29 Tex. 394, 94 Am. Dec. 290; *Cope v. Pitzer*, — Tex. Civ. App. —, 166 S. W. 447; *Cherry v. First Texas Chemical Mfg. Co. (Tex. Civ. App.)*, 115 S.

railroad company cannot be avoided because of false expressions of opinion or prediction as to the future location of the road, or as to the ability of the company to construct and equip the same, or as to the time within which, or the manner in which, it will be constructed, unless they also involve false and fraudulent representations as to past or existing facts.⁶⁶ Representations as to value are almost

W. 81; Gough Mill & Gin Co. v. Looney (Tex. Civ. App.), 112 S. W. 782.

Utah. Campbell v. Zion's Co-op. Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Virginia. Campbell v. Eastern Building & Loan Ass'n, 98 Va. 729, 37 S. E. 350.

Washington. Johns v. Clothier, 78 Wash. 602, 139 Pac. 755.

A statement that a certain patent is by far the most efficient and economical invention yet made for the production of a certain commodity is an expression of opinion. *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631.

And the same is true of a representation that by a certain process brick salable at twenty-two dollars per thousand could be made for eight dollars per thousand. In *re National Pressed Brick Co.*, 212 Fed. 878.

Similarly false representations by promoters as to the objects and purposes of the proposed corporation do not relate to any past or existing fact, and cannot be relied upon by a subscriber as constituting fraud. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

But the statement that certain patents to be acquired by the proposed corporation were the basic patents for the production of a certain commodity which it was to manufacture was held to be the affirmation of a fact rather than the expression of an opinion. *American Alkali Co. v. Sa-*

lom, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631.

And the same was held to be true of a representation made to induce a subscriber to sign a note for the amount of his subscription to the effect that all subscribers who had not yet signed notes for their subscriptions were then ready and willing to do so, or that they would pay their subscriptions in cash. *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949.

⁶⁶ **United States.** Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105.

Alabama. Montgomery Southern Ry. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60.

California. Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772.

Georgia. Weston v. Columbus Southern Ry. Co., 90 Ga. 289, 15 S. E. 773; *Bell v. Americus, P. & L. R. Co.*, 76 Ga. 754.

Illinois. Illinois Midland R. Co. v. Barnett, 85 Ill. 313.

Indiana. Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; *Bish v. Bradford*, 17 Ind. 490; *McAllister v. Indianapolis & C. R. Co.*, 15 Ind. 11; *Carlisle v. Evansville, I. & C. Straight Line R. Co.*, 13 Ind. 477; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *Evansville, I. & C. Straight Line R. Co. v. Posey*, 12 Ind. 363. See also *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276.

Texas. Jackson v. Stockbridge, 29 Tex. 394, 94 Am. Dec. 290.

Fraud in inducing a subscription to

invariably within this principle, for they are almost necessarily mere expressions of opinion. While a subscriber may rely upon positive statements of fact as to the financial condition of the company, its ownership of particular property, the nature of its property, its freedom from incumbrance and other facts affecting the value of its assets and the advantages of the enterprise as an investment,⁶⁷ he has no right to rely upon mere expressions of opinion as to the value, present or prospective, of its assets and stock, which from their nature are necessarily speculative.⁶⁸

stock will not be deemed to be constituted by representations by the solicitor for the stock that money is on hand sufficient to complete the corporate road and that there will be no liability on the stock until the road has been completed between specified points, where it is not alleged that he knew his statements to be false. *Tanner v. Nichols*, 25 Ky. L. Rep. 2191, 80 S. W. 225.

And the same is true of representations that a railroad company had stock enough to complete its road and would do so in two years. *Hardy v. Merriweather*, 14 Ind. 203.

⁶⁷ Representations that an existing paper had been obtained for a proposed newspaper publication, and the associated press reports secured, are not mere statements of opinion, judgment, probability or expectation. *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

Representations that an agreement had been completed to consolidate the corporation with certain other corporations, the completion of the arrangement being a mere matter of figures, are representations of existing facts, and not in the nature of opinions, expectations or belief. *Mack v. Latta*, 83 N. Y. App. Div. 242, 82 N. Y. Supp. 130, rev'd on other grounds 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97.

See § 613, *supra*.

⁶⁸ *Georgia*. *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

Indiana. *White v. Butler University*, 78 Ind. 585; *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174.

Iowa. *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019.

Kentucky. *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37; *German Nat. Bank's Receiver v. Nagel*, 25 Ky. L. Rep. 748, 82 S. W. 433.

Massachusetts. *Everett v. Foster*, 223 Mass. 553, 112 N. E. 239.

Michigan. *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

Minnesota. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Missouri. *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889; *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440.

New York. *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, aff'g 154 App. Div. 161, 138 N. Y. Supp. 852.

Utah. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

Washington. *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

That the stock will be a good investment and will pay dividends. *Weston v. Columbus Southern Ry. Co.*, 90 Ga. 289, 15 S. E. 773.

That the company would be so prosperous that unpaid balances on sub-

Representations as to the value of the property or stock of a corporation, involving no positive statement of fact, or as to the probable cost and profit of the enterprise, the dividends that will be paid, etc., are almost always mere expressions of opinion or prediction, which cannot be set up as constituting fraud.⁶⁹ So, as a rule, representations as to the future earnings and prospects of the company,⁷⁰ or as to its future profits,⁷¹ cannot be made the basis of a charge of fraud. And the same is true of representations that it probably will earn large dividends,⁷² or that it will pay a dividend at a certain time in the future,⁷³ or that the dividends will pay the principal and interest

scriptions would never be called for. *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

⁶⁹ *Indiana*. *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174.

Iowa. *Swan v. Mathre*, 103 Iowa 261, 72 N. W. 522.

Maryland. *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Minnesota. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Mississippi. *Walker v. Mobile & O. R. Co.*, 34 Miss. 245.

Missouri. *Union Nat. Bank v. Hunt*, 76 Mo. 439.

Ohio. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

England. *Denton v. Macneil*, L. R. 2 Eq. 352; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99.

A false statement by an officer of a corporation that its stock is worth a certain sum per share is a mere expression of opinion, and does not constitute fraud, although relied upon. *Union Nat. Bank v. Hunt*, 76 Mo. 439.

A false statement as to the value of a patent owned by a corporation is not fraud. *Denton v. Macneil*, L. R. 2 Eq. 352.

⁷⁰ *Delaware*. *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809.

Iowa. *Davis v. Campbell*, 93 Iowa 524, 61 N. W. 1053.

Kentucky. *Castleman Blakemore Co. v. Brucker*, 167 Ky. 269, 180 S.

W. 360; *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37.

Massachusetts. *Everett v. Foster*, 223 Mass. 553, 112 N. E. 239.

Utah. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

Virginia. *Campbell v. Eastern Building & Loan Ass'n*, 98 Va. 729, 37 S. E. 350.

The mere expression of a favorable opinion as to the corporation and its business outlook is not ground for rescinding contract. *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79.

⁷¹ *Bartley v. Big Branch Coal Co.*, 160 Ky. 123, 169 S. W. 601; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

⁷² *Sawyer v. Prickett*, 19 Wall. (U. S.) 146, 22 L. Ed. 105; *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019; *Cherry v. First Texas Chemical Mfg. Co.* (Tex. Civ. App.), 115 S. W. 81; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

That the rents of certain property will pay six per cent. on the stock for the first year. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

⁷³ *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32. See also *Southern States Fire & Casualty Ins. Co. v. De Long*, 178 Ala. 110, 59

of notes given in payment of the amount of the subscription.⁷⁴

It has sometimes been said that, if an opinion is falsely expressed with intent to deceive, and does deceive, it will constitute fraud, so as to render a contract of subscription voidable. But this is not true where there is a mere expression of opinion, and nothing more, at least unless there is some peculiar relation of trust and confidence between the parties, for the doctrine that a mere expression of opinion does not amount to fraud is based, not upon the ground that there is no intent to deceive, nor upon the ground that it does not in fact deceive, but upon the ground that persons have no right to rely upon representations or statements of such a nature, and it is due to their own folly if they do so, and are deceived. If, however, the matter to which the representation relates is a matter susceptible of exact knowledge, and material, and is not equally within the means of knowledge of both parties, a statement in the form of an expression of opinion thereon, which is known to be false, and is made with the intention that it shall be acted upon, and which is acted upon, is a false and fraudulent representation, constituting fraud, and not a mere expression of opinion.⁷⁵ So representations as to the value of corporate assets may be relied on when made by an officer of the corporation who is in a better position to know the truth than the subscriber.⁷⁶

A statement that the property of a corporation cost a certain sum is not a mere expression of opinion, like statements as to value, but is a representation of fact, which, if known to be false, will constitute a false and fraudulent representation.⁷⁷

§ 619. — Promises and statements of intention. A representation, to constitute fraud, must relate to a past or existing fact, and not be a mere collateral promise or a statement of intention, or other statement as to future events. The latter are no ground for rescinding a subscription, although they may be made with intent to deceive,

So. 61; *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37.

⁷⁴ *Sawyer v. Prickett*, 19 Wall. (U. S.) 146, 22 L. Ed. 105; *State Bank v. Mentzer*, 125 Iowa 101, 100 N. W. 69.

⁷⁵ If an opinion is falsely expressed, with intention to deceive, and does deceive, it becomes a false statement of fact and vitiates the contract. *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Campbell v. Zion's Co-op. Home*

Building & Real Estate Co., 46 Utah 1, 148 Pac. 401. And see *Scott v. Snyder Dynamite Projectile Co.*, 67 L. T. R. (N. S.) 104.

Opinions may be fraudulently expressed. *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

⁷⁶ Representations by the manager as to the value of notes and accounts. *Byers Bros. v. Maxwell* (Tex. Civ. App.), 73 S. W. 437.

⁷⁷ See § 613, *supra*.

and may not be performed or realized.⁷⁸ Thus, a subscriber for stock

78 United States. Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105.

California. Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772.

Georgia. Chicago Bldg. & Mfg. Co. v. Summerour, 101 Ga. 820, 29 S. E. 291; Chattanooga, R. & C. R. Co. v. Warthen, 98 Ga. 599, 25 S. E. 988; Weston v. Columbus Southern Ry. Co., 90 Ga. 289, 15 S. E. 773; Bell v. American, P. & L. R. Co., 76 Ga. 754.

Illinois. Goodwin v. Wilbur, 104 Ill. App. 45.

Indiana. Fox v. Allensville, C. S. & V. Turnpike Co., 46 Ind. 31; Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; Bish v. Bradford, 17 Ind. 490; McAllister v. Indianapolis & C. R. Co., 15 Ind. 11; Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

Iowa. First Nat. Bank of Ottumwa v. Fulton, 156 Iowa 734, 137 N. W. 1019; Swan v. Mathre, 103 Iowa 261, 72 N. W. 522.

Kentucky. Chicago Bldg. & Mfg. Co. v. Beaven, 149 Ky. 267, 148 S. W. 37.

Maryland. Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Hughes v. Antietam Mfg. Co., 34 Md. 316.

Minnesota. Columbia Elec. Co. v. Dixon, 46 Minn. 463, 49 N. W. 244.

Mississippi. Saffold v. Barnes, 39 Miss. 399; Walker v. Mobile & O. R. Co., 34 Miss. 245.

Nebraska. York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440.

New Hampshire. Shattuck v. Robins, 68 N. H. 565, 44 Atl. 694.

New York. Wilson v. Meyer, 138 N. Y. Supp. 1048.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

Pennsylvania. Guarantee & Collection Co. v. Weil, 141 Pa. St. 511, 21 Atl. 665; Chartiers Ry. Co. v. Hodgins, 85 Pa. St. 501.

Texas. Jackson v. Stockbridge, 29 Tex. 394, 94 Am. Dec. 290; Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681; General Bonding & Casualty Ins. Co. v. Mount, — Tex. Civ. App. —, 183 S. W. 783; Commonwealth Bonding & Casualty Ins. Co. v. Barrington, — Tex. Civ. App. —, 180 S. W. 936; Cope v. Pitzer, — Tex. Civ. App. —, 166 S. W. 447.

Utah. Campbell v. Zion's Co-op. Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Wisconsin. Milwaukee Brick & Cement Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838.

Statements by the person procuring a subscription to a proposed newspaper corporation that they had arranged to buy a certain newspaper and were going to have the associated press news, are the expression of a mere opinion, or of an existing intention to do a certain act, and are no defense to an action on the subscription where it does not appear that such person did not act in good faith and did not believe his statements to be true. Shattuck v. Robins, 68 N. H. 565, 44 Atl. 694.

Similarly fraud cannot be predicated upon statements that the corporation will put a certain amount of working capital into the business, Goff v. Hawkeye Pump & Windmill Co., 62 Iowa 691, 18 N. W. 307; nor upon representations that it was the intention of the company to raise a certain sum by subscriptions with which to purchase steamships, and that such sum would be subscribed within a certain time. Philadelphia & Gulf Steamship Co. v. Pechin, 5 Pa. Dist. Rep. 518.

But a statement in the subscription contract that it was proposed to pay a certain amount in stock and a cer-

in a railroad company cannot avoid his subscription because of false representations or statements as to how, when, or where the road will be built, although made, not as mere expressions of opinion, but as statements of fact.⁷⁹ Similarly fraud cannot be predicated upon representations as to the objects and purposes for which a proposed corporation is to be formed,⁸⁰ or statements that it will establish branch offices in certain cities,⁸¹ or upon promises that it will give the subscriber employment.⁸²

A statement of intention or other statement as to future events is not within this principle, where by implication it necessarily involves a representation as to past or existing facts, and this implied representation is false, and known to be so. One who represents that a certain thing will or will not be done or happen in the future impliedly represents that there is nothing known to him at the time of the representation by reason of which it cannot be true. A representation that not more than a certain amount of stock and bonds will be issued for each mile of a railroad is a false and fraudulent representation, where a much greater amount has in fact been issued at the

tain sum in cash for certain patents to be used by the company has been held to be a statement of fact, and not a mere promissory statement as to future plans or expectations. *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631.

⁷⁹ *California*. *Jefferson v. Hewitt*, 95 Cal. 535, 30 Pac. 772.

Georgia. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

Indiana. *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Bish v. Bradford*, 17 Ind. 490. See also *Evansville, I. & C. Straight Line R. Co. v. Posey*, 12 Ind. 363.

Kentucky. *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

Mississippi. *Walker v. Mobile & O. R. Co.*, 34 Miss. 245.

Ohio. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

See also other cases in the note preceding.

Representations that the construc-

tion of a railroad would largely increase land values, and would provide a better market, that the road would be constructed and equipped within a year, that the company would pay large dividends, etc. *Sawyer v. Prickett*, 19 Wall. (U. S.) 146, 22 L. Ed. 105.

Representations as to the future purposes of a railroad company, as that it intends to build the road it was incorporated to build, between the termini named in its articles. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

⁸⁰ *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁸¹ *Guarantee & Collection Co. v. Mayer*, 141 Pa. St. 511, 21 Atl. 665.

⁸² As, for example, a statement that the company intended to build a manufacturing plant, and a promise that it would do so and would give the defendant the contract for the mason work. *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

time of the representation.⁸³ And the same is true of promissory representations and statements which the party making them, from knowledge peculiarly his own, may certainly know will prove to be false.⁸⁴ And a promise may be ground for rescission where the person making it does not intend to perform it, and does not do so.⁸⁵

§ 620. — Representations as to the law. False representations as to the law, although relied upon by a subscriber, are no ground for avoiding his subscription, for all persons are bound to take notice of the law, and have no right to complain if they rely upon such representations.⁸⁶ For this reason he cannot avoid his subscription because of false representations as to its legal effect.⁸⁷ For example, a person who has subscribed for stock and received a certificate of stock which on its face renders him liable as a matter of law, for the par value of the stock, cannot avoid liability on the subscription because of false representations by the officers or agents of the corporation that the stock is nonassessable, or that it is only assessable for a certain per

Or a promise that the subscriber will be made manager of the company, made by persons having no authority to make it. *Collins v. Southern Brick Co.*, 92 Ark. 504, 135 Am. St. Rep. 197, 19 Ann. Cas. 882, 123 S. W. 652.

⁸³ *Weems v. Georgia Midland & Gulf R. Co.*, 84 Ga. 356, 11 S. E. 503.

⁸⁴ A promise made by an agent may be ground for rescission where he knows that neither he nor his principal will perform or be bound by it, as, for example, a promise that the corporation will take the subscriber's note for the amount of his subscription and will extend it indefinitely, where he knows that it will not and cannot do so. *General Bonding & Casualty Ins. Co. v. Mount*, — Tex. Civ. App. —, 183 S. W. 783.

See *Sawyer v. Prickett*, 19 Wall. (U. S.) 146, 22 L. Ed. 105.

⁸⁵ *General Bonding & Casualty Ins. Co. v. Mount*, — Tex. Civ. App. —, 183 S. W. 783. See also *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Cope v. Pitzer*, — Tex. Civ. App. —, 166 S. W. 447.

A promise that one will take a certain amount of stock. *Byers Bros. v. Maxwell* (Tex. Civ. App.), 73 S. W. 437.

⁸⁶ *United States*. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Peters v. Lincoln & N. W. R. Co.*, 14 Fed. 319.

Alabama. See *Hall v. Selma & T. R. Co.*, 6 Ala. 741.

Delaware. *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809.

Indiana. *Parker & Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653.

Kentucky. *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

Mississippi. *Ellison v. Mobile & O. R. Co.*, 36 Miss. 572.

⁸⁷ *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653; *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 35 S. W. 643; *Gough Gin & Mill Co. v. Looney* (Tex. Civ. App.), 112 S. W. 782.

cent. of the par value, for such representations relate to the legal effect of the subscription and certificate.⁸⁸ Nor is a representation that the stock is nonassessable ground for rescission where the law in mandatory terms imposes a duty on corporate officers to levy an assessment in any contingency, so that an assessment charge may not be avoided through either the acts of the directors or by agreement with the subscriber.⁸⁹

Where, however, the corporation has power to contract with subscribers that its stock shall be nonassessable, such a representation will be held to be an assurance that the corporation has taken whatever steps are necessary to effectually waive its right to levy assessments, and hence to be a representation of fact and not a mere expression of opinion as to the law.⁹⁰ And such a representation is actionable if the stock is assessable because of a failure to comply with a plain mandate of the statute necessary to give the stock immunity from assessment.⁹¹

Fraud cannot be predicated upon a false representation by a railroad subscription agent to a subscriber for stock, to the effect that he will not be called upon to pay anything until the road is worked or laid out in his county, for this is as to the legal effect of his subscription,⁹² nor upon a representation that the subscriber's signature will not be binding unless he attends a meeting at which books will be opened for subscriptions and signs his name to the stock books.⁹³

All persons subscribing for stock in a corporation are presumed to know the provisions of its charter or articles of incorporation and their effect, and if they are induced to subscribe by false representations of the agents of the corporation as to the powers of the

⁸⁸ Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Upton v. Tribilecock, 91 U. S. 45, 23 L. Ed. 203. See also Fouché v. Merchants' Nat. Bank of Rome, 110 Ga. 827, 36 S. E. 256; Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

A representation that the stock is nonassessable is not actionable if it involves merely the expression of an opinion on the liability of the stock to assessment under the law of the state where the corporation was formed. Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467, aff'g 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

⁸⁹ Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542.

⁹⁰ Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542.

⁹¹ Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467, aff'g 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

⁹² Clem v. Newcastle & D. R. Co., 9 Ind. 488, 68 Am. Dec. 653. And see New Albany & S. R. Co. v. Fields, 10 Ind. 187. See also Northeastern R. Co. v. Rodrigues, 10 Rich. (S. C.) 278.

⁹³ New Albany & S. R. Co. v. Fields, 10 Ind. 187.

corporation, or by false representations that it will do what its charter does not authorize it to do, they cannot rely upon such representations as ground for rescinding their subscriptions.⁹⁴ This is true, for instance, of a false representation that a railroad company has a right or intends to construct its road along a certain route, or between certain points, and similar representations, where its route or termini are fixed by its charter;⁹⁵ and of a representation that a railroad company will be aided by another company.⁹⁶

Misrepresentations as to foreign laws, including the laws of another state, are misrepresentations of fact.⁹⁷

§ 621. — Nondisclosure or concealment of facts. As a general rule, to constitute fraud for the purpose of avoiding a subscription to stock, as for the purpose of avoiding any other contract, there must be a false representation, and not a mere failure to disclose facts, without more.⁹⁸ A representation, however, which is true as far as it goes, may be rendered false by reason of a failure to disclose facts, or, in other words, may be half-truth only, and in such a case it will amount

⁹⁴ **United States.** *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Peters v. Lincoln & N. W. R. Co.*, 14 Fed. 319.

Georgia. *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350.

Indiana. *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

Kentucky. *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 35 S. W. 643; *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

Mississippi. *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829.

See also other cases in the notes following.

Since one subscribing for stock in a railroad company was bound to take notice that it had no power to issue to its stockholders any stock in a construction company, it was held that false representations touching the resources of the construction company, or the value of its stock, were no ground for avoiding a subscription to the stock of the railroad

company. *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350.

⁹⁵ *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Ellison v. Mobile & O. R. Co.*, 36 Miss. 572.

⁹⁶ *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

⁹⁷ *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 35 S. W. 643.

⁹⁸ See *Heymann v. European Central Ry. Co.*, L. R. 7 Eq. 154. And see works treating generally of fraud.

Failure of the officers of a corporation to disclose to a subscriber or purchaser of stock omissions or neglect of the corporation to comply with statutory or charter provisions in regard to receiving property in payment of subscriptions, and making and recording statements of the affairs of the company, will not support an action against the company or the officers for fraud. *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

to fraud.⁹⁹ This is true where a prospectus or other statement purports to be a full and fair statement of facts, but conveys a false impression by reason of the suppression of material facts.¹

This principle also applies to oral representations. So one who is induced to subscribe by representations that a certain other person has subscribed may rescind where the latter's subscription is made under a secret agreement that he will not be required to pay for his shares, or will not be required to pay for them in full.² And the

⁹⁹ *Melendy v. Keen*, 89 Ill. 395; *Peerless Fire Ins. Co. v. Riveire*, — Tex. Civ. App. —, 188 S. W. 254.

Concealment of facts which would have shown that property for which stock and bonds had been issued had been enormously overvalued, accompanied by fraudulent representations as to the value of the corporate property and as to other material facts, was held to warrant rescission, in *Manning v. Berdan*, 135 Fed. 159.

Where the directors of the corporation certify to the governor that ten per cent. of the subscriptions have been paid in, in order to induce him to subscribe on behalf of the state, but do not inform him that the money so paid has been returned to the subscribers under an agreement whereby they are to work out the amounts, the contract may be rescinded in equity. *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305.

¹ See *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun (N. Y.) 334, 25 N. Y. Supp. 432; *New Brunswick & C. Railway & Land Co. v. Muggeridge*, 1 Dr. & Sm. 363, 381; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99. "It appears to me that it is quite necessary to uphold this as a principle: that those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein

contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." *New Brunswick & C. Railway & Land Co. v. Muggeridge*, 1 Dr. & Sm. 363, 381.

In estimating the probability of subscribers being misled by prospectuses, the court will take into consideration not only the facts stated, but also those suppressed. *Wiser v. Lawler*, 189 U. S. 260, 47 L. Ed. 802; *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

² *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72; *Coles v. Kennedy*, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088; *Gast v. King*, 27 Okla. 554, 112 Pac. 997. See also *Alabama Foundry & Machine Works v. Dallas*, 127 Ala. 513, 29 So. 459; *Zabel v. New State Tel. Co.*, 127 Mich. 402, 86 N. W. 949; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

A representation that certain persons have subscribed is a fraud, where the fact that they are to pay or have paid in property at an overvaluation is concealed. *Alabama Foundry & Machine Works v. Dallas*, supra.

same has been held to be true where the agent represents that the subscription is to the stock of a corporation to be formed in the future by certain persons known to the subscriber to be of men of repute and standing in the community and of good business and financial ability, and conceals from him the fact that the corporation has already been organized and is then controlled by other persons not known to the subscriber.³

Nondisclosure or concealment of material facts will constitute fraud where there is a duty to disclose them.⁴

If the subscriber has no other information on the subject than that which the promoter or soliciting agent chooses to convey, the statements of the latter must be characterized by the utmost fairness and honesty.⁵ So concealment by a promoter of the fact that other subscriptions are not bona fide,⁶ or that he has agreed to release all

Where plaintiff signed a subscription contract upon the understanding that no subscription should be binding until bona fide subscriptions for a certain number of shares had been obtained, a false representation that the required number had been subscribed for, when in fact two of the persons signing the subscription contract did so with the express understanding that they were not to be liable on such subscriptions, was held to warrant a rescission. *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949.

And see to the same effect, *Sigler v. R. W. Winstead & Co. (Ky.)*, 125 S. W. 272.

And see *Sawyer v. Prickett*, 19 Wall. (U. S.) 146, 22 L. Ed. 105, where it was held that the evidence showed that the subscriptions of certain persons were made in good faith and that there was no secret arrangement with them that they would not be required to pay the full amount. But in *Woman's Temperance Bldg. Ass'n v. Devore*, 160 Ill. App. 153, it was held that the fact a subscriber did not know that the stockholders had previously voted stock to a promoter in payment for his services was no defense to an action by a creditor

to collect the balance due on his subscription.

³ *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

⁴ *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168. See also *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

The subscriber may recover damages for fraud where the defendants knew that he expected and offered to subscribe for treasury stock, but the stock actually delivered to him belonged to one of the officers of the company who received the money paid by the plaintiff therefor. *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689, 148 N. W. 797.

⁵ *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168. See also *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

The promoters owe a duty to those whom they seek to interest in the company to deal openly, fairly and honestly with them. *Sigler v. R. W. Winstead & Co. (Ky.)*, 125 S. W. 272.

⁶ *Goodwin v. Wilbur*, 104 Ill. App. 45.

As, for example, a failure to disclose that such subscriptions are subject to secret agreements that they may be canceled in part, or that less

subscribers who desire to be released from their subscriptions,⁷ may constitute fraud. And a subscriber may rescind because of secret profits or advantages obtained by a promoter,⁸ especially when accompanied by false representations that there is no promoter's fund or advantage.⁹ So it has been held that he may rescind where the promoter falsely represents that he and the subscriber are on an equality with reference to property purchased by the promoter for the corporation,¹⁰ or conceals the fact that he has an option on land which the corporation is formed to purchase, especially where he represents that it belongs to another,¹¹ or where he represents that such land may be bought for a certain price, and the price so stated includes a secret commission or profit to him.¹²

The relation of the directors to the stockholders is one of trust and confidence, and if they seek to obtain additional subscriptions from the latter, it is their duty to disclose to them the fact that the company is financially embarrassed and actually insolvent, at least where they know that the stockholders have been misinformed as to the facts, and their omission to do so will constitute a fraudulent concealment which will justify a rescission of the subscription. And especially is this true where the purpose of the directors in procuring the additional subscriptions is to obtain payment of certain claims

than par shall be paid for the stock. *Sigler v. Winstead & Co.* (Ky.), 125 S. W. 272.

⁷ *Hall v. Grayson County Nat. Bank*, 36 Tex. Civ. App. 317, 81 S. W. 762.

⁸ See *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

Suppression of the fact that a certain per cent. of the money received from the sale of the stock was applied to the payment of secret commissions of officers and directors of the corporation. *Peerless Fire Ins. Co. v. Riveire*, — Tex. Civ. App. —, 188 S. W. 254.

⁹ *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810.

¹⁰ *Hall v. Grayson County Nat. Bank*, 36 Tex. Civ. App. 317, 81 S. W. 762.

¹¹ *Virginia Land Co. v. Haupt*, 90

Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

¹² *Hall v. Grayson County Nat. Bank*, 36 Tex. Civ. App. 317, 81 S. W. 762.

Where the promoters represent that land which the corporation is formed to purchase is worth a certain sum and that it will cost them a certain less sum, but in reality they purchase it for a still less sum and make a large secret profit on the transaction, a subscriber may rescind. *West End Real Estate Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182.

As to the right to rescind subscriptions to stock in a reorganized company because of the interest of the manager of the syndicate bringing about the reorganization in property sold to the company, see *Edenborn v. Sim*, 206 Fed. 275.

of their own against the corporation, and not a bona fide rehabilitation of its business.¹³

Failure to disclose facts which would be disclosed upon examination of the charter or articles of association, with a knowledge of which subscribers are chargeable, or to disclose a purpose to do things authorized thereby, cannot constitute fraud.¹⁴

§ 622. — Falsity of statement. A representation to amount to fraud must be false.¹⁵

¹³ King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897.

¹⁴ Oil City Land & Improvement Co. v. Porter, 99 Ky. 254, 16 Ky. L. Rep. 397, 35 S. W. 643.

¹⁵ United States. American Alkali Co. v. Salom, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631.

Arizona. People's Nat. Bank v. Taylor, 17 Ariz. 215, 149 Pac. 763.

Colorado. Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Georgia. Coca-Cola Bottling Co. v. Anderson, 13 Ga. App. 772, 80 S. E. 32.

Illinois. Hutchinson Furnace & Smoke Consuming Co. v. Lyford, 123 Ill. 300, 13 N. E. 844, aff'g 22 Ill. App. 461; Hays v. Ottawa, O. & F. R. Val. R. Co., 61 Ill. 422.

Indiana. White v. Butler University, 78 Ind. 585.

Iowa. Farmers' & Merchants' State Bank v. Shaffer, 147 N. W. 851.

Kentucky. Castleman Blakemore Co. v. Brucker, 167 Ky. 269, 180 S. W. 360; Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373.

Michigan. Kelly v. Clements, 175 Mich. 98, 140 N. W. 1006.

Mississippi. Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829.

Missouri. Tinker v. Kier, 195 Mo. 183, 94 S. W. 501; Muck v. Hayden, 173 Mo. App. 27, 155 S. W. 889; Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783; Hess v. D. T. Draffen & Co., 99 Mo. App. 580, 74 S. W. 440.

New Hampshire. Anderson v. Scott, 70 N. H. 534, 49 Atl. 568.

New Jersey. Braddock v. Philadelphia, M. & M. R. Co., 45 N. J. L. 363.

New York. Keeler v. Seaman, 47 Misc. 292, 95 N. Y. Supp. 920.

North Carolina. Queen City Printing & Paper Co. v. McAden, 131 N. C. 178, 42 S. E. 575.

Oklahoma. King v. Howeth & Co., 42 Okla. 178, 140 Pac. 1182.

Texas. Byers Bros. v. Maxwell (Tex. Civ. App.), 73 S. W. 437.

Utah. Campbell v. Zion's Co-op. Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

Virginia. Reed & McCormick v. Gold, 102 Va. 37, 45 S. E. 868.

Washington. Johns v. Clother, 78 Wash. 602, 139 Pac. 755.

West Virginia. Reiniger v. Piercy, — W. Va. —, 86 S. E. 926; Kimmins v. Wilson, 8 W. Va. 584.

Wisconsin. Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949.

Where a deed of trust covers the mining property forming the basis of the assets of the corporation, a representation to one asked to buy stock that the corporation is free from debt, constitutes a fraudulent representation, although the deed of trust constituting the incumbrance had been executed by a third person. Tinker v. Kier, 195 Mo. 183, 94 S. W. 501.

Proof that the corporation lost money during the period from 1908 to 1912 is irrelevant on the issue of

When, however, a subscriber has been deceived by a prospectus, it is not necessary, in order to make out a case of fraud, to show any particular false statement. It is enough if the prospectus, taken as a whole, conveyed a false impression as to material facts, if it was intended to have this effect.¹⁶ And such a prospectus will be interpreted by the effect which it will produce upon an ordinary mind.¹⁷

If the representation is false when made and when the contract is entered into, the right to rescind is not affected by the fact that it is made good by the subsequent acts of the corporation.¹⁸

the truth or falsity of representations that it was earning forty per cent. dividends when the subscription was made in November, 1909. *Philadelphia & Gulf Steamship Co. v. Clark*, 59 Pa. Super. Ct. 415. Nor is evidence as to the financial condition of the corporation in 1911 admissible on such issue. *Philadelphia & Gulf Steamship Co. v. Clark*, 59 Pa. Super. Ct. 415. A receiver of such corporation appointed in 1911, and having no personal knowledge of the condition of the company when the subscription was made, cannot testify as to his deductions on that subject from the books, where they are not produced nor their absence accounted for. *Philadelphia & Gulf Steamship Co. v. Clark*, 59 Pa. Super. Ct. 415.

In *Getchell v. Dusenbury*, 145 Mich. 197, 108 N. W. 723, which was an action against directors of a corporation for damages for false representations as to the credit and financial condition of a corporation, whereby plaintiff was induced to subscribe for an increase of its stock, it was said that the plaintiff was elected a director soon after he subscribed and participated in all the subsequent transactions, and that there was nothing to show that the transactions in which he participated were not the cause of the failure of the corporation.

¹⁶ *Wiser v. Lawler*, 189 U. S. 260, 47 L. Ed. 802; *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App.

Div. 209, 130 N. Y. Supp. 988; *Lehman-Charley v. Bartlett*, 135 N. Y. App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125; *Aaron's Reefs v. Twiss*, [1896] A. C. 273; *Scott v. Snyder Dynamite Projectile Co.*, 67 L. T. R. (N. S.) 104.

¹⁷ *Wiser v. Lawler*, 189 U. S. 260, 47 L. Ed. 802; *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

A statement that shares of stock "have been issued, or are contracted to be issued," conveys the idea that they have been issued or contracted to be issued for money or property its equivalent in value, and is false if such is not the case. *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

And a declaration that dividends have been paid imports that they have been earned, and is false if they have not been. *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

¹⁸ The right to rescind for a false representation that the corporation has acquired title to certain property is not affected by the fact that it subsequently acquires title to it. *Lehman-Charley v. Bartlett*, 135 N. Y. App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125.

But a false representation that all of the stock had been subscribed has been held not to be ground for rescission, where all but ten per cent. of it had been subscribed, and the balance was taken and paid for before the corporation had any occasion to use it.¹⁹

A representation that the capital stock of the corporation is to be a certain sum is not false where its charter permits it to have a maximum capital of that amount though it also authorizes it to do business upon a smaller minimum amount.²⁰

A subscriber is not entitled to rescind because of alleged false representations that the corporation had made arrangements whereby it could loan him money at a certain rate, where, by the terms of his contract, he is entitled to a loan only when he has paid his subscription in full, which he has not done.²¹

In actions at law the question whether or not the representations were false is ordinarily for the jury.²²

§ 623. — Knowledge of falsity and intention to deceive. In order to support an action of deceit, false representations must have been made with intent to deceive the other party,²³ and with the intent that he should act upon them,²⁴ and the person making them must

¹⁹ *National Leather Co. v. Roberts*, 221 Fed. 922.

²⁰ *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868.

²¹ *Commonwealth Bonding & Casualty Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

²² *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631.

²³ *Salem Mill Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363; *Drake v. Fairmont Drain Tile & Brick Co.*, 129 Minn. 145, 151 N. W. 914; *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440; *Nelson v. Luling*, 4 Jones & S. (N. Y.) 544.

The plaintiff must prove "that the representations were fraudulently made, that is to say, that they were not only false in fact, but that they were made with the intent to deceive." *Nelson v. Luling*, 4 Jones & S. (N. Y.) 544.

A fraudulent intent on the part of the author and publisher of a prospectus may be inferred from the falsity of the statements therein contained. *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

²⁴ *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

It follows that if the representations in question were made before new stock subscribed for was issued, it must be alleged and proved that some future issue of stock was in contemplation when they were made, and that the person making them knew that fact, and intended that the person to whom the representations were made should act upon them in subscribing for such stock. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

His intention is an inferential fact to be gathered from the circumstances

either have known them to be false, or must have made them as of his own knowledge without knowing whether they were true or false.²⁵

Representations which are made innocently, without any intention to deceive and under the belief that they are true, will not support such an action.²⁶ Nor is one guilty of actionable deceit where he repeats information received from others, if he believes it to be true and explains the sources of his information,²⁷ or even where he reports as a fact a matter in respect to which he has received information from a reliable source and which he has every reason to believe and does believe to be true.²⁸

In some jurisdictions the same rule is applied in suits to rescind, or where fraud is set up as a defense to an action on the contract, and even under such circumstances it must be shown that the representations were made with intent to deceive the other party,²⁹ and

of the case. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

²⁵ *Hutchinson Furnace & Smoke Consuming Co. v. Lyford*, 123 Ill. 300, 13 N. E. 844, aff'g 22 Ill. App. 461; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783; *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440; *Lyon v. James*, 97 N. Y. App. Div. 385, 90 N. Y. Supp. 28, aff'd 181 N. Y. 512, 73 N. E. 1126; *Keeler v. Seaman*, 47 N. Y. Misc. 292, 95 N. Y. Supp. 920; *Edgington v. Fitzmaurice*, 29 Ch. Div. 459.

See also *infra*, this section.

²⁶ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Lyon v. James*, 97 N. Y. App. Div. 385, 90 N. Y. Supp. 28, aff'd 181 N. Y. 512, 73 N. E. 1126.

"The representations, though false, if innocent and made without any intention to defraud, and under the belief that they were true, furnish no support to the allegation of fraud and deceit." *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

But in Michigan one who purchases or subscribes for stock in the belief of, and reliance upon, false statements regarding it, may sue for and recover the damages occasioned thereby, whether the representations are made

in good or bad faith. *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

²⁷ *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

²⁸ *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

But representations which are professedly made not of personal knowledge, but from information obtained from others, may constitute actionable fraud if the person making them does not correctly set forth the information obtained by him, or if he knows or has reason to believe that it is not correct. *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

²⁹ *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631; *Kennedy v. Panama, N. Z. & A. Royal Mail Co.*, L. R. 2 Q. B. 580. See also *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355; *Salem Mill Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

A plea of fraud is bad where it does not aver that the representations were false and fraudulent, and for aught that appears they may have been innocent. *Hays v. Ottawa, O. & F. R. Val. R. Co.*, 61 Ill. 422.

In *Tabor & N. Ry. Co. v. McCormick*, 90 Iowa 446, 57 N. W. 949, it

that the person making them either knew that they were false, or made them recklessly without knowing that they were true.³⁰

But in a number of jurisdictions it has been held that proof of a fraudulent intent,³¹ or scienter,³² is not an essential prerequisite to rescission if the statements are made by one upon whose statements the subscriber had a right to rely and are in fact false; and that a

was held that certain parol representations were not a defense to an action on a written contract of subscription, where there was no allegation nor proof that they were fraudulently made.

In *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363, it was held that proof that certain statements as to the projected route of a railroad were made and that the route of the road, when constructed, did not correspond to such statements, was not a good defense to an action on a subscription induced by such statements, where there was no proof that such statements were fraudulent.

³⁰ *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240; *Queen City Printing & Paper Co. v. McAden*, 131 N. C. 178, 42 S. E. 575; *King v. Howeth & Co.*, 42 Okla. 178, 140 Pac. 1182.

The representation must have been made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. *Chicago Bldg. & Mfg. Co. v. Beaven*, 149 Ky. 267, 148 S. W. 37.

It must appear that the representation was not actually believed by the person making it, on reasonable grounds, to be true. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

It must either be known to be false by the person making it, or his position must be such as to make it his duty to know the truth. *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829.

A representation in good faith that

the title to corporate property is good, although false, does not amount to fraud. *New Brunswick & C. Railway & Land Co. v. Conybeare*, 9 H. L. Cas. 711.

Allegations that the defendants were induced to subscribe for railroad stock by fraudulent representations, that there was sufficient money to build the road, that work would begin on it as soon as the right of way was secured, and that they would not have to pay anything until the road was completed between certain points, were held insufficient to show fraud where it was not alleged that the person making the representations knew that they were false. *Tanner v. Nichols*, 25 Ky. L. Rep. 2191, 80 S. W. 225.

The failure of an answer setting up fraud to allege that the person making the representations knew that they were false is waived if not taken advantage of by demurrer. *Queen City Printing & Paper Co. v. McAden*, 131 N. C. 178, 42 S. E. 575.

See also *infra*, this section.

³¹ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

³² *National Leather Co. v. Roberts*, 221 Fed. 922; *Farnsworth v. Muscatine Produce & Pure Ice Co.*, 161 Iowa 170, 141 N. W. 940; *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Drake v. Fairmont Drain Tile & Brick Co.*, 129 Minn. 145, 151 N. W. 914.

rescission may be had even though such statements were innocently made,³³ and though the party making them believed them to be true.³⁴

Both in actions for deceit³⁵ and in suits to rescind, or where fraud is set up as a defense to an action on the subscription contract,³⁶ it is sufficient to show either that the party making the representations knew that they were false, or that he made them recklessly, without knowing whether they were true or false. And statutes in some states specifically provide that misrepresentations of a material fact which

33 Alabama. King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897.

Iowa. Farnsworth v. Muscatine Produce & Pure Ice Co., 161 Iowa 170, 141 N. W. 940.

Michigan. Krause v. Cook, 144 Mich. 365, 108 N. W. 81.

Missouri. Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783.

Texas. Byers Bros. v. Maxwell (Tex. Civ. App.), 73 S. W. 437.

34 Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

In *Cunningham v. Edgefield & K. R. Co.*, 2 Head (Tenn.) 23, it is said that generally false representations which are not fraudulent, and which form no part of the contract itself, will not vacate it, but that "even if innocent, if the party acts upon them to his injury, relief will be afforded."

In *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60, it is said that the principle permitting an untrue statement to be set up as a defense under such circumstances "rests, not on the doctrine of fraud, but on the ground that the purchaser failed to get what he bargained for, and failed because of the erroneous statement of fact made by the vendor, which he trusted, and had a right to trust."

35 Krause v. Cook, 144 Mich. 365, 108 N. W. 81; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783; *Edgington v. Fitzmaurice*, 29 Ch. Div. 459.

Intent to deceive "may be inferred from evidence showing that the party making them knew of their falsity at the time, or at least professed knowledge of their truth when in point of fact he was conscious that he had none." *Nelson v. Luling*, 4 Jones & S. (N. Y.) 544.

"Due diligence to ascertain the truth in regard to statements made as of matters of fact within one's own knowledge is not enough to relieve the maker of them of liability, if they are false and are relied upon as true, and the person to whom they are made suffers loss thereby." *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427.

36 Ala. Code 1907, § 4298. *Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co.*, 180 Ala. 1, 60 So. 98; *Chicago Bldg. & Mfg. Co. v. Beaven*, 149 Ky. 267, 148 S. W. 37; *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

It is ground for rescission if one asserts a fact to be true without knowing whether it is true or false, though he believes it to be true and does not intend to deceive. *Foulks Accelerating Air Motor Co. v. Thies*, 26 Nev. 158, 99 Am. St. Rep. 684, 65 Pac. 373.

Persons who make assertions without knowing whether they are true or not must be held responsible to

are acted upon by the opposite party constitute legal fraud though made by mistake and innocently.³⁷

It has been held that if a representation is concerning affairs not susceptible of exact knowledge, the assertion of knowledge is to be taken as meaning no more than a strong belief founded upon what appear to be reasonable and certain grounds, and that in such a case the question is wholly one of good faith.³⁸

Whether representations were made dishonestly, or in bad faith, or with an intent to deceive, is generally a question of fact.³⁹

Evidence of similar representations made by the same person at or about the same time to other persons for the purpose of inducing them to subscribe is admissible to show a fraudulent intent.⁴⁰

§ 624. — The representation as an inducement. In order that a subscription may be avoided, or an action of deceit maintained, because of false and fraudulent representations, they must have been believed and relied upon by the subscriber, and a complaint or plea by the subscriber must so allege. However false and fraudulent a representation may have been, it has no effect unless it constituted a material inducement for the subscription.⁴¹ In other words, there

the same extent as if they had asserted that which they knew to be untrue. *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64.

³⁷ Ala. Code 1907, § 4298. *Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co.*, 180 Ala. 1, 60 So. 98.

³⁸ *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

³⁹ *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

⁴⁰ Where it was admitted that the person taking the subscription knew all the facts as to the truth of his representations and that the representations were made to induce the subscription, the question at issue being whether the representations were in fact fraudulent, it was held that the exclusion of evidence of representations made to other parties to induce subscriptions similar to those

made to defendant, even if erroneous, was harmless. *Anderson v. Scott*, 70 N. H. 534, 49 Atl. 568.

⁴¹ *United States*. *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105; *National Leather Co. v. Roberts*, 221 Fed. 922; *Manning v. Berdan*, 135 Fed. 159.

Alabama. *Southern States Fire & Casualty Ins. Co. v. Tanner*, 180 Ala. 30, 60 So. 81; *Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co.*, 180 Ala. 1, 60 So. 98; *Southern States Fire & Casualty Ins. Co. v. De Long*, 178 Ala. 110, 59 So. 61; *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

Colorado. *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Delaware. *Grone v. Economic Life Ins. Co. (Del. Ch.)*, 80 Atl. 809.

Georgia. *Weems v. Georgia Midland & G. R. Co.*, 88 Ga. 303, 14 S. E. 583.

Illinois. *Hutchinson Furnace &*

must be a relation of cause and effect between the false statement and the subscription.⁴²

The subscriber can neither rescind nor maintain an action for damages if he relies upon his own judgment in entering into the contract rather than upon the false representations,⁴³ or if he relies upon the reports or statements,⁴⁴ or the advice,⁴⁵ of third persons.

Representations made after the contract was entered into cannot operate to defeat it, since they could not have influenced the subscriber to make it.⁴⁶ So where a person subscribes for stock, and

Smoke Consuming Co. v. Lyford, 123 Ill. 300, 13 N. E. 844, aff'g 22 Ill. App. 461; **Illinois Midland R. Co. v. Barnett**, 85 Ill. 313.

Indiana. **Parker v. Thomas**, 19 Ind. 213, 81 Am. Dec. 385.

Iowa. **Goff v. Hawkeye Pump & Windmill Co.**, 62 Iowa 691, 18 N. W. 307.

Kentucky. **Chicago Bldg. & Mfg. Co. v. Beaven**, 149 Ky. 267, 148 S. W. 37; **Wight v. Shelby R. Co.**, 16 B. Mon. 4, 63 Am. Dec. 522; **German Nat. Bank's Receiver v. Nagel**, 26 Ky. L. Rep. 748, 82 S. W. 433.

Louisiana. **Vicksburg, S. & T. R. Co. v. McKean**, 12 La. Ann. 638.

Maryland. **Hughes v. Antietam Mfg. Co.**, 34 Md. 316.

Michigan. **McEacheran v. Western Transportation & Coal Co.**, 97 Mich. 479, 56 N. W. 860.

Mississippi. **Selma, M. & M. R. Co. v. Anderson**, 51 Miss. 829.

Missouri. **Tinker v. Kier**, 195 Mo. 183, 94 S. W. 501; **Muck v. Hayden**, 173 Mo. App. 27, 155 S. W. 889; **Hess v. D. T. Draffen & Co.**, 99 Mo. App. 580, 74 S. W. 440.

New York. **Keeler v. Seaman**, 47 Misc. 292, 95 N. Y. Supp. 920.

North Carolina. **Queen City Printing & Paper Co. v. McAden**, 131 N. C. 178, 42 S. E. 575.

Oklahoma. **King v. Howeth & Co.**, 42 Okla. 178, 140 Pac. 1182.

Oregon. **Oregon Cent. R. Co. v. Scoggin**, 3 Ore. 161.

Texas. **Bohn v. Burton Lingo Co.**, — Tex. Civ. App. —, 175 S. W. 173; **Cherry v. First Texas Chemical Mfg. Co.**, — Tex. Civ. App. —, 115 S. W. 81; **Byers Bros. v. Maxwell** (Tex. Civ. App.), 73 S. W. 437. See also **Medlin v. Commonwealth Bonding & Casualty Ins. Co.**, — Tex. Civ. App. —, 180 S. W. 899.

Utah. **Campbell v. Zion's Co-op. Home Building & Real Estate Co.**, 46 Utah 1, 148 Pac. 401.

Virginia. **Reed & McCormick v. Gold**, 102 Va. 37, 45 S. E. 868.

West Virginia. **Reiniger v. Piercy**, — W. Va. —, 86 S. E. 926.

England. **Pulsford v. Richards**, 17 Beav. 96.

A colorable subscription by a person of influence shown to another to induce him to subscribe, does not entitle him to avoid his subscription, unless he relied upon it, and was thereby induced to subscribe. **Walker v. Mobile & O. R. Co.**, 34 Miss. 245.

⁴² **National Leather Co. v. Roberts**, 221 Fed. 922.

⁴³ **Byers Bros. v. Maxwell** (Tex. Civ. App.), 73 S. W. 437.

⁴⁴ **Southern States Fire & Casualty Ins. Co. v. Tanner**, 180 Ala. 30, 60 So. 81.

⁴⁵ **Grone v. Economic Life Ins. Co.** (Del. Ch.), 80 Atl. 809.

⁴⁶ **Bartol v. Walton & Whann Co.**, 92 Fed. 13; **Reed & McCormick v. Gold**, 102 Va. 37, 45 S. E. 868; **Jones-Thompson Inv. Co. v. Cascade Steel**

afterwards gives his note in payment, he cannot avoid liability on the ground of false and fraudulent representations made, not at the time of the subscription, but at the time the note was given.⁴⁷

In acting on the representation the subscriber must have been ignorant of its falsity, and must reasonably have believed it to be true.⁴⁸ If he knew that it was false, or knew facts which must have shown it to be false, he clearly cannot complain.⁴⁹ And the same

Foundry Co., 59 Wash. 601, 110 Pac. 416; Reiniger v. Piercy, — W. Va. —, 86 S. E. 926.

⁴⁷ Goodrich v. Reynolds, Wilder & Co., 31 Ill. 490, 83 Am. Dec. 240.

⁴⁸ Campbell v. Zion's Co-op. Home Building & Real Estate Co., 46 Utah 1, 148 Pac. 401.

⁴⁹ United States. Benton v. Ward, 59 Fed. 411.

Iowa. Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; Maine v. Midland Inv. Co., 132 Iowa 272, 109 N. W. 801; Goff v. Hawkeye Pump & Windmill Co., 62 Iowa 691, 18 N. W. 307.

Kentucky. Yenawine v. Tycrete-Concrete Products Co., 160 Ky. 198, 169 S. W. 594; Oil City Land & Improvement Co. v. Porter, 99 Ky. 254, 35 S. W. 643; Wight v. Shelby R. Co., 16 B. Mon. 4, 63 Am. Dec. 522.

Michigan. McEacheran v. Western Transportation & Coal Co., 97 Mich. 479, 56 N. W. 860.

Missouri. Muck v. Hayden, 173 Mo. App. 27, 155 S. W. 889; Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783.

Texas. Cherry v. First Texas Chemical Mfg. Co. (Tex. Civ. App.), 115 S. W. 81.

Virginia. West End Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. 900.

If he is in possession of information that the representations are false, or has been put on notice as to their falsity he cannot complain.

Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37.

A representation as to a matter equally open to both parties cannot deceive. Montgomery Southern Ry. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60.

False representations as to the purpose or character of the corporation do not constitute fraud, where the subscription itself shows their falsity. Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149.

A person clearly cannot rescind a subscription for stock because of false statements in a prospectus or newspaper article, or elsewhere, if he was himself an officer of the corporation, and participated in preparing the statements. Raymond v. San Gabriel Valley Land & Water Co., 53 Fed. 883.

A false statement that stock is full paid and nonassessable will not be deemed to have deceived a subscriber from whom payment of but one-fourth of the par value is required. Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

The argument that the subscriber could not have believed that the stock was fully paid because he bought it from the company for less than par is a proper one to address to the jury, but it cannot be considered on demurrer as affecting or qualifying an allegation of the complaint that he relied on the representation that

is true if, after the representation has been made, his attention is directed to the sources of information on the subject and he is given a sufficient opportunity to examine into the real facts, and he commences, or purports or professes to commence an investigation. Under such circumstances he is charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness.⁵⁰

Whether he knew the truth is a question for the jury, where the evidence on the subject is conflicting.⁵¹

A misrepresentation is not ground for rescission where the element of untruth tends to discourage rather than to encourage the making of the contract, and makes it less likely that the person to whom it is made will subscribe, as, for example, where the stock would be less desirable if the facts were as stated.⁵²

But though the representation must have been a material inducement for the subscription, it need not have been the sole inducement. It is enough if it was a material inducement,—if it so contributed as an inducement that without it the subscription would not have been made,—although other inducements may also have contributed.⁵³ Nor

it was fully paid. *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, aff'g 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

In *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4, where the defendant claimed that he was induced to subscribe by false representations that his subscription was to the stock of a corporation to be formed in the future by certain persons, when in fact the corporation had already been organized by other persons, it was held that the fact that a note given by the subscriber in part payment of his subscription was made payable to the corporation in its corporate name, and that he assigned certain stock to it in the same name did not necessarily show that he knew that the corporation had already been organized, or estop him from showing that he did not know it.

⁵⁰ *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

⁵¹ Whether the subscriber's bus-

band was her agent, and whether he knew the truth. *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689, 148 N. W. 797.

The finding of the trial court on the subject will not be disturbed on appeal where it cannot be said that the testimony preponderates against it. *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

⁵² *National Leather Co. v. Roberts*, 221 Fed. 922.

A false representation that the preferred stock offered to the plaintiff had previously been subscribed for by some one else and was to be obtained by the plaintiff through a transfer from him, and that he refused to give up the common stock given to subscribers to the preferred stock as a bonus, so that the plaintiff would not get such a bonus, is not ground for rescission. *National Leather Co. v. Roberts*, 221 Fed. 922.

⁵³ *Castleman Blakemore Co. v. Brucker*, 167 Ky. 269, 180 S. W. 360;

need he have believed in the absolute correctness of the representations if he believed in them to such an extent that they influenced him to take the stock.⁵⁴

It has been held that where the subscription contract itself embodies the false representations set forth as the material inducements to subscribe, the signature of a subscriber thereto is, in the absence of evidence to the contrary, sufficient proof that he relied on the representations and acted on the faith of them.⁵⁵

Mere lapse of time between the making of the representation and the entering into the contract of subscription will not necessarily operate as a withdrawal of the representation or exhaust its effect as the cause of the subscription, unless it is wholly unreasonable, but the question whether it was the inducing cause remains one of fact.⁵⁶

§ 625. — Right to rely on representations. As a general rule, if a positive representation as to a material fact is made to a person to induce him to subscribe for stock in a corporation, with the intention that he shall rely upon it, and the fact is one as to which the person making the representation can be supposed to have knowledge, the subscriber has a right to rely upon the same, and is not bound to make independent inquiry or investigation to ascertain for himself whether it is true or false; and if a subscription, therefore, is in fact induced by a false and fraudulent representation of fact, the subscriber's right to rescind cannot be resisted by the corporation on the mere ground that he was negligent in relying upon the representation, and that he could have ascertained the truth if he had made inquiry or investigation.⁵⁷ Under such circumstances he is not

Derry v. Peek, 14 App. Cas. 337; Peek v. Derry, 37 Ch. Div. 541; Edgington v. Fitzmaurice, 29 Ch. Div. 459.

It is immaterial that the subscriber also relied on a certain unenforceable promise of the agent. Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App., 169 S. W. 1060.

Or on a guaranty. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

⁵⁴ Representations as to the quantity and value of the corporate assets. Byers Bros. v. Maxwell (Tex. Civ. App.), 73 S. W. 437.

⁵⁵ American Alkali Co. v. Salom,

131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631.

⁵⁶ The fact that six months had elapsed will not so operate as a matter of law. King v. Livingston Mfg. Co., 180 Ala. 118, 60 So. 143.

⁵⁷ United States. Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800.

Colorado. Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Iowa. Maine v. Midland Inv. Co., 132 Iowa 272, 109 N. W. 801.

Missouri. Broilaski v. Carr, 127 Mo. App. 279, 105 S. W. 284.

New York. Mead v. Bunn, 32 N. Y. 275.

Virginia. West End Real Estate

bound to go to the public records or other sources of information to verify the truth of the representations,⁵⁸ and of course a failure to examine the public records will not preclude a rescission where such investigation would not have disclosed the truth.⁵⁹

In a leading English case it was said: "When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'"⁶⁰ And in a New York case it was said: "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which, the other party to the contract, with full means of knowledge, has deliberately pledged his faith."⁶¹

This doctrine was applied where the prospectus of a railroad company, issued for the purpose of inducing subscriptions, contained false representations as to a contract for the construction of the road, but stated that the engineer's reports, maps, plans, etc., might be inspected at the company's offices. It was held that the right of a

Co. v. Claiborne, 97 Va. 734, 34 S. E. 900.

Wisconsin. McClellan v. Scott, 24 Wis. 81.

England. Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99.

If the representations are of a character to induce him to rely upon them, and he believes them to be true and relies upon them, this is sufficient, though by the exercise of ordinary care he might have ascertained that they were not true. Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762.

"Contributory negligence is not a defense to an action for deceit. If the false statement is made by one who may be fairly assumed to know

what he is talking about, it may be accepted as true, without question and without inquiry, although the means of correct information are easily within reach." King v. Livingston Mfg. Co., 180 Ala. 118, 60 So. 143.

⁵⁸ Maine v. Midland Inv. Co., 132 Iowa 272, 109 N. W. 801.

⁵⁹ Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

⁶⁰ Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99, 120, quoted with approval in Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16800; West End Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. 900.

⁶¹ Per Porter, J., in Mead v. Bunn, 32 N. Y. 275.

subscriber, who relied upon the prospectus, to rescind his subscription, could not be defeated by setting up his failure to examine the documents referred to, and which, if examined, would have shown the falsity of the prospectus.⁶² Similarly a subscriber who is a stranger to the business in which the corporation is about to engage has a right to rely upon the representations of the promoters of the enterprise.⁶³ It has also been held that a person desiring to subscribe for stock and who is ignorant of the corporation, may rely on material and apparently reasonable representations made to him by the agent soliciting the subscription concerning the value of the stock, the solvency of the corporation, and other existing matters relating to its business, management and affairs, and is not obliged to seek information from other sources or make any effort to verify the truth of the representations so made.⁶⁴ And also that a subscriber has a right to rely upon statements of the manager of the corporation as to the value of notes and accounts owned by it, since he is in a better position than any one else to know their true value,⁶⁵ or upon his statements as to the earnings of the company.⁶⁶ And he may also rely upon statements of the vice president of the company as to the intrinsic value of its stock, since that is a matter as to which the officer is presumably fully advised,⁶⁷ or upon statements of its president that

⁶² *Kisch v. Central Ry. Co. of Venezuela*, 34 L. J. Ch. 545; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99.

Another English case is to the contrary. It was there said: "If a person purchases shares in a company upon the faith of a prospectus, and is referred to any document which will show the untruth or inaccuracy of any of its statements, and chooses not to make use of his means of knowledge, but to continue in a state of wilful ignorance of the facts, he cannot afterwards be heard to complain that he has been deceived by the alleged misstatements." It was further said: "In considering the question of knowledge or means of knowledge, it is important to see whether the plaintiff was a person likely, through inexperience, to be misled by a prospectus, or to place

implicit reliance upon all that it contains." *Lord Chelmsford*, in *Halwells v. Fernie*, L. R. 3 Ch. 477.

⁶³ *Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501; *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440.

⁶⁴ *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37.

⁶⁵ *Byers Bros. v. Maxwell* (Tex. Civ. App.), 73 S. W. 437.

⁶⁶ *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

⁶⁷ A subscriber to the stock of an insurance company, who knows nothing about the value of stock in such companies, has a right to rely on representations as to its value made by the vice president of the company, who is also one of its promoters, since the matter is one about which the latter is presumably fully advised. *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889.

property owned by it cost a certain sum,⁶⁸ or upon statements of its secretary that it is fully and legally organized.⁶⁹ Similarly a stockholder subscribing for or purchasing stock in an existing corporation has a right to rely upon representations of its officers as to its financial condition, without availing himself of his right to examine the books of the corporation.⁷⁰ It has also been held that a subscriber may rely upon representations as to the cost of property of the corporation, and is not bound to examine the records of the corporation, or otherwise investigate, for the purpose of ascertaining the truth for himself.⁷¹

Statements made to induce subscriptions may be of such a nature, or relate to such a fact, that the person to whom they are made will have no right to rely upon them, and if this is so, he cannot treat them as ground for avoiding his subscription, or recovering damages.⁷² Thus, as we have seen, a subscriber ordinarily has no right to rely upon mere expressions of opinion,⁷³ or upon predictions, promises, and statements of intention, or statements as to future events,⁷⁴ or upon representations as to the law.⁷⁵

Moreover, in order to be made the basis of a charge of fraud, the representation must be of such a character that it is likely to impose upon a person exercising common prudence and caution.⁷⁶

⁶⁸ *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

⁶⁹ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

⁷⁰ *Union Nat. Bank v. Hunt*, 76 Mo. 439.

⁷¹ *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

A person who is a stranger to the abstract business, in which the corporation is about to engage, may rely upon representations of the promoters as to the completeness of abstract books to be turned over to it, their value, etc. *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440.

⁷² *Delaware*. *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809.

Indiana. *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

Maryland. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Missouri. *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440.

Ohio. *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

Texas. *Byers Bros. v. Maxwell* (Tex. Civ. App.), 73 S. W. 437.

Virginia. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

The position of the subscriber must be such as to warrant him in relying on the representations. *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829.

⁷³ See § 618, *supra*.

⁷⁴ See §§ 618, 619, *supra*.

⁷⁵ See § 620, *supra*.

⁷⁶ *Sawyer v. Prickett*, 19 Wall. (U. S.) 146, 22 L. Ed. 105.

The representations must be such as a man of ordinary prudence would rely upon. *Hutchinson Furnace & Smoke Consuming Co. v. Lyford*, 123 Ill. 300, 13 N. E. 844, *aff'd* 22 Ill. App. 461.

They must have been reasonably relied on. *Queen City Printing &*

Even representations as to past or existing facts may be of such a nature that a subscriber cannot rely upon them. In some of the cases it has been held that a subscriber has no right to rely upon representations of fact by the agent of a corporation, where the fact is not peculiarly within the knowledge of the corporation or the person making the representation, but is equally within the means of knowledge of the subscriber, and that he cannot avoid his subscription in such a case because of the falsity of the representation.⁷⁷ And the same has been held to be true where the subscriber is given the source of the truth of the statements, it being his duty, under such circumstances, to investigate their truth for himself.⁷⁸

The improbability or incredibility of a statement, as judged by ordinary standards, will not of itself preclude a right of action, but is merely relevant to the question whether it was accepted as true by the party to whom it was made.⁷⁹

A subscriber who can read cannot avoid his subscription because

Paper Co. v. McAden, 131 N. C. 178, 42 S. E. 575.

Where the subscriber might have protected himself by ordinary prudence he cannot complain. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

In *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51, it is said that a statement that if one subscribed for stock he would not have the subscription to pay "could not have imposed upon the credulity of the most unsuspecting."

⁷⁷ *Delaware*. *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809.

Florida. See *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 So. 174.

Indiana. *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499.

Minnesota. See *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Mississippi. *Walker v. Mobile & O. R. Co.*, 34 Miss. 245.

Missouri. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

England. *Jennings v. Broughton*, 22 L. J. Ch. 585.

In *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481, it was held that a subscriber could not avoid his subscriptions because of a false representation that certain other persons had also subscribed, where he had ample opportunity to ascertain the truth of the representation, both before he subscribed, and thereafter before the corporation was organized.

He will be held to know what he could have known by the exercise of reasonable diligence, and where he could easily have verified the statements made to him, but did not do so, he cannot rescind. In re *American Nat. Beverage Co.*, 193 Fed. 772.

If a railroad is already located, and the subscriber has the means of knowing the fact and ascertaining the exact location, he has no right to rely on the statement of a promoter as to where it will be located. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51.

⁷⁸ *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809.

⁷⁹ *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

of false representations as to the contents of the subscription paper.⁸⁰ Nor can he escape liability on the ground that he did not read the contract or did not understand its contents,⁸¹ or on the ground that he did not read the corporate charter or by-laws, or did not know what they contained.⁸²

But an illiterate person may rely upon representations by the agent of the corporation as to the provisions of the articles of incorporation or of a written subscription paper, and may avoid the subscription on the ground of fraud if the paper is falsely read to him, or its provisions falsely and fraudulently misrepresented.⁸³

It has been held that a subscriber has no right to rely upon subscriptions appearing to have been made by other persons, and that he cannot avoid his subscription on the ground that other subscriptions, apparently bona fide and absolute, were in fact fictitious, or were made under a secret agreement that they should not be paid.⁸⁴ This, however, cannot be true of a positive and material false representation as to prior subscriptions.⁸⁵

A subscriber has no right to rely upon representations as to the provisions of the articles of association or charter of the corporation.⁸⁶

⁸⁰ *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499.

A plea of fraud alleging that the terms sought to be enforced were printed on a separate page of the paper which was so folded as to conceal them, that there was nothing on the face of the paper signed by the defendant to indicate any terms, and that he was fraudulently led to sign on verbal representations and agreements as to the terms of subscription, is not demurrable on its face. *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

Where the page of the contract signed by the subscriber refers to terms set out on another sheet attached thereto, it is not competent to plead and prove a parol contract differing therefrom, no sufficient reason appearing why the subscriber did not or could not read the reference on the page where he signed and be put on notice of the written contract. *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

⁸¹ *Chicago Bldg. & Mfg. Co. v. Beaven*, 149 Ky. 267, 148 S. W. 37. 'See also *Chicago Bldg. & Mfg. Co. v. Peterson*, 133 Ky. 596, 118 S. W. 384.

Where there is no actual misrepresentation as to its contents, and no trick or device is practiced upon him to prevent him from reading it. *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406; *Chicago Bldg. & Mfg. Co. v. Summerour*, 101 Ga. 820, 29 S. E. 291.

⁸² *Upton v. Tribilecock*, 91 U. S. 45, 23 L. Ed. 203.

⁸³ *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind. 242.

⁸⁴ *Connecticut & Passumpsic Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

⁸⁵ See § 615, supra.

⁸⁶ *Oil City Land & Improvement Co. v. Porter*, 99 Ky. 254, 16 Ky. L. Rep. 397, 35 S. W. 643.

Representations as to the character or purpose of the corporation do not constitute fraud where the subscription itself shows them to be false.

§ 626. — Necessity for injury. To constitute fraud, there must be some injury. In no case can a subscriber for shares avoid his subscription because of false representations, if he has not been injured or prejudiced thereby;⁸⁷ as in a case where the representation, although false when made, is afterwards made good;⁸⁸ or where the alleged fraud consists in concealment of the fact that other subscriptions, apparently absolute, were in fact conditional or upon special terms, if the conditions or special terms are void, and such subscriptions are therefore enforceable absolutely.⁸⁹

Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149.

⁸⁷ **United States.** *Stern v. Kirby Lumber Co.*, 134 Fed. 509.

Illinois. *Hutchinson Furnace & Smoke Consuming Co. v. Lyford*, 123 Ill. 300, 13 N. E. 844, aff'g 22 Ill. App. 461.

Indiana. *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355.

Iowa. *French v. Northwestern Laundry*, 132 Iowa 81, 107 N. W. 430.

Kentucky. *Central Life Ins. Co. v. Taylor*, 164 Ky. 844, 176 S. W. 373.

Michigan. *Hamilton v. American Hulled Bean Co.*, 156 Mich. 609, 121 N. W. 731.

Missouri. *Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501; *Hess v. D. T. Draffen & Co.*, 99 Mo. App. 580, 74 S. W. 440.

Nebraska. *American Building & Loan Ass'n v. Bear*, 48 Neb. 455, 67 N. W. 500.

New York. *Keeler v. Seaman*, 47 Misc. 292, 95 N. Y. Supp. 920.

Oklahoma. *King v. Howeth & Co.*, 42 Okla. 178, 140 Pac. 1182.

Tennessee. *Cunningham v. Edgefield & K. R. Co.*, 2 Head 23.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington*, — Tex. Civ. App. —, 180 S. W. 936; *Commonwealth Bonding & Casualty Ins. Co. v. Bomar*, — Tex. Civ. App. —, 169 S. W. 1060; *Southwestern Surety Ins. Co. of Oklahoma v. Fer-*

guson, 62 Tex. Civ. App. 332, 131 S. W. 662.

Utah. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

England. *Ship v. Crosskill*, L. R. 10 Eq. 73.

⁸⁸ *Ship v. Crosskill*, L. R. 10 Eq. 73.

If damage or injury at the time of the subscription is shown, it will not be presumed, as against the subscriber, that the corporation has since remedied it. Hence the petition in a suit to rescind need not show that it has not done so. *Commonwealth Bonding & Casualty Ins. Co. v. Bomar*, —, Tex. Civ. App. —, 169 S. W. 1060.

False representations that the corporation has on hand sufficient money, property or assets with which to pay dividends from the start and for from three to five years are none the less ground for rescission because dividends to an amount equivalent to an eight per cent. dividend for from three to five years have in fact been paid, where in fact they were not earned and were not paid out of surplus profits or net earnings, and hence the stockholders were not entitled to them. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

⁸⁹ *Anderson v. Newcastle & R. R. Co.*, 12 Ind. 376, 74 Am. Dec. 218;

Some courts, however, hold that in a suit in equity to rescind, it is the fraud and not the damages which entitle the defrauded party to relief,⁹⁰ and that, while a court of equity doubtless would deny him relief in a case of purely inconsequential fraud,⁹¹ it is not necessary for him to show that he has sustained pecuniary loss,⁹² and that a measure of the injury or damage is not essential,⁹³ but that it is sufficient if it appears that the stock of the subscriber would have been of greater intrinsic value if the representation had been true.⁹⁴ So it has been held, that where the representation inducing the subscription is false, the subscriber may obtain release from his subscription although the stock is, in fact, worth the subscription price, or more.⁹⁵ And also that where one is induced to enter into the contract by false representations that the subscription is to stock of a corporation to be formed in the future, when in fact the corporation has already been formed, he will not be denied the right to rescind because stock in the latter corporation is of equal value.⁹⁶

§ 627. Remedies of subscriber or purchaser in case of fraud—Rescission in general. A person who has been induced to subscribe for or purchase stock in a corporation by fraud is entitled to have his contract rescinded in the same manner as if the question had arisen

Connecticut & Passumpsic Rivers R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Wilson v. Hundley, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492. See also § 615, supra. Compare Coles v. Kennedy, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088.

⁹⁰ Stern v. Kirby Lumber Co., 134 Fed. 509.

⁹¹ Stern v. Kirby Lumber Co., 134 Fed. 509; Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App. —, 169 S. W. 1060.

⁹² Stern v. Kirby Lumber Co., 134 Fed. 509.

⁹³ Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App. —, 169 S. W. 1060.

⁹⁴ Stern v. Kirby Lumber Co., 134 Fed. 509; Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App. —, 169 S. W. 1060.

A subscriber is injured by a representation that two hundred thousand dollars of the capital has been paid in cash, when in fact not more than twenty thousand dollars has been so paid, since his stock is less valuable than it would have been if the representation had been true. Commonwealth Bonding & Casualty Ins. Co. v. Bomar, — Tex. Civ. App. —, 169 S. W. 1060.

⁹⁵ Mack v. Latta, 83 N. Y. App. Div. 242, 82 N. Y. Supp. 130, rev'd on other grounds 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97.

A bill for rescission is not demurrable for failure to show that the stock was not equal to nor greater than the subscription price. Stern v. Kirby Lumber Co., 134 Fed. 509.

⁹⁶ Johns v. Coffee, 74 Wash. 189, 133 Pac. 4.

between two natural persons,⁹⁷ provided he has not been guilty of laches,⁹⁸ and has not waived or otherwise lost the right to do so.⁹⁹

The subscriber has but one election to affirm or rescind. If he elects to affirm his contract, he cannot thereafter disaffirm it, but must abide by the decision he has made.¹ Similarly, where the corporation is a going concern, the status of the parties becomes fixed by a rescission, and one who rescinds must abide by his rescission, unless the parties mutually agree otherwise. Under such circumstances the subscriber who first takes steps to rescind acquires superior rights over other subscribers who subsequently do so, both in respect to cash paid by him on his subscription, and notes given by him for the subscription price. Nor will the legal rights which he thus acquires be affected by the subsequent appointment of a receiver for the corporation on the application of the other defrauded subscribers,² nor by the subsequent insolvency of the corporation.³

But where all of the subscribers seek to rescind for fraud discovered by all of them before the corporation is completed, and transacts any business, and because of expenditures made from the money received by the corporation, the full amounts paid by each cannot be returned to them, a court of equity will proceed on equitable principles in distributing the amount remaining and in disposing of unpaid subscription notes, and, regardless of the priority of the various rescissions, will treat the subscription notes of all of the subscribers as canceled and will not consider them in the distribution, but will distribute the money available to each subscriber in the proportion that the amount of cash paid in by him bears to the total amount of cash paid in by all.⁴

A subscriber may rescind by notifying the corporate authorities to that effect, without taking legal proceedings.⁵ Or he may repudi-

⁹⁷ *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810; *Latulippe v. New England Inv. Co.*, 77 N. H. 31, 86 Atl. 361; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

See also § 610, *supra*.

⁹⁸ See § 634, *infra*.

⁹⁹ See § 633, *infra*.

¹ *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

See § 633, *infra*.

² *Wm. B. Joyce & Co. v. Eifert*, 56 Ind. App. 190, 105 N. E. 59.

³ See § 636, *infra*.

⁴ *Wm. B. Joyce & Co. v. Eifert*, 56 Ind. App. 190, 105 N. E. 59.

⁵ *Indiana*. *Wm. B. Joyce & Co. v. Eifert*, 56 Ind. App. 190, 105 N. E. 59.

Maryland. *Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

Oklahoma. *Gast v. King*, 27 Okla. 554, 112 Pac. 997.

Texas. *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

ate his subscription and maintain a suit in equity to cancel the same and be relieved from further liability as a stockholder, and for other relief.⁶ Or he may set up the fraud as a defense in an action at law

Washington. Johns v. Coffee, 74 Wash. 189, 133 Pac. 4.

⁶ **United States.** Tyler v. Savage, 143 U. S. 79, 36 L. Ed. 82; National Leather Co. v. Roberts, 221 Fed. 922; Manning v. Berdan, 135 Fed. 159; Stern v. Kirby Lumber Co., 134 Fed. 509; Barcus v. Gates, 89 Fed. 783.

Alabama. Wiseola Co. v. Moore, 187 Ala. 163, 65 So. 398; Southern States Fire & Casualty Ins. Co. v. Cromartie, 181 Ala. 295, 61 So. 907; Southern States Fire & Casualty Ins. Co. v. Tanner, 180 Ala. 30, 60 So. 81; Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co., 180 Ala. 1, 60 So. 98; Southern States Fire & Casualty Ins. Co. v. De Long, 178 Ala. 110, 59 So. 61; Southern States Fire & Casualty Ins. Co. v. Whatley, 173 Ala. 101, 55 So. 620.

California. Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542.

Connecticut. Ashmead v. Colby, 26 Conn. 287.

Georgia. Georgia Portland Cement & Slate Co. v. Jackson, 143 Ga. 84, 84 S. E. 461; Stewart v. Rutherford, 74 Ga. 435; City Bank v. Bartlett, 71 Ga. 797.

Illinois. Briggs v. Reynolds, 176 Ill. App. 420.

Indiana. Wm. B. Joyce & Co. v. Eifert, 56 Ind. App. 190, 105 N. E. 59.

Iowa. Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; Coles v. Kennedy, 81 Iowa 360, 25 Am. St. Rep. 503, 46 N. W. 1088.

Kentucky. Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373; Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37; Reid v. Owensboro Sav. Bank & Trust Co., 141 Ky.

444, 132 S. W. 1026; Weissinger Tobacco Co. v. Van Buren, 135 Ky. 759, 135 Am. St. Rep. 502, 123 S. W. 289; Kentucky Mut. Inv. Co.'s Assignee v. Schaefer, 120 Ky. 227, 85 S. W. 1098.

Maryland. Negley v. Hagerstown Manufacturing, Mining & Land Improvement Co., 86 Md. 692, 39 Atl. 506.

Michigan. Hamilton v. American Hulled Bean Co., 156 Mich. 609, 121 N. W. 731, 143 Mich. 277, 106 N. W. 731; Sherman v. American Stove Co., 85 Mich. 169, 48 N. W. 537.

Minnesota. Drake v. Fairmont Drain, Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

New Jersey. Hubbard v. International Mercantile Agency, 68 N. J. Eq. 434, 59 Atl. 24; Garrison v. Technic Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

New York. Mack v. Latta, 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97, rev'g on other grounds 83 App. Div. 242, 82 N. Y. Supp. 130; Bosley v. National Mach. Co., 123 N. Y. 550, 25 N. E. 990; Buker v. Leighton Lea Ass'n, 63 App. Div. 507, 71 N. Y. Supp. 610; Cawthra v. Stewart, 109 N. Y. Supp. 770.

Oklahoma. Gast v. King, 27 Okla. 554, 112 Pac. 997.

Pennsylvania. Howard v. Turner, 155 Pa. St. 349, 35 Am. St. Rep. 883, 26 Atl. 753.

Tennessee. State v. Jefferson Turnpike Co., 3 Humph. 305.

Texas. Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681; Davis v. Burns, — Tex. Civ. App. —, 173 S. W. 476.

Virginia. McClanahan v. Ivanhoe

by the corporation, or in a suit in equity, to recover the amount of the subscription or of an assessment thereon or the price in case of a sale, or in an action upon a note given by him in payment.⁷ Or,

Land & Improvement Co., 96 Va. 124, 30 S. E. 450; *Carey v. Coffee-Stemming Mach. Co.*, 20 S. E. 778; *Bosher v. Richmond & H. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360.

West Virginia. *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

Wisconsin. *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949; *Waldo v. Chicago, St. P. & F. R. Co.*, 14 Wis. 575.

It has been held that a number of persons who have been induced by the same fraud to subscribe for stock in a corporation may join in a suit to cancel their subscriptions and recover what they have paid. *Carey v. Coffee-Stemming Mach. Co. (Va.)*, 20 S. E. 778; *Bosher v. Richmond & H. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360. And see *Sherman v. American Stove Co.*, 85 Mich. 169, 48 N. W. 537.

Persons induced to subscribe to stock by identical false representations may unite in a bill for identical relief, although the representations were made at different times. *Hamilton v. American Hulled Bean Co.*, 156 Mich. 609, 121 N. W. 731, 143 Mich. 277, 106 N. W. 731.

The petition in a suit to rescind must specify in what way the representations were false. A mere general allegation that all the representations mentioned were false is insufficient. It must also show in what manner the plaintiff was injured and the extent of his injury. And it must negative laches or a waiver of the right to seek rescission. *Central Life Ins. Co. v. Taylor*, 164 Ky. 844, 176 S. W. 373.

If the petition specifies the fraudulent representations relied on, the

plaintiff is confined to those so specified. *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37.

United States. *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631. But see *Maine Northwestern Development Co. v. Northern Commercial Co.*, 213 Fed. 103.

Alabama. *Alabama Foundry & Machine Works v. Dallas*, 127 Ala. 513, 29 So. 459.

Arizona. *People's Nat. Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 763.

Colorado. *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; *Divine v. Western Slope Fruit Growers' Ass'n*, 27 Colo. App. 368, 149 Pac. 841.

Georgia. *Huson Ice & Coal Co. v. Thornton*, 143 Ga. 297, 84 S. E. 969; *Weems v. Georgia Midland & Gulf R. Co.*, 84 Ga. 356, 11 S. E. 503.

Illinois. *Melendy v. Keen*, 89 Ill. 395; *Hays v. Ottawa, O. & F. R. Val. R. Co.*, 61 Ill. 422.

Indiana. *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653.

Iowa. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72; *Davis v. Dumont*, 37 Iowa 47.

Kansas. *Beal v. Dillon*, 5 Kan. App. 27.

Kentucky. *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1876, 72 S. W. 768, 24 Ky. L. Rep. 1110, 70 S. W. 868.

Maryland. *Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

Michigan. *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 97.

Mississippi. *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655.

subject to same limitations, he may do so in a suit by a receiver or assignee for the benefit of creditors, or in a suit by a creditor or creditors.⁸

Generally all promises are excluded from consideration unless incorporated as a term of the contract of subscription.

§ 628. — Recovery of money or other consideration paid. When a subscriber rescinds his subscription for fraud, and returns or tenders back his shares, he may maintain an action against the corporation

Missouri. Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79; Muck v. Hayden, 173 Mo. App. 27, 155 S. W. 889.

Nevada. Foulks Accelerating Air Motor Co. v. Thies, 26 Nev. 158, 99 Am. St. Rep. 684, 65 Pac. 373.

New Hampshire. Anderson v. Scott, 70 N. H. 534, 49 Atl. 568, 70 N. H. 350, 47 Atl. 607.

North Carolina. Queen City Printing & Paper Co. v. McAden, 131 N. C. 178, 42 S. E. 575.

Oklahoma. Gast v. King, 27 Okla. 554, 112 Pac. 997.

Pennsylvania. Howard v. Turner, 155 Pa. St. 349, 35 Am. St. Rep. 883, 26 Atl. 753; Spellier Elec. Time Co. v. Leedom, 149 Pa. St. 185, 24 Atl. 197; Crossman v. Penrose Ferry Bridge Co., 26 Pa. St. 69.

Texas. Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762; Byers Bros. v. Maxwell (Tex. Civ. App.), 73 S. W. 437.

Virginia. Jordan & Davis v. Annex Corporation, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050; Wilson v. Hundley, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492; Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

Washington. Johns v. Coffee, 74 Wash. 189, 133 Pac. 4.

West Virginia. West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182.

Wisconsin. See Milwaukee Brick &

Cement Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838.

England. Bwlch y Plwm Lead Min. Co. v. Baynes, 36 L. J. Exch. 183.

A subscription was made in reliance upon a representation by the promoter that the subscriber and the promoter were on an equality with reference to certain land which the promoter had purchased for the corporation. A secret agreement existed in fact whereby the vendors of the land were to protect the promoter in case of loss in a certain amount, and the benefit of this protection the promoter actually received. Action was brought on the note given by the subscriber to pay his subscription. The court held that the proportional part of the amount repaid to the promoter by the vendors must be credited to the subscriber. Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762.

⁸ Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; Fear v. Bartlett, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

Where he has previously given notice of rescission he may set up the fraud as a defense to an action on his subscription by the corporation or its receiver subsequently appointed. Johns v. Coffee, 74 Wash. 189, 133 Pac. 4.

As to the effect of the insolvency of the corporation on the right to rescind, see § 636, *infra*.

to recover back what he has paid on the subscription, whether in money or property,⁹ or he may recover the same in a suit in equity to cancel the subscription,¹⁰ or by way of set-off in an action against

9 United States. See *Newbegin v. Newton Nat. Bank of Newton*, 66 Fed. 701.

California. *Dox v. R. E. Lomax Co.*, 29 Cal. App. 718, 156 Pac. 874.

Georgia. *Hamilton v. Grangers' Life & Health Ins. Co.*, 67 Ga. 145; *Grangers' Ins. Co. v. Turner*, 61 Ga. 561.

Illinois. *Booth v. Smith*, 18 Ill. App. 266, aff'd 117 Ill. 370, 7 N. E. 610.

Michigan. *Sherman v. American Stove Co.*, 85 Mich. 169, 48 N. W. 537.

Missouri. *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719.

New Hampshire. *Latulippe v. New England Inv. Co.*, 77 N. H. 31, 86 Atl. 361.

New York. *Dunn v. Candee*, 98 App. Div. 317, 90 N. Y. Supp. 674.

Virginia. *Jordan & Davis v. Annex Corporation*, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

10 United States. *National Leather Co. v. Roberts*, 221 Fed. 922; *Barcus v. Gates*, 89 Fed. 783.

Alabama. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Wiseola Co. v. Moore*, 187 Ala. 163, 65 So. 398.

Georgia. *Georgia Portland Cement & Slate Co. v. Jackson*, 143 Ga. 84, 84 S. E. 461; *Stewart v. Rutherford*, 74 Ga. 435.

Illinois. *Briggs v. Reynolds*, 176 Ill. App. 420.

Indiana. *Wm. B. Joyce & Co. v. Eifert*, 56 Ind. App. 190, 105 N. E. 59.

Iowa. *Farnsworth v. Muscatine Produce & Pure Ice Co.*, 161 Iowa 170, 141 N. W. 940; *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Kentucky. *Reid v. Owensboro Sav. Bank & Trust Co.*, 141 Ky. 444, 132 S. W. 1026; *Weissinger Tobacco Co. v. Van Buren*, 135 Ky. 759, 135 Am. St. Rep. 502, 123 S. W. 289.

Michigan. *Hamilton v. American Hulled Bean Co.*, 156 Mich. 609, 121 N. W. 731, 143 Mich. 277, 106 N. W. 731; *Sherman v. American Stove Co.*, 85 Mich. 169, 48 N. W. 537.

New Jersey. *Hubbard v. International Mercantile Agency*, 68 N. J. Eq. 434, 59 Atl. 24; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

New York. *Mack v. Latta*, 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97, rev'g on other grounds 83 App. Div. 242, 82 N. Y. Supp. 130; *Lehman-Charley v. Bartlett*, 135 App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125; *Buker v. Leighton Lea Ass'n*, 63 App. Div. 507, 71 N. Y. Supp. 610; *Cawthra v. Stewart*, 109 N. Y. Supp. 770.

Oklahoma. *Gast v. King*, 27 Okla. 554, 112 Pac. 997.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476; *Burleson v. Davis*, — Tex. Civ. App. —, 141 S. W. 559.

Utah. *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401.

Virginia. *McClanahan v. Ivanhoe Land & Improvement Co.*, 96 Va. 124, 30 S. E. 450; *Boscher v. Richmond & H. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360.

West Virginia. *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

But he is not entitled to a lien on real property purchased with the pro-

him on a demand in favor of the corporation,¹¹ or by intervening in a suit for the appointment of a receiver and to wind up the affairs of the company.¹²

Officers or agents of a corporation who have received payments on a subscription induced by their false and fraudulent representations are liable therefor to the subscriber, on his rescission of the contract, in an action for money had and received.¹³ And the officers or agents who made the representations may be joined as defendants in a suit to rescind in which it is sought to recover the money paid,¹⁴ even though they personally received no part of the same.¹⁵

But it has been held that an agent who professes to act only for the corporation, and who has no knowledge that the representations which he makes are false, is not personally liable though they were in fact untrue.¹⁶

§ 629. — Action for deceit. Instead of repudiating the contract, he may, if he chooses, ratify the same, and maintain an action to recover damages for the deceit, either against the corporation,¹⁷ or

ceeds of his subscription and those of other persons not made parties to the suit. *Lehman-Charley v. Bartlett*, 135 N. Y. App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125.

¹¹ *Hamilton v. Grangers' Life & Health Ins. Co.*, 67 Ga. 145, 65 Ga. 750; *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

¹² *People v. California Safe Deposit & Trust Co.*, 19 Cal. App. 414, 126 Pac. 516; *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa 294, 103 N. W. 961.

¹³ *Jarrett v. Kennedy*, 6 C. B. 319. See also *Gast v. King*, 27 Okla. 554, 112 Pac. 997.

As to the personal liability of directors and other agents and officers generally, see Chap. 42 and Chap. 43, *infra*.

¹⁴ *Alabama*. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Georgia. *City Bank v. Bartlett*, 71 Ga. 797.

New Jersey. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

New York. *Mack v. Latta*, 178 N.

Y. 525, 67 L. R. A. 126, 71 N. E. 97, rev'g 83 App. Div. 242, 82 N. Y. Supp. 130; *Lehman-Charley v. Bartlett*, 135 App. Div. 674, 120 N. Y. Supp. 501, aff'd 202 N. Y. 524, 95 N. E. 1125; *Cawthra v. Stewart*, 109 N. Y. Supp. 770.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681.

West Virginia. *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

¹⁵ *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

¹⁶ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

¹⁷ *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447; *Jordan & Davis v. Annex Corporation*, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

In *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492, it was held that, when a subscription is in-

against the directors or other officers or agents or promoters who made or are responsible for the representations,¹⁸ or, against both the cor-

duced by fraud, and is affirmed, with knowledge of the fraud, the subscriber cannot maintain an action against the corporation, after insolvency, to recover damages for the deceit; but no authority is cited in support of the decision, and it is contrary to the well-settled rule in the case of contracts generally, that a person who has been induced to enter into a contract by the fraud of the other party may affirm the contract, and sue to recover damages for the fraud.

18 United States. Tyler v. Savage, 143 U. S. 79, 36 L. Ed. 82.

Illinois. Goodwin v. Wilbur, 104 Ill. App. 45.

Indiana. Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

Iowa. Hubbard v. Weare, 79 Iowa 678, 44 N. W. 915.

Massachusetts. Huntress v. Blodgett, 206 Mass. 318, 92 N. E. 427.

Michigan. Getchell v. Dusenbury, 145 Mich. 197, 108 N. W. 723.

Missouri. Hornblower v. Crandall, 78 Mo. 581, 7 Mo. App. 220; Hess v. D. T. Draffen & Co., 99 Mo. App. 580, 74 S. W. 440.

New York. Mack v. Latta, 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97, rev'g on other grounds 83 App. Div. 242, 82 N. Y. Supp. 130; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505; Miller v. Barber, 66 N. Y. 558; Potts v. Lambie, 138 App. Div. 144, 122 N. Y. Supp. 935, rev'g 65 Misc. 334, 121 N. Y. Supp. 384; Keeler v. Seaman, 47 Misc. 292, 95 N. Y. Supp. 920.

North Carolina. Austin v. Murdock, 127 N. C. 454, 37 S. E. 478.

Oklahoma. Gast v. King, 27 Okla. 554, 112 Pac. 997.

Vermont. Paddock v. Fletcher, 42 Vt. 389.

England. Derry v. Peek, 14 App. Cas. 337; Clarke v. Dickson, 6 C. B. (N. S.) 453; Bagshaw v. Seymour, 93 E. C. L. 873.

See also cases hereafter cited.

The corporation is not a necessary party to an action against the individuals who procured the subscription, nor is the subscriber obliged to first seek relief against it. Austin v. Murdock, 127 N. C. 454, 37 S. E. 478.

If the directors of a corporation make false and fraudulent representations, in a prospectus or otherwise, for the purpose of inducing the public to subscribe for or purchase shares of its stock, they are all equally liable in an action of deceit to any person who subscribes or purchases shares in reliance on the subscription, and is thereby defrauded. Clarke v. Dickson, 6 C. B. (N. S.) 453; Bagshaw v. Seymour, 93 E. C. L. 873; Bedford v. Bagshaw, 4 H. & N. 538; Watson v. Earl of Charlemont, 12 Q. B. 856. And see Chap. 42, infra.

Innocent directors or other officers are not liable in damages because of the fraud of other directors or officers, or of their agents. Mabey v. Adams, 3 Bosw. (N. Y.) 346; In re Denham, 25 Ch. Div. 752; Weir v. Barnett, 3 Exch. Div. 32.

Directors will not be held personally liable for false statements in a prospectus where there is no proof that it was issued at the instance or with the consent of any of them, or even that it was issued or authorized by the corporation. Kelly v. Clements, 175 Mich. 98, 140 N. W. 1006.

But if a director acquiesces in false representations by the other directors, it is equivalent to active participation on his part. See Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

poration and the latter.¹⁹ Or he may set up such damages by way of counterclaim in an action on the subscription.²⁰

The fact that the corporation has become insolvent, and has made an assignment for the benefit of creditors, does not bar an action against it to recover damages for the deceit,²¹ although it may bar the right to rescind the subscription.²² Nor will the fact that the subscriber seeks to rescind by tendering the stock to the company and demanding a return of the money which he has paid preclude him from recovering damages from the individuals making the false representations.²³

Of course an action for damages must be brought within the time fixed by the statute of limitations.²⁴

Where a pamphlet containing false statements as to the financial condition of the company is issued under the names and sanction of all of the directors, all of them are liable to one who is thereby induced to become a stockholder for any damages he has thereby sustained, even though some of them did not know that such statements were false and did not make them recklessly, not caring whether they were true or false. But before a director can be required to return to the subscriber the full amount of his investment regardless of the amount of his actual damage, such knowledge or recklessness must be shown. *Lyon v. James*, 97 N. Y. App. Div. 385, 90 N. Y. Supp. 28, *aff'd* 181 N. Y. 512, 73 N. E. 1126.

The Michigan statute providing that no action shall be brought to charge any person upon or by reason of any favorable representation concerning the character, conduct, credit, ability, trade or dealings of any other person, unless the representation is in writing and is signed by the party to be charged, applies to representations made by officers of a bona fide corporation in order to induce subscriptions to an increase in its stock, where they make no personal profit on such subscriptions, but does not apply to one who obtains subscriptions on

commission. *Getchell v. Dusenbury*, 145 Mich. 197, 108 N. W. 723.

As to the liability of a trust company acting as agent of a corporation in selling and issuing certificates of stock, see *McClure v. Central Trust Co.*, 28 N. Y. App. Div. 433, 53 N. Y. Supp. 188.

As to the personal liability of officers, agents and directors generally, see Chap. 42 and Chap. 43, *infra*.

¹⁹ *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689, 148 N. W. 797.

²⁰ *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950. And see *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

²¹ *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208. But see dictum to the contrary in *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

²² See § 636, *infra*.

²³ *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689, 148 N. W. 797.

²⁴ Limitations cannot be taken advantage of by demurrer unless the complaint shows on its face that the action is barred. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

In *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38

As in other cases the measure of damages is compensation for the injury sustained,²⁵ which has been held to be the amount paid for the stock, with interest thereon, less the value of the stock at the time when the fraud was discovered.²⁶

If no market value can be established because of want of sales, evidence showing the assets and liabilities of the corporation is admissible as tending to show the real value of the stock.²⁷

Under some circumstances the proper measure of damages may be the amount paid for the stock, with interest.²⁸

§ 630. Limitations upon the right to rescind—In general. A contract of subscription induced by fraud, like other contracts induced by fraud, is not absolutely void, but merely voidable at the option of the subscriber, and does not become void until it is repudiated by him,²⁹ and the subscriber, therefore, may ratify the same,³⁰ or lose his right to rescind by laches,³¹ or by the intervention of superior equities of third persons.³²

N. E. 208, it was held that there was such active concealment of the fraud as would postpone the running of the statute.

²⁵ *Goodwin v. Wilbur*, 104 Ill. App. 45.

²⁶ *Goodwin v. Wilbur*, 104 Ill. App. 45. See also *Smith v. Duffy*, 57 N. J. L. 679, 32 Atl. 371.

²⁷ *Goodwin v. Wilbur*, 104 Ill. App. 45.

²⁸ In *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689, 148 N. W. 797, an award of that amount was held to be proper in view of the testimony.

²⁹ **United States.** In re *Eureka Furniture Co.*, 170 Fed. 485; *Scott v. Latimer*, 89 Fed. 843, certiorari denied 172 U. S. 649, 43 L. Ed. 1183; *Farrar v. Walker*, 3 Dill. 506, note, Fed. Cas. No. 4,679; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800.

Georgia. *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834.

Indiana. *Marion Trust Co. v. Blish* (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R.

A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

Maryland. *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

New Jersey. *Roe v. Oradell Farms Dairy Co.*, 85 N. J. Eq. 146, 96 Atl. 65.

Pennsylvania. *Howard v. Turner*, 155 Pa. St. 349, 35 Am. St. Rep. 883, 26 Atl. 753.

Texas. *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476; *Burleson v. Davis*, — Tex. Civ. App. —, 141 S. W. 559.

Virginia. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

England. *Tennent v. City of Glasgow Bank & Liquidators*, 4 App. Cas. 615; *Oakes v. Turquand*, L. R. 2 H. L. 325.

See also § 627, *supra*, and also the cases cited in the notes following.

³⁰ See § 633, *infra*.

³¹ See § 634, *infra*.

³² See § 635, *infra*.

The right to rescind, when it exists, is an absolute one, in no wise dependent upon the consent of any one,³³ and the rule, which will be subsequently considered,³⁴ that a subscription contract cannot be terminated except by unanimous consent of all the stockholders, has no application under such circumstances.³⁵ Nor will the mere fact that the corporation has made large expenditures on the strength of a subscription and with the money paid thereon, preclude a rescission, where there is no element of estoppel.³⁶

§ 631. — Restoration of the status quo. As in other cases, it is essential to a rescission that the parties be restored to the condition which they occupied before the contract was made.³⁷

The subscriber must return or offer to return anything of value that he has received as an inducement to subscribe,³⁸ and any dividends or profits that he has received from his subscription.³⁹

³³ *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

³⁴ See § 639, *infra*.

³⁵ *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

³⁶ *Drake v. Fairmont Drain, Tile & Brick Co.*, 129 Minn. 145, 151 N. W. 914.

³⁷ *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Commonwealth Bonding & Casualty Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

There can be no rescission where the parties cannot be placed in statu quo. *Edenborn v. Sim*, 206 Fed. 275; *Jordan & Davis v. Annex Corporation*, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050.

So the court cannot cancel or rescind the contract where the subscriber has sold his stock or exchanged it for stock in another corporation. *Commonwealth Bonding & Casualty Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

³⁸ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

He can rescind if he can restore what he has received in the same state in which he received it. *Jordan*

& *Davis v. Annex Corporation*, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050.

Where the subscriber received a loan from the company, and was employed by it at a salary in excess of the value of his services as an inducement to subscribe, it was held that he would be required to repay the loan and to refund the excess salary that he had received. *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1876, 72 S. W. 768, 24 Ky. L. Rep. 1110, 70 S. W. 868.

A bill to rescind is not demurrable for failing to offer to do equity where it is alleged that no certificates of stock have ever been issued to the plaintiff and that he has been denied the right to share in the profits or dividends of the company, and it does not show that he ever received any profits. *Wiseola Co. v. Moore*, 187 Ala. 163, 65 So. 398.

³⁹ *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Hanly v. Cosmopolitan Nat. Bank*, 20 Pa. Dist. 401.

The subscriber should not be charged with amounts credited to him

As a rule he must also return or offer to return the certificate of stock, if he has received one from the corporation.⁴⁰ And this has been held to be true even though the stock is of no value,⁴¹ though some courts hold to the contrary.⁴²

Generally, in cases of actual fraud, a court of equity will not require a restoration or offer thereof by the complainant before filing his bill for rescission,⁴³ but it will be deemed sufficient if the offer is made in the bill or petition.⁴⁴ And it has been held that even such an offer is unnecessary since the court may provide for restitution in its decree as a condition to the granting of relief.⁴⁵

as dividends where nothing was in fact paid. *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1876, 72 S. W. 768, 24 Ky. L. Rep. 1110, 70 S. W. 868.

Where a bill to cancel a subscription alleges that no certificates of stock have ever been issued to complainant, and does not show that he has ever received any profits from his subscription, it is not demurrable because it fails to offer to do equity. *Wiseola Co. v. Moore*, 187 Ala. 163, 65 So. 398.

⁴⁰ *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; *Francis v. New York & B. El. R. Co.*, 108 N. Y. 93, 15 N. E. 192. And see *Marion Trust Co. v. Blish* (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814; *Building & Loan Ass'n of Dakota v. Cameron*, 48 Neb. 124, 66 N. W. 1109; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 Pac. 401. See also *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

The court cannot cancel nor rescind the contract where the subscriber has sold his stock or exchanged it for stock in another corporation. *Commonwealth Bonding & Casualty Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074.

But in *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631, it was held

that it was sufficient where the defendant made a continuing tender of the return of his stock though he had sold a few of his shares before discovering the fraud, since he could replace the latter by purchasing shares in the open market and thus make his tender effective.

⁴¹ *Marion Trust Co. v. Blish* (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

⁴² *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

There is no necessity to return or offer to return the certificate if, at the time the fraud is discovered, a note given in part payment of the subscription has been transferred by the corporation and the stock is of no value. *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509. See also *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72, where it was conceded by counsel that no return was necessary in order to interpose fraud as a defense.

⁴³ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Cawthra v. Stewart*, 109 N. Y. Supp. 770.

⁴⁴ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Cawthra v. Stewart*, 109 N. Y. Supp. 770.

⁴⁵ *Cawthra v. Stewart*, 109 N. Y. Supp. 770.

§ 632. — Removal of name from books. In the absence of statutory provision to the contrary, all that is necessary, in order that a subscriber may effectually avoid his subscription on the ground of fraud, is that he shall seasonably repudiate the same, and notify the company of the repudiation; and he is under no duty to see that his name is removed from the books of the company.⁴⁶

§ 633. — Ratification or waiver as a bar to rescission. A ratification or affirmance of the contract of subscription, with knowledge of the fraud, while it does not bar an action of deceit,⁴⁷ is a complete and absolute bar to a rescission.⁴⁸ And such ratification or affirmance may be implied from the acts of the subscriber after discovery of the fraud. If, with full knowledge of the fraud, he acts as a shareholder in the organization of the corporation, or takes part in stockholders' meetings after organization, or acts as an officer, or pays assessments,

⁴⁶ *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414; *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4.

In *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414, it is said to be the settled law in England that the subscriber must institute proceedings to have his name removed from the register, but it is pointed out that this rule is based upon the provisions of the statute.

⁴⁷ *Potts v. Lambie*, 122 N. Y. Supp. 935, rev'g 65 N. Y. Misc. 334, 121 N. Y. Supp. 384. Compare *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

See § 629, *supra*.

⁴⁸ *United States. Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85.

California. Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107.

Florida. Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Georgia. Gress v. Knight, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; *City Bank of Macon v. Bartlett*, 71 Ga. 797; *Southern Tobacco Co. v.*

Armstrong, 11 Ga. App. 501, 75 S. E. 828.

Illinois. See *Chicago Trust & Savings Bank v. Ball*, 208 Ill. 256, 70 N. E. 305, rev'g 108 Ill. App. 321; *Anderson v. Chicago Trust & Savings Bank*, 195 Ill. 341, 63 N. E. 203, aff'g 93 Ill. App. 347.

Maine. Chaffin v. Cummings, 37 Me. 76.

Mississippi. Perkins v. Merchants' & Farmers' Bank, 103 Miss. 179, Ann. Cas. 1915 B 788, 60 So. 131.

New York. Buker v. Leighton Lea Ass'n, 63 App. Div. 507, 71 N. Y. Supp. 610.

Virginia. Wilson v. Hundley, 96 Va. 96, 30 S. E. 492.

Wisconsin. Franey v. Wauwatosa Park Co., 99 Wis. 40, 74 N. W. 548.

England. Ex parte Briggs, L. R. 1 Eq. 483.

And see other cases in the notes following.

In an action by a subscriber to recover back what he has paid, condonation of the fraud is a matter of defense to be set up by plea or answer. *Grangers' Ins. Co. v. Turner*, 61 Ga. 561.

or receives dividends, or transfers the stock, or does any other act which is inconsistent with an intention to rescind his subscription, he will be held to have ratified the same, and he cannot afterwards rescind, either as against the corporation, or as against its receiver, assignee, or creditors.⁴⁹

A demand by the subscriber as a condition of rescission that the

49 United States. *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *In re Northern Pressed Brick Co.*, 212 Fed. 878.

California. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.

Florida. *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 So. 174.

Georgia. *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; *City Bank of Macon v. Bartlett*, 71 Ga. 797; *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32; *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828.

Illinois. *Chicago Trust & Savings Bank v. Ball*, 208 Ill. 256, 70 N. E. 305, rev'g 108 Ill. App. 321; *Anderson v. Chicago Trust & Savings Bank*, 195 Ill. 341, 63 N. E. 203, aff'g 93 Ill. App. 347; *Great Western Tel. Co. v. Bush*, 35 Ill. App. 213.

Iowa. *Bowen v. Aetna Indemnity Co.*, 160 Iowa 548, 142 N. W. 205, 151 Iowa 663, 131 N. W. 1086; *French v. Northwestern Laundry*, 132 Iowa 81, 107 N. W. 430. See also *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801, where the proof was held not to show an estoppel.

Kentucky. *Castleman-Blakemore Co. v. Brucker*, 167 Ky. 269, 180 S. W. 360.

Maine. *Chaffin v. Cummings*, 37 Me. 76.

Michigan. See *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79.

Minnesota. See *Nichols v. Atwood*, 127 Minn. 425, 149 N. W. 672.

Mississippi. *Perkins v. Merchants' & Farmers' Bank*, 103 Miss. 179, Ann. Cas. 1915 B 788, 60 So. 131.

Nebraska. *Foley v. Holtry*, 41 Neb. 563, 59 N. W. 781.

South Carolina. *Glenn v. Rosborough*, 48 S. C. 272, 26 S. E. 611.

Tennessee. *Lear v. S. K. Paige Lumber & Manufacturing Co. (Tenn.)*, 42 S. W. 808.

Texas. *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Commonwealth Bonding & Casualty Ins. Co. v. Cator*, — Tex. Civ. App. —, 175 S. W. 1074; *Southwestern Surety Ins. Co. of Oklahoma v. Ferguson*, 62 Tex. Civ. App. 332, 131 S. W. 662.

Virginia. *Campbell v. Eastern Building & Loan Ass'n*, 98 Va. 729, 37 S. E. 350; *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492. See also *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868.

West Virginia. *West End Real Estate Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182.

Wisconsin. *Columbus Institute v. Conohan*, — Wis. —, 159 N. W. 720; *Franey v. Wauwatosa Park Co.*, 99 Wis. 40, 74 N. W. 548.

England. *Ex parte Briggs*, L. R. 1 Eq. 483; *In re Dunlop-Truffault Cycle & Tube Mfg. Co.*, 75 L. T. R. (N. S.) 385.

In order to enable him to rescind and recover what he has paid he "must refrain from taking any benefit under his contract of subscription inconsistent with his contention that

corporation return to him the amount of assessment for which he voted, and which he voluntarily paid, after he had acquired full knowledge of the fraud, invalidates his offer to rescind.⁵⁰

In order that acts of a subscriber may amount to a ratification, so as to bar a rescission for fraud, they must have been done with knowledge of the fraud.⁵¹ But it is not necessary that he be ap-

he is a creditor." *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85.

A subscriber cannot rescind for fraud of the president, where, for two months after discovery of the fraud, he remains a director, demands his salary as superintendent, and sues the president personally for his damages. *Lear v. S. K. Paige Lumber & Mfg. Co.* (Tenn. Ch.), 42 S. W. 808.

A person cannot rescind a subscription or purchase for fraud, where it appears that on the day he discovered the fraud he attended a stockholders' meeting, and voted for an assessment on the stock, and afterwards, before attempting to rescind, attended another meeting, and voluntarily paid the assessment on his shares. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.

A stockholder who for years receives dividends or income from his stock, while the corporation is a going concern and is incurring debts, is estopped to rescind as against creditors after the corporation has been adjudged a bankrupt. *Ratcliffe v. Clendenin*, 232 Fed. 61.

Stockholders who, pursuant to notice to do so, prove their holdings and receive dividends as stockholders in a proceeding, instituted by a stockholder in behalf of himself and all other stockholders, to wind up the affairs of the corporation, are estopped to thereafter sue to rescind their subscriptions for fraud and recover back what they have paid thereon. *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85.

Where, on discovery of the fraud, the subscriber elects to retain his membership in the corporation and seeks to obtain an adjustment of his rights as a member, he cannot thereafter, and after several years have elapsed, have his subscription canceled and recover back what he has paid. *Buker v. Leighton Lea Ass'n*, 63 N. Y. App. Div. 507, 71 N. Y. Supp. 610.

A subscriber is not estopped to set up fraud where his name did not appear as an incorporator or stockholder, no stock was ever issued to him, and he never participated in any of the meetings except one in which he repudiated all further liability upon his subscription. *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79.

⁵⁰ *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.

⁵¹ *Alabama*. *Alabama Foundry & Machine Works v. Dallas*, 127 Ala. 513, 29 So. 459.

Minnesota. *Nichols v. Atwood*, 127 Minn. 425, 149 N. W. 672.

South Dakota. *National Bank of Dakota v. Taylor*, 5 S. D. 99, 55 N. W. 297.

Texas. *Strong v. Southwestern Bridge & Iron Co.* (Tex.), 38 S. W. 546; *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716.

Virginia. *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 382; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492; *Virginia Land Co. v.*

praised of all the incidents of the fraud, and if, after discovery of the essential fact constituting the fraud, he waives the right to rescind, discovery of new incidents in the same fraud will not again give him that right.⁵²

The acts relied on to constitute a waiver or ratification must also be inconsistent with an intention to repudiate the contract.⁵³

Acts done by the subscriber as the result of the reasonable expectation on his part that the representations will be made good and

Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

West Virginia. West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182.

Current suspicion and rumor are not enough, but there must be knowledge of facts which will enable the party to take efficient action. Nor is notice of facts that if followed up would have led to the truth, sufficient. Cattlemen's Trust Co. of Ft. Worth v. Pruett, — Tex. Civ. App. —, 184 S. W. 716.

Denial of liability on other grounds before suit brought is not a waiver where it does not appear that he knew of the fraud when the denial was made. Alabama Foundry & Machine Works v. Dallas, 127 Ala. 513, 29 So. 459.

One induced to subscribe by a promoter, who makes misrepresentations and fraudulently conceals facts, is not precluded from rescinding by reason of the fact that he gives a proxy to said promoter to represent him at the first stockholders' meeting at which the truth is disclosed. He is not affected by notice to the promoter of facts which the latter knew from the beginning and failed to disclose. Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

That one was induced to exchange his stock by false representations will not preclude the company from rely-

ing on such exchange as a waiver, where the person making the representations was not its agent and it was in no way responsible for them. Commonwealth Bonding & Casualty Co. v. Cator, — Tex. Civ. App. —, 175 S. W. 1074.

⁵² Where a person, who has been induced to subscribe for stock by false representations that certain others have subscribed, affirms the subscription on discovery that the latter's subscriptions were optional, he cannot afterwards rescind on discovering the terms of the option, since these are mere incidents of the fraud, which was known at the time of the affirmation. Wilson v. Hundley, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

⁵³ Fear v. Bartlett, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322.

In Fear v. Bartlett, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322, it was held that the fact that a subscriber, who had previously repudiated his subscription, gave one of the directors of the company a check, did not amount to a ratification of the subscription or preclude him from setting up the fraud as a defense to an action to recover the balance due thereon, where he could not read and write, and at the time expressly stated that he would never pay another dollar on his subscription, and that he gave the check only to save what he had already paid thereon.

the fraud remedied, will not amount to a waiver or ratification.⁵⁴ Nor will he be bound by acquiescence or a ratification made in ignorance of the fraud and induced by false representations on the part of the company.⁵⁵

A ratification by an agent of the subscriber having power to bind him by a contract is binding on the subscriber if the agent acts in good faith,⁵⁶ but not where the agent combines with third persons to commit a fraud on his principal.⁵⁷

Waiver is largely a question of intent.⁵⁸

The burden of showing a waiver of the fraud and a ratification of the contract is on the corporation in an action by it on the subscription.⁵⁹

Ratification and acquiescence are always questions of fact.⁶⁰

Whether the subscriber has waived his right to rescind by participating in the management of the corporate affairs after discovering the fraud, is a question for the jury where the evidence is conflicting.⁶¹ And the same is true of the question whether or not the subscriber knew of the fraud when he did the acts relied on as constituting a waiver or ratification,⁶² or whether he was induced to act as he did by the reasonable expectation that the fraud would be expurgated, or that an arrangement satisfactory to him would be made with respect to it.⁶³

§ 634. — Laches as a bar to rescission. A subscriber cannot rescind his subscription for fraud, either in equity or at law, if he has been guilty of laches, either in repudiating his subscription after

⁵⁴ *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582; *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

⁵⁵ *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868.

⁵⁶ A state which subscribes for stock in a corporation is bound by the acts of its agents in this respect to the same extent as an individual would be. *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305.

⁵⁷ *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305.

⁵⁸ *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Commonwealth*

Bonding & Casualty Co. v. Cator, — Tex. Civ. App. —, 175 S. W. 1074.

⁵⁹ *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

⁶⁰ *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

⁶¹ *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828.

⁶² *Nichols v. Atwood*, 127 Minn. 425, 149 N. W. 672; *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716.

⁶³ *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

discovery of the fraud, or in discovering the fraud,⁶⁴ and especially

64 United States. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349; In re American Nat. Beverage Co., 193 Fed. 772; Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85; In re Eureka Furniture Co., 170 Fed. 485; Brown v. Allebach, 166 Fed. 488; American Alkali Co. v. Salom, 131 Fed. 46, certiorari denied 196 U. S. 641, 49 L. Ed. 631; Bartol v. Walton & Whann Co., 92 Fed. 13; Wallace v. Bacon, 86 Fed. 553; Newton Nat. Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727; Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957, rev'd on other grounds sub nom. Peck v. Elliott, 79 Fed. 10, 38 L. R. A. 616; Newbegin v. Newton Nat. Bank, 66 Fed. 701; Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4,679; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; Upton v. Jackson, 1 Flip. 413, Fed. Cas. No. 16,802.

Alabama. Southern States Fire & Casualty Ins. Co. v. De Long, 178 Ala. 110, 59 So. 61.

California. Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107; People v. California Safe Deposit & Trust Co., 19 Cal. App. 414, 126 Pac. 516.

Colorado. Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Connecticut. Barrows v. Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951; Northrop v. Bushnell, 38 Conn. 498.

Georgia. Gress v. Knight, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; Beck v. Henderson, 76 Ga. 360; City Bank of Macon v. Bartlett, 71 Ga. 797; Coca-Cola Bottling Co. v. Anderson, 13 Ga. App. 772, 80 S. E. 32; Southern Tobacco Co. v. Armstrong, 11 Ga. App. 501, 75 S. E. 828.

Idaho. Meholin v. Carlson, 17 Idaho

742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. Fey v. Peoria Watch Co., 32 Ill. App. 618.

Indiana. Dynes v. Shaffer, 19 Ind. 165; Marion Trust Co. v. Blish (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

Iowa. Johnson v. Morgan, — Iowa —, 160 N. W. 2; Farmers' & Merchants' State Bank v. Shaffer (Iowa), 147 N. W. 851; Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; French v. Northwestern Laundry, 132 Iowa 81, 107 N. W. 430; Cedar Rapids Ins. Co. v. Butler, 83 Iowa 124, 48 N. W. 1026.

Kentucky. Castleman-Bickemore Co. v. Brucker, 167 Ky. 269, 180 S. W. 360; Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373; Bartley v. Big Branch Coal Co., 160 Ky. 123, 169 S. W. 601; Robertson v. Owensboro Sav. Bank & Trust Co., 150 Ky. 50, 149 S. W. 1144; Chicago Bldg. & Mfg. Co. v. Beaven, 149 Ky. 267, 148 S. W. 37; Reid v. Owensboro Sav. Bank & Trust Co., 141 Ky. 444, 132 S. W. 1026; Kentucky Mut. Inv. Co.'s Assignee v. Schaefer, 120 Ky. 227, 85 S. W. 1098.

Maryland. Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810; Fear v. Bartlett, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

Massachusetts. Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306.

Michigan. Hamilton v. American Hulled Bean Co., 156 Mich. 609, 121 N. W. 731, 143 Mich. 277, 106 N. W. 731; Duffield v. Barnum Wire & Iron Works, 64 Mich. 293, 31 N. W. 310.

Minnesota. Olson v. State Bank, 67 Minn. 267, 69 N. W. 904; Dunn v.

is this limitation upon the right to rescind imposed where the

State Bank of Minneapolis, 59 Minn. 221, 61 N. W. 27.

Mississippi. Perkins v. Merchants' & Farmers' Bank, 103 Miss. 179, Ann. Cas. 1915 B 788, 60 So. 131.

Missouri. Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719.

Nebraska. American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493.

New Jersey. Tierney v. Parker, 58 N. J. Eq. 117, 44 Atl. 151.

New York. Schanck v. Morris, 7 Rob. 658.

North Carolina. Chamberlain v. Trogden, 148 N. C. 139, 16 Ann. Cas. 177, 61 S. E. 628.

Pennsylvania. Howard v. Turner, 155 Pa. St. 349, 35 Am. St. Rep. 883, 26 Atl. 753; Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Hanly v. Cosmopolitan Nat. Bank, 20 Pa. Dist. 401.

South Dakota. See Keyes v. Blue Bell Medicine Co., 34 S. D. 297, 148 N. W. 505.

Tennessee. Heiskell v. Morris, 135 Tenn. 238, 186 S. W. 99; State v. Jefferson Turnpike Co., 3 Humph. 305.

Virginia. Campbell v. Eastern Building & Loan Ass'n, 98 Va. 729, 37 S. E. 350; West End Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. 900; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591; Weisiger v. Richmond Ice Mach. Co., 90 Va. 795, 20 S. E. 361; Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

Washington. Krisch v. Inter-State Fisheries Co., 39 Wash. 381, 81 Pac. 855.

West Virginia. Reiniger v. Piercy, — W. Va. —, 86 S. E. 926.

England. In re London & S. Fire Ins. Co., 24 Ch. Div. 149; Ashley's Case, L. R. 9 Eq. 263; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L.

99. And see In re Dunlop-Truffault Cycle & Tube Mfg. Co., 66 L. J. Ch. 25, 75 L. T. R. (N. S.) 385.

A bare refusal to pay calls does not amount to a repudiation within this rule. Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306.

In order to bar the subscriber he must have notice of the fraud. Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

A subscriber cannot rescind for fraud where he has accepted dividends and participated in stockholders' meetings for a number of years, without investigating as to the truth of the alleged false representations, and an investigation might have easily been made by examining the books of the corporation. Barrows v. Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951.

In Deppen v. German-American Title Co., 24 Ky. L. Rep. 1876, 72 S. W. 768, 24 Ky. L. Rep. 1110, 70 S. W. 868, it was held that a subscriber was not estopped to set up fraud as a defense to a suit to foreclose brought by assignees of notes and a mortgage given for the amount of his subscription by reason of the fact that he was an employee and had been a director of the company, where he had no opportunity to discover the truth, nor because of unsuccessful attempts by him as such employee to sell such notes to others.

One who has been induced by fraud to subscribe for stock is not affected with knowledge of the fraud by the disclosure of facts at a stockholders' meeting for which the perpetrator of the fraud holds proxies for him, and at which he is not present. Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

It does not lie in the mouth of the corporation to charge a subscriber

rights of creditors are involved.⁶⁵

"A man," said Lord Romilly in a leading English case, "must not play fast and loose; he must not say, 'I will abide by the company, if successful, and I will leave the company if it fails'; and therefore, whenever a misrepresentation is made of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company, or whether he will remain a member."⁶⁶

The reasons for the rule have been said to be that, by remaining in the company, the subscriber may mislead others into becoming members, or induce others to deal with the corporation and give credit to it, upon the credit of his name, when otherwise they would not do so.⁶⁷

Whether a subscriber's delay in rescinding his subscription for fraud was unreasonable, so as to constitute laches, depends upon the circumstances, as well as upon the extent of the delay. Even a long delay will not be fatal if satisfactorily explained, and if the circumstances are not such as to render rescission inequitable,⁶⁸ or where the rights of creditors or stockholders, who may have become such on the faith of the defrauded party's subscription, have not intervened.⁶⁹

with lack of diligence in discovering the fraudulent character of representations contained in the subscription contract, and, as against it, he is not bound to investigate the truth of statements therein. *American Alkali Co. v. Salom*, 131 Fed. 46, certiorari denied 196 U. S. 141, 49 L. Ed. 631.

⁶⁵ See § 636, *infra*.

⁶⁶ *Ashley's Case*, L. R. 9 Eq. 263, quoted with approval in *Brown v. Allebach*, 166 Fed. 488; *Upton v. Englehart*, 3 Dill. (U. S.) 496, Fed. Cas. No. 16,800; *City Bank v. Bartlett*, 71 Ga. 797; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414; *Perkins v. Merchants' & Farmers' Bank*, 103 Miss. 179, Ann. Cas. 1915 B 788, 60 So. 131.

⁶⁷ *Brown v. Allebach*, 166 Fed. 488; *Upton v. Englehart*, 3 Dill. (U. S.) 496, Fed. Cas. No. 16,800; *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

⁶⁸ *United States. Davis v. Louis-*

ville Trust Co., 181 Fed. 10, 30 L. R. A. (N. S.) 1011.

Colorado. *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681.

Virginia. *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

Wisconsin. *McClellan v. Scott*, 24 Wis. 81.

England. *Aaron's Reefs v. Twiss*, [1896] A. C. 273; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99.

⁶⁹ *Commonwealth Bonding & Casualty Ins. Co. v. Meeks*, — Tex. Civ. App. —, 187 S. W. 681; *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

"If negligence and indifference is relied upon as ground of estoppel, such conduct must not only influence the action of some other person to his

Delay in rescinding the subscription after discovery of the fraud will not bar relief where it is the result of a reasonable belief on the part of the subscriber that the corporation will make good the representations or remedy the fraud,⁷⁰ as, for example, where it is due to promises on the part of the corporation to refund the money paid for the stock.⁷¹ Nor will delay in discovering the fraud bar relief where it is due to the fraud of the corporation or its officers.⁷² But the duty to act promptly is not dependent upon proof of injury to the other party by the delay.⁷³

The burden of showing knowledge of the fraud and laches is on the corporation.⁷⁴

Whether or not the party seeking a rescission has acted promptly is generally a question of fact to be determined from the proof,⁷⁵ and in actions at law is ordinarily a question for the jury.⁷⁶

injury, but it must further appear that it might reasonably have been expected that it would have such effect while such other person was exercising ordinary prudence." Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681.

As to the right to rescind after the corporation has become insolvent, see § 636, infra.

⁷⁰ White v. American Nat. Life Ins. Co., 115 Va. 305, 78 S. E. 582; West End Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. 900. See also Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681.

As where he is induced to delay bringing suit until certain options can be sold, which the promoter represents that he can and will do, when his money and more will be returned to him. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

⁷¹ Georgia Portland Cement & Slate Co. v. Jackson, 143 Ga. 84, 84 S. E. 461.

⁷² Krisch v. Inter-State Fisheries Co., 39 Wash. 381, 81 Pac. 855.

Neither the corporation nor its receiver can contend that the subscriber could sooner have discovered

the truth by making inquiry, where he did inquire concerning the matter in question of the vice president of the company who reiterated the misrepresentations. Johns v. Coffee, 74 Wash. 189, 133 Pac. 4.

⁷³ West End Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. 900.

⁷⁴ Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; Aaron's Reefs v. Twiss, [1896] A. C. 273.

⁷⁵ People v. California Safe Deposit & Trust Co., 19 Cal. App. 414, 126 Pac. 516; Commonwealth Bonding & Casualty Ins. Co. v. Meeks, — Tex. Civ. App. —, 187 S. W. 681.

⁷⁶ United States. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Newton Nat. Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727.

Georgia. Southern Tobacco Co. v. Armstrong, 11 Ga. App. 501, 75 S. E. 828.

Iowa. Farmers' & Merchants' State Bank v. Shaffer (Iowa), 147 N. W. 851.

Maryland. Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810; Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

North Carolina. Chamberlain v. Trogden, 148 N. C. 139, 16 Ann. Cas. 177, 61 S. E. 628.

§ 635. — Rescission as against third persons. When a negotiable note is given in payment of a subscription for stock, and the subscription is afterwards rescinded for fraud, the note cannot be avoided in the hands of a bona fide purchaser for value. But it may be avoided in the hands of one who was not a purchaser for value, or who purchased with notice of the fraud.⁷⁷ If, pending a suit for cancellation of such a note, it appears that the same has been transferred to a bona fide purchaser so that equitable relief by way of cancellation cannot be had, the court may retain jurisdiction for the purpose of awarding damages against the original payees, and may allow as damages the face of the notes with interest, though the same have not yet been paid.⁷⁸

The right to rescind a subscription as against creditors after the corporation has become insolvent will be considered in a subsequent section.⁷⁹

§ 636. — Effect of insolvency of the corporation. All the courts agree, no doubt, that the fact that a corporation is insolvent, and that an action on a subscription is brought by its receiver or assignee for the benefit of creditors, or by creditors themselves, where this is allowed, cannot affect the subscriber's right to set up as a defense that the subscription was induced by fraud, if he repudiated the subscription before the corporation's insolvency, and while it was a going concern.⁸⁰ This does not conflict with the doctrine known as the "trust fund doctrine,"—that the assets of a corporation, when it is insolvent, constitute a trust fund for the payment of its debts, since that doctrine does not become applicable until the company has

⁷⁷ *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Under the Kentucky statute, where the notes are not placed on the same footing as bills of exchange by its provisions, fraud may be interposed as a defense against bona fide holders. *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1876, 72 S. W. 768, 24 Ky. L. Rep. 1110, 70 S. W. 868.

See works on negotiable instruments.

⁷⁸ *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949.

⁷⁹ See § 636, *infra*.

⁸⁰ *Fear v. Bartlett*, 81 Md. 435, 33

L. R. A. 721, 32 Atl. 322; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414; *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719; *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4; *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Cocksedge v. Metropolitan Coal Consumers' Ass'n*, 64 L. T. R. (N. S.) 826. See also *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629. Compare *Tennent v. City of Glasgow Bank & Liquidators*, 4 App. Cas. 615; *In re Lenox Pub. Co.*, 62 L. T. R. (N. S.) 791.

been dissolved or has become insolvent, nor so long as it is a going concern.⁸¹

In England, and in some of the states in this country, it has been held that a subscription cannot be repudiated on the ground of fraud, for the first time, after the corporation has become insolvent, and has made an assignment or gone into the hands of a receiver or an assignee in bankruptcy, even though the fraud may not have been discovered before insolvency, and though there may have been no laches in discovering it.⁸² And there are numerous holdings to the

⁸¹ *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

"Whatever may have been the origin of the doctrine, it means and can only mean, that when a corporation has been lawfully dissolved or has become insolvent, its entire property, including unpaid subscriptions to its capital stock, becomes a trust fund for the payment of its debts, and that creditors are entitled in equity to have their debts paid out of the assets of the company before there can be any distribution among the stockholders. * * * And no one can question the justice and sound sense of the doctrine as thus understood. But it is only when the company has been dissolved or has become insolvent that this equitable doctrine arises. So long as the company is a going concern, having the possession and management of its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals. And such being the case, if one is induced to become a subscriber to its capital stock by the fraud of the company and within a reasonable time after the discovery of the fraud, there being no laches on his part in discovering the fraud, repudiates his subscription, and this, too, before the insolvency of the company, under such circumstances he is, according to the settled law of this country, relieved of all liability on account of his subscription. He is relieved

because he has the right to avoid a fraudulent contract, and because he has exercised this right. The subsequent insolvency of the company can upon no principle make him liable on a fraudulent contract which he has thus repudiated. And under such circumstances we cannot agree that the equities of the creditor are superior to those of the defrauded shareholder.

* * * And when we speak of the right of the defrauded shareholder to rescind his contract before the insolvency of the company, we mean before proceedings in insolvency voluntary or involuntary have been instituted, or some act done that in law is regarded as an act of insolvency, for until then the trust fund doctrine relied on by the appellee has no application." *Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322, quoted in *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

⁸² *Roe v. Oradell Farms Dairy Co.*, 85 N. J. Eq. 146, 96 Atl. 65; *McDowall v. Sheehan*, 36 N. Y. St. 104, 13 N. Y. Supp. 386; *Kent v. Freehold Land & Brick-Making Co.*, L. R. 3 Ch. App. 493; *Wright's Case*, L. R. 12 Eq. 331; *Oakes v. Turquand*, L. R. 2 H. L. 325. See also *Johnson v. Morgan*, — Iowa —, 160 N. W. 2; *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

In *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523, which was an action by an assignee in bankruptcy, it is said: "It has been several times adjudged

effect that where the corporation is insolvent the right of the sub-

in this court, that, in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defense of false and fraudulent representations inducing such subscription cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract."

In *Lantry v. Wallace*, 97 Fed. 865, aff'd 182 U. S. 536, 45 L. Ed. 1218, and *Wallace v. Hood*, 89 Fed. 11, aff'd 97 Fed. 983, 182 U. S. 555, 45 L. Ed. 1227, it was held that one who is induced by fraud to purchase stock in a national bank, who continues to be a stockholder therein until after it becomes insolvent, cannot set up the fraud as a defense to an action by the receiver to recover the amount of an assessment on his stock without showing affirmatively that he has been guilty of no negligence in rescinding, and that there are no creditors of the bank who became such while he was a stockholder. The supreme court based its judgment of affirmance in these cases on the ground that such a defense is an equitable one which cannot be set up in an action at law, and that the defendant's remedy, if any, is by a suit in equity for a rescission and cancellation of his certificate to which the bank and the receiver must be parties. It expressly refused to decide whether the defendant could have successfully maintained such a suit.

In case of bankruptcy proceedings, see *Michener v. Payson*, Fed. Cas. No. 9,524.

Where a bill to rescind and to recover back the money paid on the subscription alleges that the corporation is insolvent, no preference can be given the subscriber over the other

creditors. *Schwarz v. Bowler Mfg. Co.*, 177 Ill. App. 294.

In *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585, which was an action by a receiver to enforce the statutory double liability of a stockholder in a bank, it was held that the defendant having permitted the depositors of the bank to rely on his apparent ownership of the stock, and having received dividends upon the stock for years, which he did not offer to return, could not be heard to repudiate his liability.

See also *Duffield v. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310.

In *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696, which was an action by a receiver of a bank to enforce the statutory liability of its stockholders, it was held that one who became the registered owner of stock six months before the bank became insolvent could not escape liability on the ground that he had been induced to purchase it by fraud.

In *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523, it is held that fraud in obtaining the subscription is no defense to an action thereon by a receiver.

In *Hall v. Old Talargoch Lead Min. Co.*, 3 Ch. Div. 749, proceedings to rescind a subscription were sustained, although commenced after commencement of winding-up proceedings, where they were commenced in good faith, and in ignorance of the winding-up proceedings.

The rule stated in the text is referred to in *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904; and in *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27.

In *Kentucky Mut. Inv. Co.'s Assignee v. Schaefer*, 120 Ky. 227, 85 S. W. 1098, this rule is stated, but it is held not to obtain in that state.

scriber to rescind is subordinate to the rights of those who, without any knowledge of the fraud, have become creditors of the corporation after the making of the contract of subscription and before its repudiation,⁸³ even though they did not know of such subscription at

⁸³ **United States.** In *re American Nat. Beverage Co.*, 193 Fed. 772. See also In *re Eureka Furniture Co.*, 170 Fed. 485; *Scott v. Abbott*, 160 Fed. 573.

Georgia. *Empire Life Ins. Co. v. Brown*, 145 Ga. 818, 89 S. E. 1085; *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828.

"The status of a stockholder relative to creditors who became such after he took the stock is not in all respects identical with that relative to antecedent creditors. As to creditors whose debts were created before he took the stock, questions of laches, acts inconsistent with rescission, estoppel, etc., may arise." *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834.

A subscriber cannot rescind for fraud and recover back what he has paid if there are creditors to an equal or larger amount on debts contracted after his subscription. *Hamilton v. Grangers' Life & Health Ins. Co.*, 67 Ga. 145; *Turner v. Grangers' Life & Health Ins. Co.*, 65 Ga. 649, 38 Am. Rep. 801.

This is a matter to be set up by plea or answer in such an action. *Grangers' Ins. Co. v. Turner*, 61 Ga. 561.

In *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610, it was held that though a subscription was obtained by fraud, the subscriber would be liable to corporate creditors for so much of his unpaid subscription as, in connection with the amount due by other corporators, might be necessary to pay its debts. In this

case, however, the defendant was an original corporator, and whatever debts were incurred were made after his subscription.

In *Stewart v. Rutherford*, 74 Ga. 435, it was held that one who had been induced by fraud to join in procuring a charter, entering into a venture, and putting in money, was entitled to equitable relief notwithstanding the insolvency of the company, but it was expressly held that the rights of innocent parties would be protected and that creditors were entitled to be paid.

Idaho. See *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. In *Woman's Temperance Bldg. Ass'n v. Devore*, 160 Ill. App. 153, it was held that the defense of fraud was not available as against a creditor under the circumstances.

Indiana. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344; 84 N. E. 814, rev'g (Ind. App.), 79 N. E. 415.

That a person was induced to become a member of the corporation by fraud and misrepresentation is no defense to an action against him by a creditor of the company to enforce his statutory personal liability for the corporate debt. *Reeder v. Maranda*, 66 Ind. 485.

The rule precluding rescission does not apply as to subsequent creditors who have actual or constructive knowledge of the fraud at the time when they extend the credit. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814, rev'g (Ind. App.), 79 N. E. 415.

the time when they became subscribers, or that it had not been paid.⁸⁴

A receiver cannot enforce the subscription as against prior creditors. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814, rev'g (Ind. App.), 79 N. E. 415.

And since in collecting stock subscriptions a receiver must represent all the creditors, he cannot recover on a subscription procured through fraud where there are both prior and subsequent creditors, for in such case the recovery would inure to the benefit of the subsequent creditors only. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814, rev'g (Ind. App.), 79 N. E. 415.

Pennsylvania. The subscription can only be avoided subject to the rights of creditors where there is a winding-up order or a voluntary winding up. *Howard v. Turner*, 155 Pa. St. 349, 35 Am. St. Rep. 883, 26 Atl. 753.

When the rights of innocent third parties have intervened, and it is essential to their protection that the contract be sustained, equity requires that it be upheld. *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889.

An intervening equity is not necessarily one that comes in after the fraud is discovered, but all equities intervening after the date of the defendant's membership are included. *Van Dyke v. Baker*, 214 Pa. 168, 63 Atl. 594.

The burden of establishing the intervening equities under such circumstances is on the receiver. *Van Dyke v. Baker*, 214 Pa. 168, 63 Atl. 594.

A member of a mutual insurance company cannot set up fraud as a defense to an action by a receiver to recover an assessment where other persons became members after he did, even though he did not discover the fraud until after the receiver was ap-

pointed. *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889.

In an action by a receiver to recover assessments due from a member of a mutual fire insurance company it was held that, as against creditors and members of the company who had become such later, the company having intervened, such member was not permitted to set up a fraud on the part of the company in inducing membership. *Van Dyke v. Baker*, 214 Pa. 168, 63 Atl. 594.

Texas. *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173; *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476; *Burleson v. Davis*, — Tex. Civ. App. —, 141 S. W. 559; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

In *Byers Bros. v. Maxwell* (Tex. Civ. App.), 73 S. W. 437, and *Robinson v. Dickey*, 14 Tex. Civ. App. 70, 36 S. W. 499, rescission was permitted after the appointment of a receiver, but in *Burleson v. Davis*, — Tex. Civ. App. —, 141 S. W. 559, the court says in reference to them: "It does not appear that the rights of subsequent creditors were made an issue in either of these cases, nor that the court made any decision as to the rights of creditors of insolvent corporations as against stockholders who had been induced by fraudulent representations to purchase stock. There was no pleading upon which evidence as to subsequent creditors could have been offered in the case of *Robinson v. Dickey*; and no evidence as to such creditors was adduced in *Byers v. Maxwell*."

And see *Morrissey v. Williams*, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509, where this rule is stated.

⁸⁴ *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476.

On the other hand a number of courts have held that the fact that the corporation is insolvent, or has made an assignment for the benefit of its creditors, or that a receiver has been appointed for it, will not bar a rescission where there has been no unreasonable delay.⁸⁵

⁸⁵ *People v. California Safe Deposit & Trust Co.*, 19 Cal. App. 414, 126 Pac. 516; *Kentucky Mut. Inv. Co.'s Assignee v. Schaefer*, 120 Ky. 227, 85 S. W. 1098.

The contrary was held in *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1110, 70 S. W. 868, but this part of the opinion was withdrawn on petition for rehearing (24 Ky. L. Rep. 1876, 72 S. W. 768) on the ground that a determination of the question was not necessary to a decision.

In *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509, fraud was held to be a good defense to an action by a receiver to recover on a subscription where there was no laches. In this case the right to rescind after insolvency was not discussed.

In *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719, it was held that, as against the corporation, and where none of the creditors were parties to the proceeding, a subscriber might rescind and recover back what he had paid, though the corporation was insolvent. In this case there had been no adjudication of insolvency and no assignment, but the court intimates that the holding would have been the same even if there had been.

In *Chamberlain v. Trogden*, 148 N. C. 139, 16 Ann. Cas. 177, 61 S. E. 628, it is said that the weight of authority in this country seems to establish that, under exceptional circumstances, the subscriber may avail himself of this defense even after insolvency, but the right to rescind was denied because of laches.

In Virginia it would appear that

the defense of fraud is now available to the subscriber, notwithstanding the insolvency of the corporation and as against a trustee, receiver or assignee, under Va. Code 1904, § 1103a, providing that "all pleas, defenses and evidence which would be admissible if the company were solvent shall be equally admissible and shall have the same effect in law in any action brought after the insolvency of any such company." As to the effect of this provision generally, see *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920; *Shickel v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

In *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591, it is said: "The decisions of the courts, we think, sustain the doctrine * * * that a person who has to all external appearances become a stockholder cannot, as to creditors who may have trusted the company upon the faith of his membership, have his contract of subscription rescinded upon the ground of fraud, where he did not repudiate the contract, and take steps to have it rescinded, before the company stopped payment and became actually insolvent; certainly not, where it does not appear that he was diligent in discovering the fraud, and prompt in repudiating his contract after it was discovered." In this case it was held that the subscriber was guilty of laches, and also that the statute above quoted was inapplicable by its terms because a final decree had been rendered in the suit

Some courts hold that, assuming diligence, the right to rescind may be exercised, notwithstanding actual insolvency, unless proceedings of insolvency, voluntary or involuntary, have been instituted, or some act has been committed which is regarded as an act of insolvency,⁸⁶ this on the theory that until then the trust fund doctrine has no application,⁸⁷ and that "not until then does the entire property of the corporation, including unpaid subscriptions to its capital stock, become a trust fund for the payment of its debts, and not until then are the creditors entitled to the payment of their debts before there can be any distribution among the stockholders."⁸⁸

Others, however, hold that actual insolvency will preclude a rescission where the security of bona fide creditors would thereby be diminished even though insolvency proceedings have not been instituted and no act of insolvency has been committed.⁸⁹

Some courts have adopted the rule that if a considerable period of time has elapsed since the subscription was made; if the subscriber

in which the question arose before it took effect.

In *Jordan & Davis v. Annex Corporation*, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050, it was held that a subscriber to stock in a corporation organized for the purpose of leasing certain land could not rescind after two-thirds of the term of the lease had expired, and the money paid by the stockholders had been spent and the company had become insolvent, since the parties could not be placed in statu quo. The statute was not referred to.

See also *Morrissey v. Williams*, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509, where this rule is stated.

⁸⁶ *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; *Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322. See also *Johnson v. Morgan*, — Iowa —, 160 N. W. 2; *Jordan & Davis v. Annex Corporation*, 109 Va. 625, 17 Ann. Cas. 267, 64 S. E. 1050; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

And see *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719, where a subscriber was permitted to rescind and recover back what he had paid notwithstanding actual insolvency.

⁸⁷ *Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322.

⁸⁸ *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

⁸⁹ *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828.

In *Duffield v. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310, which was an action by a subscriber to rescind, commenced on the same day that the corporation made an assignment for the benefit of creditors, but previously thereto, the court was equally divided on the question of the plaintiff's right to rescind, and the judgment of the lower court for the defendant was therefore affirmed. See also in this connection, *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585, where the question is discussed but not decided.

has actively participated in the affairs of the corporation; if there has been any want of diligence on the part of the stockholder; or if any considerable amount of indebtedness has been created since the subscription was made, which is outstanding and unpaid, the right to rescind will be denied where the attempt to exercise it is not made until after the corporation has become insolvent; but that if none of these conditions exist, and the proof of the alleged fraud is clear, the subscription may be rescinded as well after as before the company ceases to be a going concern.⁹⁰

It has been said that in at least the majority of cases in this country in which the right to rescind has been denied, the denial was not based solely on the ground of insolvency, or that proceedings in insolvency or bankruptcy had been instituted, but that there was a showing of lack of diligence in discovering the fraud or in repudiating the contract, or active participation in the management of the corporation, or that debts had been contracted by the corporation subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholder, as against a corporate creditor, from asserting that he was not a shareholder.⁹¹

The rule precluding rescission is generally based on the doctrine that unpaid subscriptions constitute a trust fund for the benefit of

⁹⁰ *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85; *Scott v. Abbott*, 160 Fed. 573; *Scott v. Latimer*, 89 Fed. 843, certiorari denied 172 U. S. 649, 43 L. Ed. 1183; *Wallace v. Bacon*, 86 Fed. 553; *Newton Nat. Bank v. Newbegin*, 74 Fed. 135, 33 L. R. A. 727; *Hanly v. Cosmopolitan Nat. Bank*, 20 Pa. Dist. 401; *Morrissey v. Williams*, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509, the holding in which was followed in *Scott v. Williams*, — W. Va. —, 82 S. E. 511. See also *Grier v. Union Nat. Life Ins. Co.*, 217 Fed. 287; *Newbegin v. Newton Nat. Bank of Newton*, 66 Fed. 701, aff'd sub nom. *Wallace v. Hood*, 89 Fed. 11, which was affirmed sub nom. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218; *People v. California Safe Deposit & Trust Co.*, 19 Cal. App. 414, 126 Pac. 516; *Gress v. Knight*, 135 Ga.

60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755; *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

One who has held stock in a national bank and received dividends thereon for four years, and during that time has taken no steps to rescind, cannot do so after a receiver has been appointed. *Scott v. Latimer*, 89 Fed. 843, certiorari denied 172 U. S. 649, 43 L. Ed. 1183.

⁹¹ *Newton Nat. Bank v. Newbegin*, 74 Fed. 135, 33 L. R. A. 727.

In *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834, it is said, "Some American decisions have announced in general terms the rule laid down by the English courts; but in most of them additional circumstances existed, such as receiving benefits after knowledge or notice of

creditors,⁹² and that they have superior rights to the corporate assets, including the corporate stock.⁹³

Other reasons which have been given in support of it are that the subscriber must be held to contemplate that the corporation will incur debts and will pledge its capital, including unpaid subscriptions, to their payment,⁹⁴ and that the persons who in good faith extend credit to the corporation on the faith of this security stand in the position of bona fide purchasers, and that it would be unjust to permit the subscriber to disaffirm his contract and refuse to pay his share of the capital after it has been so pledged with his knowledge and consent.⁹⁵ It has also been said that the rule is based on the doctrine, which is maintained in some jurisdictions, that an assignee for the benefit of creditors stands as a bona fide purchaser without notice, and hence does not obtain where the assignee simply stands in the shoes of his assignor, and any defense which may be made against the assignor may be made against him.⁹⁶ And also that it is based on the doctrine that if one of two innocent parties must suffer from the misconduct of the third, the burden must fall upon the one whose conduct enabled the third person to perpetrate the wrong complained of.⁹⁷

The rule subordinating the right to rescind to the intervening rights of creditors has no application where the rescission is made and consummated prior to the intervention of such rights. In other words, the subscriber is relieved of liability to corporate creditors if he repudiates his subscription promptly, and before the rights of

the fraud, acts done, after notice or knowledge, inconsistent with a disaffirmance, laches, estoppel, the intervening of rights of innocent third parties, or the like."

⁹² Schwarz v. Bowler Mfg. Co., 177 Ill. App. 294; Davis v. Burns, — Tex. Civ. App. —, 173 S. W. 476; Burleson v. Davis, — Tex. Civ. App. —, 141 S. W. 559.

⁹³ Scott v. Abbott, 160 Fed. 573; Southern Tobacco Co. v. Armstrong, 11 Ga. App. 501, 75 S. E. 828; Hanly v. Cosmopolitan Nat. Bank, 20 Pa. Dist. 401. See also Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591.

⁹⁴ Southern Tobacco Co. v. Armstrong, 11 Ga. App. 501, 75 S. E. 828;

Marion Trust Co. v. Blish (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814; Burleson v. Davis, — Tex. Civ. App. —, 141 S. W. 559.

⁹⁵ Southern Tobacco Co. v. Armstrong, 11 Ga. App. 501, 75 S. E. 828; Marion Trust Co. v. Blish (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

⁹⁶ Kentucky Mut. Inv. Co.'s Assignee v. Schaefer, 120 Ky. 227, 85 S. W. 1098.

⁹⁷ Scott v. Abbott, 160 Fed. 573; Gress v. Knight, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; Martin v.

such creditors have intervened.⁹⁸ And the subscriber may rescind even after insolvency or the appointment of a receiver if the rights of creditors will not be impaired,⁹⁹ or where no debts have been contracted by the corporation since the date of the subscription,¹ or where all the creditors who might have had a right to object to the rescission have waived such right, or have been paid.²

Insolvency of the corporation does not bar an action by a subscriber against the corporation and its assignee to recover damages for fraud inducing the subscription.³ Nor can an officer of a corporation who

South Salem Land Co., 94 Va. 28, 26 S. E. 591.

⁹⁸ Bohn v. Burton-Lingo Co., — Tex. Civ. App. —, 175 S. W. 173.

⁹⁹ Morrissey v. Williams, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509; Scott v. Williams, 74 W. Va. 635, 82 S. E. 511.

The rule rests on the rights of creditors, and when the reason for it does not arise it is not applicable. Morrissey v. Williams, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509.

In Dunn v. Candee, 98 N. Y. App. Div. 317, 90 N. Y. Supp. 674, it was held that a complaint in such an action was not demurrable where it did not appear therefrom that the rights of creditors would be impaired.

In Burleson v. Davis, — Tex. Civ. App. —, 141 S. W. 559, it is said in reference to Robinson v. Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499, and Byers Bros. v. Maxwell (Tex. Civ. App.), 73 S. W. 437, where rescission was permitted after the appointment of a receiver, that "It does not appear that the rights of subsequent creditors were made an issue in either of these cases nor that the court made any decision as to the rights of creditors of insolvent corporations as against stockholders who had been induced by fraudulent representations to purchase stock."

¹ Real v. Dillon, 5 Kan. App. 27, 47 Pac. 317; Park v. Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905; Morrissey v.

Williams, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509; Scott v. Williams, 74 W. Va. 635, 82 S. E. 511.

The subscriber may recover back what he has paid where the corporation was actually insolvent when the subscription was made, and all the creditors became such before that time, and the corporation is still in existence, and not in the hands of the court. Dox v. R. E. Lomax Co., 29 Cal. App. 718, 156 Pac. 874.

One who has been induced to purchase stock from a corporation by fraud is not precluded from rescinding by the appointment of a receiver where it does not appear that any creditors have given credit to the corporation on the faith of such sale. People v. California Safe Deposit & Trust Co., 19 Cal. App. 414, 126 Pac. 516.

In an action by the receiver of a national bank to enforce a stockholder's statutory liability in which fraud is set up as a defense, the burden is on the defendant to show that the creditors in whose behalf the assessment was levied did not become such while he held the stock. Wallace v. Bacon, 86 Fed. 553.

² Newton Nat. Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727. See also Lantry v. Wallace, 97 Fed. 865, aff'd 182 U. S. 536, 45 L. Ed. 1218.

³ Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

induces a subscription by false representations be heard to object to a rescission on the ground that it would affect his rights as a creditor.⁴

In all jurisdictions, no doubt, insolvency of the corporation will bar rescission of a subscription on the ground of fraud, where there have been laches, either in electing to rescind after discovery of the fraud or in discovering the fraud.⁵ And it has been held that the

⁴ An officer of the corporation who induces a subscription by false representations that the company has no liabilities and that there are no liens or mortgages on its property will not be heard to object to a rescission on the ground that it would affect his rights as a creditor of the corporation. He cannot prevent a rescission on the ground that the corporation is insolvent where its insolvency is due to an unrecorded mortgage which he holds on its property. *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828.

⁵ **United States.** *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523, and cases cited; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *Bank of North America v. Pennsylvania Oil Refining Co.*, 216 Fed. 377; *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85; *In re Eureka Furniture Co.*, 170 Fed. 485; *Brown v. Allebach*, 166 Fed. 488; *Newton Nat. Bank v. Newbegin*, 74 Fed. 135, 33 L. R. A. 727; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957, rev'd on other grounds sub nom. *Peek v. Elliott*, 79 Fed. 10, 38 L. R. A. 616; *Newbegin v. Newton Nat. Bank of Newton*, 66 Fed. 701; *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800.

California. *People v. California Safe Deposit & Trust Co.*, 19 Cal. App. 414, 126 Pac. 516.

Connecticut. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 45 Atl. 951; *Northrop v. Bushnell*, 38 Conn. 498.

Georgia. *Gress v. Knight*, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; *Southern Trust Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828. See also *Beek v. Henderson*, 76 Ga. 360.

Idaho. *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Indiana. *Marion Trust Co. v. Blish* (Ind. App.), 79 N. E. 415, rev'd on other grounds 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

Iowa. *Johnson v. Morgan*, — Iowa —, 160 N. W. 2; *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Kentucky. *Little v. Owensboro Sav. Bank & Trust Co.'s Receiver*, 150 Ky. 331, 150 S. W. 334; *Robertson v. Owensboro Sav. Bank & Trust Co.*, 150 Ky. 50, 149 S. W. 1144; *Kentucky Mut. Inv. Co.'s Assignee v. Schaefer*, 120 Ky. 227, 85 S. W. 1098.

Maryland. *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810.

Michigan. *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Duffield v. E. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310.

Minnesota. *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904; *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27.

Mississippi. *Saffold v. Barnes*, 39 Miss. 399.

New York. *Ruggles v. Brock*, 6 Hun 164.

North Carolina. *Chamberlain v. Trogden*, 148 N. C. 139, 16 Ann. Cas. 177, 61 S. E. 628.

Pennsylvania. *Hilliard v. Allegheny*

subscriber is held to a higher degree of care and diligence where the rights of creditors are involved than is required as between him and the corporation.⁶

V. WITHDRAWAL, RELEASE AND DISCHARGE OF SUBSCRIBERS

§ 637. Withdrawal of subscribers. As we have seen, a subscriber for stock in a corporation may revoke his offer and withdraw his subscription at any time before its acceptance by the corporation, except in those jurisdictions where a subscription paper is regarded as a contract between the subscribers, or where it is made irrevocable by

Geometrical Wood Carving Co., 173 Pa. St. 1, 34 Atl. 231; *Howard v. Turner*, 155 Pa. St. 349, 35 Am. St. Rep. 883, 26 Atl. 753. See also *Hanly v. Cosmopolitan Nat. Bank*, 20 Pa. Dist. 401.

South Dakota. *Keyes v. Blue Bell Medicine Co.*, 34 S. D. 297, 148 N. W. 505.

Tennessee. *Heiskell v. Morris*, 135 Tenn. 238, 186 S. W. 99.

Virginia. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Where fraud is set up as a defense to an action by a receiver of a national bank to recover an assessment, the defendant must allege facts showing diligence. *Wallace v. Bacon*, 86 Fed. 553.

A stockholder who for years receives dividends or income from his stock, while the corporation is a going concern and is incurring debts, is estopped to rescind as against creditors after the corporation has been adjudged a bankrupt. *Ratliffe v. Clendenin*, 232 Fed. 61.

Where a corporation has held itself out to the world and contracted debts on the faith of its organization, a stockholder who has stood by and interposed no objection cannot successfully set up fraud as a defense to an action by a receiver on a note given by him for the amount of his subscription. *Beck v. Henderson*, 76 Ga. 360.

A subscriber is not entitled to relief "unless he became a stockholder so shortly before the insolvency as not to have had reasonable time or opportunity to investigate its affairs and discover the fraud, nor unless upon the discovery he without delay asserts his right to appropriate relief." *Alsop v. Conway*, 188 Fed. 568; *Reid v. Owensboro Sav. Bank & Trust Co.*, 141 Ky. 444, 132 S. W. 1026.

As to the effect of laches generally on the right to rescind, see § 634, *supra*.

⁶ *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591. See also *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

What would constitute laches as between him and the creditors might not constitute laches as between him and the corporation. *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27.

He must show "that he exercised the greatest diligence to discover the fraud, and to promptly repudiate his contract of subscription." *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957, *rev'd* on other grounds *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616.

The least neglect on his part will prevent a rescission after the rights of creditors have intervened. *Brown v. Allebach*, 166 Fed. 488.

its terms.⁷ And a subscription will lapse if the subscriber dies or becomes insane before his offer is accepted by the corporation, or if such offer is not accepted within the time, if any, specified therein, or within a reasonable time if no time is specified for acceptance.⁸

It is otherwise, however, after a subscription has been accepted by the corporation, and become a binding contract. In such a case, the subscriber cannot withdraw or surrender his shares, or substitute another contract, or another subscriber, and thereby avoid liability on his subscription as made, without the consent of the corporation,⁹ unless he is given the right to withdraw by valid special terms of his contract.¹⁰ And any agreement by the subscribers that one of their number shall not be called upon to pay his subscription, to which the corporation is not a party, is not binding on it.¹¹ Nor can he withdraw, as a general rule, even when the corporation consents, if any of the other stockholders object, or if there is any prejudice to creditors.¹² This is true in the case of subscriptions upon conditions

⁷ See § 563, *supra*.

⁸ See § 567, *supra*.

⁹ *Alabama*. Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344. See also *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

Illinois. Ryder v. Alton & S. R. Co., 13 Ill. 516; Klein v. Alton & S. R. Co., 13 Ill. 514.

Indiana. Jones v. Milton & R. Turnpike Co., 7 Ind. 547.

Maryland. Busey v. Hooper, 35 Md. 15, 6 Am. Rep. 350.

New Jersey. Bordentown & S. A. Turnpike Co. v. Imlay, 4 N. J. L. 285.

New York. Hutchins v. Smith, 46 Barb. 235.

North Carolina. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Muskingum Valley Turnpike Co. v. Ward, 13 Ohio 120, 42 Am. Dec. 191.

Oklahoma. King v. Howeth & Co., 42 Okla. 178, 140 Pac. 1182; Chicago Bldg. & Mfg. Co. v. Lyon, 64 Pac. 6.

Pennsylvania. Greer v. Chartiers Ry. Co., 96 Pa. St. 391, 42 Am. Rep. 548.

South Carolina. Cheraw & C. R. Co. v. White, 10 Rich. 155; Greenville & C. R. Co. v. Coleman, 5 Rich. 118.

Tennessee. Lowe v. Edgefield & K. R. Co., 1 Head 659; Gleaves v. Brick Church Turnpike Co., 1 Sneed 491.

Wisconsin. South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

Rehbein v. Rahr, 109 Wis. 136, 85 N. W. 315.

A majority of the stockholders cannot withdraw. *Scottish Security Co.'s Receiver v. Starks*, 25 Ky. L. Rep. 1722, 78 S. W. 455; *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350.

See also § 563, *supra*.

¹⁰ See § 563, *supra* and § 640, *infra*.

¹¹ An agreement by the other subscribers that a subscriber shall retain only a part of the shares for which he subscribed, to which the corporation is not a party, is not binding on it, and does not preclude it from recovering the full amount of his subscription. *Bridgeport Window Hardware Co. v. Osborne*, 222 Mass. 517, 111 N. E. 364.

¹² As to whether a corporation may release a subscriber, see § 639, *infra*.

precedent, as well as in the case of subscriptions which are absolute and unconditional.¹³

A subscriber may be given the right to return his stock and withdraw by the special terms of his contract, provided the agreement does not operate as a fraud upon other subscribers, or upon creditors of the corporation, but not otherwise.¹⁴ And he may rescind his contract and recover what he has paid, subject to limitations elsewhere shown, if the subscription was induced by false and fraudulent representations for which the corporation is responsible.¹⁵ And he may also be entitled to withdraw and be discharged from liability by failure of the corporation to comply with conditions precedent,¹⁶ by a material alteration of his contract of subscription,¹⁷ or by a material alteration of the charter of the corporation.¹⁸

One is not relieved from liability on his subscription by reason of the fact that one of the incorporators has agreed with him to pay the amount thereof to the corporation.¹⁹

§ 638. Release of subscribers by the corporation—Right of corporation or its officers in general. There can be no doubt that a corporation may effectually release a subscriber from liability on his subscription, in whole or in part, or allow him to modify his contract, if all the stockholders expressly or impliedly consent, and if there is no fraud upon existing or subsequent creditors,²⁰ and subject to

¹³ See § 584, *supra*.

¹⁴ See § 607, *supra*.

¹⁵ See § 628, *supra*.

¹⁶ See § 646, *infra*.

¹⁷ See § 645, *infra*.

¹⁸ See § 647, *infra*.

¹⁹ *Robson v. C. E. Fenniman Co.*, 83 N. J. L. 453, 85 Atl. 356.

²⁰ **Alabama.** *Glenn v. Hatchett*, 91 Ala. 316, 8 So. 171; *Cooper v. Frederick*, 9 Ala. 738.

California. *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

Georgia. *Chicago Bldg. & Mfg. Co. v. Summerour*, 101 Ga. 820, 29 S. E. 291; *Hill v. Silvey*, 81 Ga. 500, 3 L. R. A. 150, 8 S. E. 808.

Illinois. *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, *aff'd* 27 Ill. App.

546; *Bouton v. Dement*, 123 Ill. 142, 14 N. E. 62, *rev'd* 22 Ill. App. 619. See also *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551, *aff'd* 27 Ill. App. 511.

Iowa. *Gelpeke v. Blake*, 19 Iowa 263.

Kentucky. *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Scottish Security Co.'s Receiver v. Starks*, 25 Ky. L. Rep. 1722, 78 S. W. 455.

Maine. *Cusick v. Bartlett*, 91 Me. 153, 39 Atl. 497.

New York. *Non-Electric Fibre Mfg. Co. v. Peabody*, 21 App. Div. 247, 47 N. Y. Supp. 677; *Hollingshead v. Woodward*, 35 Hun 410.

North Carolina. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352. See also *Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161.

Ohio. *Wangerien v. Aspell*, 47 Ohio St. 250, 24 N. E. 405; *Morgan v.*

the further requirements that there has been given a considera-

Lewis, 46 Ohio St. 1, 17 N. E. 558; Sanderson v. Aetna Iron & Nail Co., 34 Ohio St. 442.

Pennsylvania. Harvey v. Weitzenkorn, 232 Pa. 447, 81 Atl. 447.

South Carolina. Nettles v. Marco, 33 S. C. 47, 11 S. E. 595.

Tennessee. Lellyett v. Brooks, 62 S. W. 596.

Texas. Sheldon Canal Co. v. Miller, 40 Tex. Civ. App. 460, 90 S. W. 206. See also Howe Grain & Mercantile Co. v. Jones, 21 Tex. Civ. App. 198, 51 S. W. 24.

Virginia. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383; Stuart v. Valley R. Co., 32 Gratt. 146.

Washington. National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446.

Wisconsin. Shoemaker v. Washburn Lumber Co., 97 Wis. 585, 73 N. W. 333.

England. Plate Glass Universal Ins. Co. v. Sunley, 8 El. & Bl. 47, 120 Eng. Reprint 18.

If a corporation is not a going concern, and has no creditors or contract obligations, it is competent for its directors, who are its only stockholders, to make an agreement releasing themselves, as stockholders or subscribers, from liability to the corporation or to each other. *Non-Electric Fibre Mfg. Co. v. Peabody*, 21 N. Y. App. Div. 247, 47 N. Y. Supp. 677.

Where the rights of creditors are not involved, a corporation cannot recover on a subscription for stock, where, with the consent of subscribers, it has sold out its entire authorized stock, including that subscribed for. *Level Land Co. No. 3 v. Hayward*, 95 Wis. 109, 69 N. W. 567.

A solvent corporation may by a vote of its stockholders cancel stock subscribed but not paid for, and in the absence of bad faith, subsequent

creditors are not prejudiced and cannot complain. *Commercial Germania Trust & Savings Bank v. Jurgens*, 134 La. 755, 64 So. 703.

An agreement between a corporation and its stockholders, whereby the latter, who have paid only twenty per cent. of the par value of their stock, may surrender the stock in exchange for full-paid stock to the amount of one-fifth of their subscriptions, is valid and binding on the corporation and the stockholders who so surrender their stock, though not as to existing creditors. *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

The rights of creditors do not extend so far as to permit them to prevent a stockholder from altering his relation towards the corporation with respect to his membership therein as a holder of shares. They only have a right to insist that his subscription liability shall remain for their benefit; and since it does, they cannot complain of the action of the corporation in waiving its rights. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

Under a statute making stockholders liable for the amount unpaid on their stock, and providing that no assignor of stock shall be released by the assignment, a subscriber for stock, who surrenders it to the corporation after part payment, is not liable to creditors for the balance, where the stock is reissued by the corporation, and paid for in full by the purchaser. *First Nat. Bank of Peoria v. Peoria Watch Co.*, 191 Ill. 128, 60 N. E. 859, aff'g 93 Ill. App. 502.

Where a person signs the articles of incorporation in his own name, but on the understanding of all parties that he is merely acting in place of a third person and is not to take any

tion for the release,²¹ and the statutory provisions on the subject are complied with.²²

stock or incur any obligation, and, before the corporation is authorized to do business, assigns his stock to such third person and severs all connection with the corporation, and subsequently substituted articles are filed which contain the name of such third person as an organizer in place of his, and no one deals with the corporation or extends credit to it in the meantime, he cannot be held liable as a subscriber. *Campbell v. Raven*, 176 Mich. 208, 142 N. W. 355.

In *Sheldon Canal Co. v. Miller*, 40 Tex. Civ. App. 460, 90 S. W. 206, it was held that a preliminary subscription by the defendant for a certain number of shares was abrogated by an agreement of the stockholders at a stockholders' meeting that he should only be allowed to take a less number of shares; and that the fact that the meeting was irregular was immaterial where all the stockholders were present and concurred in the agreement.

That another person may be substituted as subscriber by agreement with the corporation, see *Weinman v. Wilkinsburg & E. L. Passenger Ry. Co.*, 118 Pa. St. 192, 12 Atl. 288; *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235; *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

²¹ *Northrop v. Bushnell*, 38 Conn. 498. And see *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906; *Braddock Elec. Ry. Co. v. Bily*, 11 Pa. Super. Ct. 144. See also *In re Eureka Furniture Co.*, 170 Fed. 485.

The directors have no authority to extend the time of payment of a subscription without a consideration which would be equal to the value of

the use of the money in the business. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

An agreement by a corporation, without consideration, to release a subscriber from liability on his subscription, is void, and cannot be set up to defeat an action by the corporation to enforce the subscription. A plea of release by a subscriber must allege or show a consideration. *Zirkel v. Joliet Opera-House Co.*, 79 Ill. 334.

An agreement by the corporation to receive a part of the amount due in full satisfaction for the stock does not relieve the subscriber from liability for the balance where there is no new consideration for such agreement. *World's Fair Excursion & Transportation Boat Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724, rev'g 59 Ill. App. 391.

An agreement between a corporation and a subscriber, who has given his note in payment of his subscription, that in consideration of certain payments on the note it will discharge him from further liability on it, is void for want of consideration. *Northrop v. Bushnell*, 38 Conn. 498.

The consent of one party to the arrangement is sufficient consideration for the consent of the others. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352. See also *Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161.

²² Where the cancellation of a subscription is effected according to the laws of the state in which the chief office of the corporation is situated, and where all its meetings but one have been held, and in which it is sought to hold the subscriber liable, it is valid though not in accordance with the laws of the state in which

The agents²³ or officers²⁴ of the corporation have no such power, however, unless it is expressly conferred upon them by the charter or statute, or by the stockholders by a by-law or otherwise. So, unless expressly authorized as above stated, neither the president,²⁵ nor the secretary,²⁶ nor the directors²⁷ have power to do so. But

the corporation was incorporated. *Scottish Security Co.'s Receiver v. Starks*, 25 Ky. L. Rep. 1722, 78 S. W. 455.

²³ *Balfour v. Baker City Gas Co.*, 27 Ore. 300, 41 Pac. 164.

Where an agent to solicit subscribers falsely informs a subscriber that his subscription is in process of cancellation, the only action against the agent is one at law for damages. An action lies in such case, further, only where the subscriber has taken or refrained from action in reliance on the statement and has suffered damage thereby.

Eames v. Brunswick Const. Co., 104 N. Y. App. Div. 566, 94 N. Y. Supp. 24.

²⁴ *Bean v. Floyd County Farmers' Union*, 8 Ga. App. 399, 69 S. E. 225; *Osgood & Moss v. King*, 42 Iowa 478. See *In re Eureka Furniture Co.*, 170 Fed. 485, where it is said that officers cannot release a subscriber without a valuable consideration.

See also Chap. 42, *infra*.

²⁵ See also Chap. 42, *infra*.

Fuches v. Hamilton Tribune Ptg. & Pub. Co., 10 Ont. 497. See also *United Brewers' Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

²⁶ *Minnehaha Driving Park Ass'n v. Legg*, 50 Minn. 333, 52 N. W. 898; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

See also Chap. 42, *infra*.

²⁷ *United States. Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Burke v. Smith*, 16 Wall. 390, 21 L. Ed. 361, *aff'g* 4 Biss. 365, Fed. Cas. No. 11,481.

Arkansas. See *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134.

California. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041. See also *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

Illinois. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, *aff'g* 63 Ill. App. 593; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, *aff'g* 53 Ill. App. 82; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Stone v. Vandalia Coal & Coke Co.*, 59 Ill. App. 536; *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

Kansas. *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601.

Maine. See *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

Maryland. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Massachusetts. *Richardson v. Devine*, 193 Mass. 336, 79 N. E. 771.

Missouri. *Boley v. Sonora Development Co.*, 126 Mo. App. 116, 103 S. W. 975.

North Carolina. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352.

Oregon. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

Pennsylvania. *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

“Neither as against the corporation itself, nor as against its stockholders, nor as against its creditors, have the managers of the corporation any power to discharge one, who has be-

the stockholders may, by their acquiescence, ratify a release which the directors have given.²⁸

§ 639. — Right as against creditors or dissenting stockholders—In general. It is thoroughly well settled that a corporation cannot, except in pursuance of a bona fide compromise,²⁹ release a stockholder from liability on his subscription, by accepting a surrender of his shares, or purchasing the same, or otherwise, as against dissenting stockholders, or as against creditors of the corporation. A release is void ³⁰

come absolutely bound in form as a stockholder, from the obligation of his subscription, or to let down or reduce that obligation in any way." *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

An agreement by the directors that the number of shares for which a person has subscribed shall be reduced, and that he shall be required to take only those for which he has already paid, is void in the absence of a statute, by-law or vote of the corporation expressly permitting it. *Hastings Lumber Co. v. Edwards*, 188 Mass. 587, 75 N. E. 57.

A rescission by the directors is not binding on the corporation where the resolution to rescind is adopted by the votes of the stockholder himself and two other members who are dominated by him, the three constituting a majority of the board. *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, aff'g 141 Ill. App. 104.

See Chap. 42, *infra*.

²⁸ See § 639, *infra*.

²⁹ See the next section, *infra*.

30 United States. *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135; *Sawyer v. Hoag*, 17 Wall. 610, 620, 21 L. Ed. 731; *Burke v. Smith*, 16 Wall. 390, 21 L. Ed. 361, aff'g 4 Biss. 365, Fed. Cas. No. 11,481.

Alabama. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala.

398, 56 So. 235, 143 Ala. 464, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363, 39 So. 285; *Alabama Terminal & Improvement Co. v. Hall & Farley*, 152 Ala. 262, 44 So. 592; *Hall v. Henderson*, 126 Ala. 449, 61 L. R. A. 621, 85 Am. St. Rep. 53, 28 So. 531; *Glenn v. Hatchett*, 91 Ala. 316, 8 So. 656.

Arkansas. *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134; *Jones v. Dodge*, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828; *Tiger v. Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912 B 488, 130 S. W. 585; *Carter v. Union Printing Co.*, 54 Ark. 576, 16 S. W. 579.

California. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

Connecticut. *Northrop v. Bushnell*, 38 Conn. 498; *Bishops' Fund v. Eagle Bank of New Haven*, 7 Conn. 476; *United Society v. Eagle Bank of New Haven*, 7 Conn. 456.

Illinois. *Moore v. United States One-Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, aff'g 141 Ill. App. 104; *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287; *World's Fair Excursion & Transportation Boat Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724, rev'g 59 Ill. App. 391; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 156, 12 L. R. A. 328, 25 N. E. 680; *Bouton*

as against such creditors and stockholders, except as above stated.

v. Dement, 123 Ill. 142, 14 N. E. 62, rev'g 22 Ill. App. 619; Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Zirkel v. Joliet Opera-House Co., 79 Ill. 334; Kesner v. World's Fair, Hippodrome, Amusement, Ballet, Pantomime & Fireworks Co., 62 Ill. App. 89; Stone v. Vandalia Coal & Coke Co., 59 Ill. App. 536; Great Western Tel. Co. v. Haight, 49 Ill. App. 633; Fey v. Peoria Watch Co., 32 Ill. App. 618. See also McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593; Chandler v. Brown, 77 Ill. 333; Hladovec v. Paul, 124 Ill. App. 589, aff'd 222 Ill. 254, 78 N. E. 619.

Indiana. Johnson v. Wabash & Mt. V. Plank-Road Co., 16 Ind. 389.

Iowa. Osgood & Moss v. King, 42 Iowa 478; Burnham & Van Shaick v. Northwestern Ins. Co., 36 Iowa 632.

Louisiana. Cammack v. Levy, 120 La. 873, 124 Am. St. Rep. 443, 41 So. 925.

Maryland. Hughes v. Antietam Mfg. Co., 34 Md. 316.

Massachusetts. Anglo-American Land, Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416. See also Richardson v. Devine, 193 Mass. 336, 79 N. E. 771.

Michigan. Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

Minnesota. Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349.

Mississippi. Vick v. La Rochelle, 57 Miss. 602; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74.

Missouri. Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514, 27 S. W. 613, 25 S. W. 578; Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Gill v. Balis, 72 Mo. 424; Wilson v. Torchon Lace & Mercantile Co., 167 Mo. App. 305, 149 S. W. 1156;

Boley v. Sonora Development Co., 126 Mo. App. 116, 103 S. W. 975; Chouteau, Harrison & Valle v. Dean, 7 Mo. App. 210.

New Hampshire. Currier v. Lebanon Slate Co., 56 N. H. 262; White Mountains R. Co. v. Eastman, 34 N. H. 124.

New Jersey. Boney v. Williams, 55 N. J. Eq. 691, 38 Atl. 189.

New York. Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; Slee v. Bloom, 19 Johns. 456, 10 Am. Dec. 273; Mann v. Pentz, 2 Sandf. Ch. 257.

North Carolina. Warren County Co-operative Ass'n v. Boyd, 171 N. C. 184, 88 S. E. 153; Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352; Harmon v. Hunt, 116 N. C. 678, 21 S. E. 559; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581, 12 S. E. 275; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680.

Ohio. Jewett v. Valley Ry. Co., 34 Ohio St. 601.

Oregon. Hawkins v. Citizens' Inv. Co., 38 Ore. 544, 64 Pac. 320; Balfour v. Baker City Gas Co., 27 Ore. 300, 41 Pac. 164.

Pennsylvania. Bedford R. Co. v. Bowser, 48 Pa. St. 29.

Tennessee. Lellyett v. Brooks, 62 S. W. 596; Cartwright v. Dickinson, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Texas. United States & M. Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.), 112 S. W. 447.

Virginia. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383; Stuart v. Valley R. Co., 32 Gratt. 146.

Washington. Gogebie Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427, 23 Am. St. Rep. 417, 47 N. W. 726; National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446.

In the absence of fraud or mistake, the unanimous consent of all

Wisconsin. *Theis v. Durr*, 125 Wis. 651, 1 L. R. A. (N. S.) 571, 110 Am. St. Rep. 880, 104 N. W. 985.

England. *Kidwelly Canal Co. v. Raby*, 2 Price 93.

In so far as it applies to creditors, the reason for the rule is found in the trust fund doctrine. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

"The subscriptions to the capital stock of a corporation are a trust fund for the benefit of creditors and no valid arrangement can be made by which a subscriber can be released therefrom." *Leman v. Teter*, 169 Ill. App. 503.

Where one subscribes and becomes liable for ten shares of stock, his liability to creditors is not affected by the fact that he was only charged on the books and accounts of the corporation with five shares, and no demand was made upon him for payment for the other five. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

"The governing officers of a corporation cannot, by agreement or other transaction with the stockholders, release the latter from their obligation to pay, to the prejudice of creditors, except by fair and honest dealing, and for a valuable consideration." Mr. Justice Miller, in *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 620, 21 L. Ed. 731.

If a subscription is absolute in its terms, the president of the company as such has no authority, as against creditors, to consent that it shall become conditional. Individual creditors may bind themselves to treat it as conditional, however. *Morgan County v. Thomas*, 76 Ill. 120.

A by-law of a corporation allowing stockholders to surrender their shares and withdraw by giving notice, and providing for payment to them of the

value of their shares, is illegal, where a statute prohibits withdrawal by stockholders of any part of the capital stock except on dissolution. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375. Indeed, such a by-law is illegal, even in the absence of such an express prohibition, as against creditors of the corporation. See the cases cited *supra*, in this note. Compare *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24.

An extension of the time of payment for such a period that the interest, if compounded, would amount to as much as the original subscription cannot be granted by the directors without the consent of the stockholders, where there is no provision for the payment of interest and no other consideration, since such an agreement would amount to a release pro tanto, and a donation of the interest to the subscriber, which would necessarily be a charge on those stockholders who had paid for the stock in full. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

The fact that a subscriber is misled by his own agent into believing that the release is valid, or is mistaken as to the law on the subject, and assumes that he is no longer a stockholder, and ceases to act as such, will not relieve him from liability although the corporation subsequently becomes insolvent. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

That subsequent creditors cannot complain, see *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333. But see *Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co.*, 168 Mo. 634, 68 S. W. 1026, where it is held that the stock cannot be surrendered or canceled so as to re-

of the stockholders is essential.³¹ But stockholders may, by their acquiescence, ratify a release which the directors have given.³²

§ 640. — Exceptions to and modifications of the rule. The doctrine invalidating the release of a subscriber by the corporation as against dissenting stockholders and creditors does not prevent a bona fide compromise between a corporation and a subscriber. If a stock-

holder believes the subscriber either as to existing or subsequent creditors.

31 United States. *In re Eureka Furniture Co.*, 170 Fed. 485.

California. *Silica Brick Co. v. Winsor*, 171 Cal. 18, 151 Pac. 425; *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

Kentucky. *Scottish Security Co.'s Receiver v. Starks*, 25 Ky. L. Rep. 1722, 78 S. W. 455.

Maryland. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Missouri. See *Shelby County R. Co. v. Crow*, 137 Mo. App. 461, 119 S. W. 435.

North Carolina. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352.

Oklahoma. *King v. Howeth & Co.*, 42 Okla. 178, 140 Pac. 1182; *Chicago Bldg. & Mfg. Co. v. Lyon*, 10 Okla. 704, 64 Pac. 6.

Oregon. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Texas. *Panhandle Packing Co. v. Stringfellow*, — Tex. Civ. App. —, 180 S. W. 145; *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

Washington. *National Realty Co. v. Neilson*, 73 Wash. 89, 131 Pac. 446.

Wisconsin. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

“The power to release from liability as a stockholder can only be exercised by the stockholders, or by the directors of a company by the authority of the stockholders.” *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601.

Even a majority of the stockholders cannot withdraw and refuse to proceed. See *Shelby County R. Co. v. Crow*, 137 Mo. App. 461, 119 S. W. 435.

Where the stockholders do not unanimously consent to the cancellation, it is not rendered valid by the fact that new subscriptions are obtained to take the place of those canceled, regardless of their validity. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

An agreement by certain individual subscribers, acting on their own initiative and without authority to represent the corporation, to release another subscriber on certain conditions, is not binding on the corporation. *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

And see other cases cited in last preceding note.

32 Silica Brick Co. v. Winsor, 171 Cal. 18, 151 Pac. 425; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041. And see *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199, where the evidence was held not to show acquiescence or ratification.

holder is unable to pay for his shares, and the transaction is in good faith, the corporation may accept a surrender of his shares and release him from any further liability,³³ and such compromise and release will be good as to subsequent creditors but not as to existing creditors. As to the latter, he will still remain liable on the basis of his original subscription.³⁴

The surrender of the shares under such circumstances is not inconsistent with the doctrine recognized in some jurisdictions,³⁵ that a corporation cannot deal in or purchase its own shares. The surrender, said Lord Herschell in an English case, like a forfeiture, "does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to be perfectly valid."³⁶ Nor, where the stock which is surrendered, or its equivalent, may be reissued to others, does its surrender amount to a reduction of the capital stock.³⁷ Nor does the general rule apply when there is a bona fide dispute as to liability on a subscription. In such a case, the corporation, if the transaction is in good faith, may compromise the dispute, accepting a surrender of his shares from the subscriber, and releasing him from further liability.³⁸

³³ *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041; *Trevor v. Whitworth*, 12 App. Cas. 409; *Hope v. International Financial Society*, 4 Ch. Div. 327. Compare *Hill v. Atoka Coal & Mining Co. (Mo.)*, 21 S. W. 508.

Whether or not there was an accord and satisfaction by the acceptance of a sum of money in satisfaction of the contract is a question of fact. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

³⁴ *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

³⁵ See Chap. 30, *infra*.

³⁶ *Trevor v. Whitworth*, 12 App. Cas. 409.

³⁷ *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041; *Ers-*

kine v. Peck, 13 Mo. App. 280, aff'd 83 Mo. 465.

³⁸ *United States*. *New Albany v. Burke*, 11 Wall. 96, 20 L. Ed. 155, rev'g 4 Biss. 365, Fed. Cas. No. 11,481. See also *Oglesby v. Attrill*, 105 U. S. 605, 26 L. Ed. 1186.

California. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041.

Iowa. *Gelpcke v. Blake*, 19 Iowa 263.

Michigan. *Whitaker v. Grummond*, 68 Mich. 249, 36 N. W. 62.

Missouri. *Erschine v. Peck*, 13 Mo. App. 280, aff'd 83 Mo. 465; *Chouteau, Harrison & Valle v. Dean*, 7 Mo. App. 210. See also *Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co.*, 168 Mo. 634, 68 S. W. 1026.

Ohio. *Morgan v. Lewis*, 46 Ohio St.

Nor does the rule prevent a corporation which is indebted to a subscriber from canceling the subscription by setting off its indebtedness, for a corporation may contract with its stockholders, and pay debts due from it to them, as it may pay its other debts, provided there is no fraud upon other creditors.³⁹ Nor does it prevent a substitution of subscribers in accordance with the terms of a contract of subscription where the means of the corporation to pay its creditors are not thereby lessened,⁴⁰ and of course the rule has no application where it is sought to rescind a subscription contract for fraud.⁴¹

There is nothing to prevent an agreement between a subscriber and other stockholders as individuals, by which the latter agree to purchase his shares from him. This is not in any sense a release of the subscriber by the corporation, and is not fraudulent as against other subscribers.⁴²

1, 17 N. E. 558; *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258.

Pennsylvania. Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318; Berks & Dauphin Turnpike Road v. Myers, 6 Serg. & R. 12, 9 Am. Det. 402.

Where there is a bona fide dispute as to the amount due from the subscriber, a compromise agreement whereby the subscriber pays a specified sum in full of the claims of the corporation against him is valid both as to the corporation and its creditors. *New Haven Trust Co. v. Nelson*, 73 Conn. 477, 47 Atl. 753. But see *Northrop v. Bushnell*, 38 Conn. 498, where it was held that a compromise made when the company was insolvent was void as to creditors, and *Whitaker v. Grummond*, 68 Mich. 249, 36 N. W. 62, where there is dictum to the effect that such a compromise cannot take away the rights of existing creditors.

There must be a compromise, and not a mere offer to compromise. *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610.

Where money paid under a compromise agreement is returned to and retained by the corporation, there is, at most, an accord without a satisfaction, and the subscriber is not released.

Anglo-American Land, Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416.

³⁹ *Goodwin v. McGehee*, 15 Ala. 232.

Other stockholders cannot complain of the action of the directors in surrendering to a stockholder his note given for stock in full discharge of his valid claim for services exceeding in value the value of the stock. *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582. See also § 643, *infra*.

⁴⁰ Where the subscriptions of individuals provide that, if the city in which they reside takes a certain amount of stock, it shall accept in part of the amount subscribed by it a transfer of the amount subscribed by each of said individuals over and above a specified sum, and the city subscribes for the amount so specified, the action of the board of directors in permitting a transfer of the stock subscribed by the individuals to the city in accordance with such provision is not a release of such 'subscriptions,' and is valid. *Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361, aff'g 4 Biss. 365, Fed. Cas. No. 11,481.

⁴¹ *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

⁴² *Morgan v. Struthers*, 131 U. S. 246, 33 L. Ed. 132; *Traphagen v.*

§ 641. — Form, construction and effect of release or cancellation.

Release of a subscription may be shown not only by the corporate records but by acquiescence by the corporation in an attempted withdrawal. Such release may be deduced from action taken by the corporation clearly indicating that it does not deem a subscription in force.⁴³

The agreement to cancel need not be express or formal, and it is sufficient if the contract of subscription is deemed abandoned by mutual consent of all the subscribers.⁴⁴

A release may be in parol,⁴⁵ and may be proved by circumstantial evidence.⁴⁶ But the mere act of canceling a certificate of stock will not operate to cancel the subscription for such stock.⁴⁷

If the corporation agrees to release the subscriber on certain conditions, he must perform them in order to relieve himself from liability.⁴⁸

Sagar, 63 Minn. 317, 65 N. W. 633; Meyer v. Blair, 109 N. Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228.

⁴³ Release of a subscription for stock may be proved as well by the acquiescence of the stockholders, and the fact that the corporation did not regard it as binding, as by its records. Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172; Thomas v. Wentworth Hotel Co., 16 Cal. App. 403, 117 Pac. 1041.

It may be proved "not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding upon it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof." Elliott v. Ashby, 104 Va. 716, 52 S. E. 383; Stuart v. Valley R. Co., 32 Gratt. (Va.) 146.

⁴⁴ National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446.

⁴⁵ Scottish Security Co.'s Receiver v. Starks, 25 Ky. L. Rep. 1722, 78 S. W. 455.

But where a stockholder signs an unambiguous written agreement to surrender his common stock in return for preferred stock, which agreement is approved and adopted by a resolu-

tion passed at a stockholders' meeting, he cannot escape liability on a previous subscription to preferred stock on the ground that the directors had agreed to cancel it as a part of the consideration for the surrender of his common stock, it not having been mentioned as a part of it either in the written agreement or the resolution. Silica Brick Co. v. Winsor, 171 Cal. 18, 151 Pac. 425.

⁴⁶ Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

⁴⁷ Chouteau, Harrison & Valle v. Dean, 7 Mo. App. 210.

The cancellation of an unissued certificate has not this effect. Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

⁴⁸ A letter sent by the secretary to a subscriber, at the direction of the board of directors, to the effect that if he would sign inclosed agreements for the transfer of his stock he would be relieved from further liability on his subscription, was held not to effect a cancellation or release, where he did not execute or return such agreements. Milwaukee Smelting & Refining Co. v. Lindenberg, 142 Wis. 273, 124 N. W. 272.

Assuming the validity of a resolution to the effect that certain subscriptions shall be binding on the subscribers "only so far as they shall elect to pay" the same, a stockholder desiring to claim the benefit of it must elect to do so within a reasonable time.⁴⁹ He cannot avail himself of the privileges of a stockholder and at the same time escape liability on his subscription on the ground that he has elected not to pay, and his act in voting his shares by proxy long after the adoption of such resolution will be regarded as an election to pay for them.⁵⁰

It has been held that where a subscription is canceled in the state in which the corporation has its principal office, and the cancellation is valid according to its laws, such cancellation is legal and binding though it is not effected according to the laws of the state where the corporation was organized.⁵¹

Whether or not there has been a cancellation by mutual consent is a question of fact where the corporate records do not show any cancellation.⁵²

§ 642. Discharge by payment. Of course a subscriber is discharged from further liability on his subscription by full payment of the same, although by virtue of a provision in the charter or general law he may be subject to further assessment for the payment of the debts of the corporation, or for the purposes of the corporation itself.⁵³ The only difficulty in this connection is in determining what

⁴⁹ *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

⁵⁰ *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

⁵¹ *Scottish Security Co.'s Receiver v. Starks*, 25 Ky. L. Rep. 1722, 78 S. W. 455.

⁵² *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601; *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383.

⁵³ *French v. Busch*, 189 Fed. 480; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62; *Marr v. Bank of West Tennessee*, 4 Lea (Tenn.) 578. See also *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169; *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79.

In *Wyman v. Bowman*, 127 Fed. 257, it was held that an arrangement whereby directors were credited with

the amount of an assessment in part payment of a loan made by them to the corporation precluded a recovery of that amount by a receiver subsequently appointed.

Though a subscriber cannot escape liability for the unpaid portion of his subscription by having the stock issued to a trustee to be held and sold as treasury stock, he is entitled to credit for money received by the corporation for stock so sold as treasury stock. In *re Grand Rapids Furniture Agency*, 209 Fed. 483.

In an action by a stockholder against a corporation in which the defendant seeks to set off the full amount of the plaintiff's subscription, an admission by the defendant that it is a corporation duly organized and that the plaintiff is a subscriber for

constitutes payment, and this subject will be very fully dealt with in a succeeding chapter.⁵⁴

As we shall see, payment may be made in property, labor or services, or in bonds, notes, mortgages, or any other equivalent of money, unless this is prohibited, expressly or impliedly, by some charter, statutory or constitutional provision.⁵⁵ And we shall also see that a payment of less than the par value of stock, while it may be a good discharge as against the corporation and consenting stockholders, will generally be no discharge as against dissenting stockholders and creditors of the corporation.⁵⁶

If payment is made in depreciated bills, the subscriber is only entitled to be credited with their actual value at the time of such payment.⁵⁷

Payment of a judgment recovered by a creditor under a statute making stockholders individually liable for corporate debts cannot be considered as a payment made upon the capital stock.⁵⁸

There is authority to the effect that a voluntary payment by a third person of the amount due from a subscriber extinguishes the debt though the corporation agrees to return the money as soon as it obtains a secured note from the subscriber.⁵⁹

On the other hand, it has been held that the corporation, as trustee of an express trust, may maintain an action against a subscriber on his subscription though, on his refusal to pay it, a third person, at

its stock may be deemed *prima facie* evidence that ten per cent. of the subscription has been paid, where there is no proof that it was made after the certificate of organization, etc., was paid, or that the whole of the stock was not subscribed before such filing, so as to make it error to allow the defendant to set off the full amount of the subscription. *Bouton v. Dry Dock, G. S. & S. F. Stage Co.*, 4 E. D. Smith (N. Y.) 420.

In the absence of a defense of payment or a denial that an alleged subscriber is a stockholder, the books of the corporation showing the state of his account are competent to show *prima facie* that he has not paid for his stock in full. *Fisk v. Sampson*, 118 Minn. 525, 136 N. W. 315.

In the federal courts, where an action is brought for the recovery of an

unpaid call by a corporation, the statement may be amended by averment that the balance due on the stock after payment of the first instalment has not been since paid. *American Alkali Co. v. Campbell*, 113 Fed. 398, *aff'd* 125 Fed. 207.

⁵⁴ See chapter on Stock and Stockholders, *infra*.

⁵⁵ See chapter on Stock and Stockholders, *infra*.

⁵⁶ See chapter on Stock and Stockholders, *infra*.

⁵⁷ *Marr v. Bank of West Tennessee*, 4 Lea (Tenn.) 578.

⁵⁸ *Union Sav. Bank of San José v. Leiter*, 145 Cal. 696, 79 Pac. 441.

⁵⁹ *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

the instance of a committee of subscribers in charge of the incorporation, advances the money to complete the capital of the company so that it can go on with its enterprise; this on the ground that the subscriber's promise to pay was for the benefit of all of the subscribers.⁶⁰

If the corporation permits its agent for the sale of stock to hold himself out as its agent to receive payments on subscriptions, it is bound by his acts in that regard, and payment to him is payment to the company, though he fails to turn over the money to it.⁶¹

Whether money given to the corporation by a subscriber was intended as a payment on his subscription or as a loan is a question of fact.⁶²

A refusal by the corporation to accept an offer of payment by a stockholder, after the subscription has been made and the obligation has become absolute, will not discharge the subscriber as against creditors or other stockholders,⁶³ especially where he continues to act as a stockholder and director until the corporation becomes insolvent.⁶⁴

§ 643. Discharge by transfer of shares. By the weight of authority, in the absence of statutory provision to the contrary, a subscriber and stockholder who has made a bona fide sale and transfer of his stock, and in doing so complied with the requirements of the charter and by-laws of the corporation, is no longer under any liability on the subscription except for assessments or calls made prior to the transfer. The transferee takes his place with respect both to the rights and to the liabilities attaching to the shares. This doctrine, however, has not been recognized in all the states, even in the absence of a statute, and in some states statutes have been enacted making the transferor of shares liable for any balance due on his subscription, notwithstanding the transfer. The question will be fully considered in treating of the transfer of shares.⁶⁵

§ 644. Discharge in bankruptcy. A valid discharge in bankruptcy discharges the debtor from liability upon subscriptions for stock made

⁶⁰ *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409.

⁶¹ *People's Life Ins. Co. v. Kohn*, 100 Ark. 240, 140 S. W. 24.

⁶² In *Calder v. Calder Packing Co.*, 160 Ill. App. 620, the transaction was held to be a loan.

⁶³ *Potts v. Wallace*, 146 U. S. 689,

36 L. Ed. 1135; *Warren County Co-operative Ass'n v. Boyd*, 171 N. C. 184, 88 S. E. 153.

⁶⁴ *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135.

⁶⁵ See chapter on Stock and Stockholders, *infra*.

prior to the discharge, if liability on the subscription existed prior to the discharge.⁶⁶

If the subscription is payable on call, the subscriber will be released from liability on calls made prior to his bankruptcy and remaining unpaid at the time of his discharge.⁶⁷ But as a rule he will not be released from liability as to that part of his subscription for which no calls have been made,⁶⁸ at least while the corporation is solvent and a going concern.⁶⁹

Reasons given for so holding are that until the call is made there is no means of ascertaining what amount the subscriber will be required to pay, or when he will be required to pay it, or whether he will ever be required to pay it at all.⁷⁰ Under such circumstances, the liability is not a debt in *praesenti* payable in *futuro*,⁷¹ nor can it be regarded as a contingent debt or liability within the provisions of the bankruptcy statutes permitting proof of claims of that character, since a contingent debt as there used means an existing demand, the cause of action upon which depends on a contingency, and not a demand whose existence depends upon one.⁷²

Some courts have held that the rule under discussion is applicable even where the corporation has made an assignment for the benefit of its creditors before the institution of the bankruptcy proceedings, and especially where it is not shown that the assignee or trustee in bankruptcy accepted the stock as part of the assets of the bankrupt's

⁶⁶ *Marr v. Bank of West Tennessee*, 4 Lea (Tenn.) 578.

An unpaid stock subscription is a provable debt because it is founded upon a contract. *In re Putnam*, 193 Fed. 464.

⁶⁷ *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895.

⁶⁸ *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895.

⁶⁹ *Hastie's Case*, L. R. 4 Ch. App. Cas. 274, aff'g L. R. 7 Eq. Cas. 3; *General Discount Co. v. Stokes*, 17 C. B. (N. S.) 765, 144 Eng. Reprint 306; *Financial Corporation v. Lawrence*, L. R. 4 C. P. 731. See also *Carey v. Mayer*, 79 Fed. 926.

⁷⁰ *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895.

It is not a debt capable of valua-

tion which it must be to be provable under the English law. *Hastie's Case*, L. R. 4 Ch. App. Cas. 274, aff'g L. R. 7 Eq. Cas. 3.

As to the purpose and effect of calls generally, see § 670, *infra*.

⁷¹ *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895. But see *Glenn v. Abell*, 39 Fed. 10; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146.

⁷² *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895; *General Discount Co. v. Stokes*, 17 C. B. (N. S.) 765, 144 Eng. Reprint 306.

"The contingency, in the case of a solvent and 'going' corporation, is so remote that a claim could not with propriety be made." *Carey v. Mayer*, 79 Fed. 926.

estate, since he is not bound to accept property of an onerous or unprofitable character.⁷³

Other courts, however, take the position that when the insolvency of the corporation is declared by the making of an assignment for the benefit of its creditors, or by the institution of insolvency proceedings against it, before the filing of the petition in bankruptcy, the obligation and liability of the subscriber to pay something becomes fixed, and that, though the amount to be paid remains uncertain, it may be made certain, and hence that it is a contingent claim or liability which may be proved against the bankrupt's estate, and from which a discharge in bankruptcy will be a release though no call has been made.⁷⁴ They say that under such circumstances it is the duty of the trustee in bankruptcy to endeavor to have the claim made certain by the court having charge of the insolvency proceedings before the final dividend is allowed in the bankruptcy proceedings.⁷⁵

Since a contract of subscription is governed by the laws of the state where the corporation is created, and since state insolvency laws have no extraterritorial effect, the discharge of a subscriber under such a law will not relieve him from liability on his subscription to the stock of a corporation organized under the laws of another

⁷³ Sayre v. Glenn, 87 Ala. 631, 6 So. 45; Glenn v. Howard, 65 Md. 40, 3 Atl. 895.

⁷⁴ Glenn v. Abell, 39 Fed. 10; Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438.

The obligation of a subscriber to respond to calls becomes a liability with a contingency, although not fixed in amount, nor payable until a call has been made, upon the declared insolvency of the corporation by execution of a deed of trust for the benefit of creditors; and if he files a petition in bankruptcy after the execution of the deed of trust, and is discharged, the discharge releases him from liability on the subscription, although no call may have been made until after the discharge. Carey v. Mayer, 79 Fed. 926.

See also Irons v. Manufacturers' Nat. Bank of Chicago, 17 Fed. 308, where a discharge in bankruptcy was

held to relieve stockholders in a national bank from their statutory individual liability.

In England, the statute (Companies Act of 1862, 25 and 26 Vict. c. 89, § 75) expressly provides that when a company is wound up, the liability of the subscriber shall become fixed, and that in the case of his bankruptcy it shall be lawful to prove against his estate the estimated value of his liability to further calls, as well as calls already made. This provision has been construed to permit the proving of the estimated value of his liability to further calls where the winding up has commenced prior to or at the date of the bankruptcy. Financial Corporation v. Lawrence, L. R. 4 C. P. 731. See also, as to the effect of this statute, Carey v. Mayer, 79 Fed. 926; Glenn v. Howard, 65 Md. 40, 3 Atl. 895.

⁷⁵ Carey v. Mayer, 79 Fed. 926.

state.⁷⁷ And this is equally true though the action for the enforcement of the subscription contract is brought in a court of the state where the subscriber resides, and under whose insolvent laws he has obtained his discharge.⁷⁸

§ 645. Discharge by alteration of contract. It is a general principle that a material alteration of a written contract by one of the parties, or by a stranger with his consent, without the consent of the other party, even when the alteration is made without any fraudulent intent, discharges the other party from liability on the contract as originally made; and of course he cannot be held liable on the contract as altered, since he has never consented thereto. The principle applies with full force to a contract of subscription. If, therefore, a subscription paper, or articles of association in which subscriptions are made, is materially and intentionally altered without the consent of a party thereto, by the corporation or its agent, or by a stranger with its consent, his subscription cannot be enforced.⁷⁹ So it has been held that the subscriber is released under such circumstances, where the subscription contract is altered by reducing the number of shares and the amount of stock which he is to take,⁸⁰ or by increasing the amount of the capital stock of the corporation.⁸¹ And if the subscription is altered by raising the number of shares subscribed for, the subscriber cannot be held for the increased amount.⁸²

⁷⁷ *Glenn v. Clabaugh*, 65 Md. 65, 3 Atl. 902.

⁷⁸ *Glenn v. Clabaugh*, 65 Md. 65, 3 Atl. 902.

⁷⁹ *Indiana*. *Richmond St. R. Co. v. Reed*, 83 Ind. 9.

Mississippi. *Ellison v. Mobile & O. R. Co.*, 36 Miss. 572.

Missouri. *Southern Hotel Co. v. Newman*, 30 Mo. 118.

New York. *Burrows v. Smith*, 10 N. Y. 550.

Ohio. *Bery v. Marietta, P. & C. Ry. Co.*, 26 Ohio St. 673.

South Carolina. *Jackson v. Cherokee Medicine Co.*, 47 S. C. 215, 25 S. E. 51.

Texas. *Texas Printing & Lithographing Co. v. Smith* (Tex. App.), 14 S. W. 1074.

"A material alteration or change in the contract without the consent of the subscriber will release him from

his obligations under the contract."⁸³ *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423; *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

Where a written contract of subscription to stock of a railroad company fixes the route and terminal points of the road, an abandonment of either of the termini or of any material part of the route without the consent of the subscriber releases him from liability, though the change is within the authority conferred on the directors by the charter. *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363.

⁸⁰ *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

⁸¹ *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

⁸² *Hardee v. Tietjen*, 140 Ga. 527, 79 S. E. 117.

A subscriber who signs articles of association is not liable on his subscription if the articles are materially altered by the corporation or the corporators, or new articles substituted, without his consent.⁸³

Immaterial changes in the contract of subscription or articles of association will not operate as a discharge,⁸⁴ nor will changes which incorporate into the articles provisions which the law would otherwise imply.⁸⁵

Generally, a mere change in the name of the corporation will not be regarded as material,⁸⁶ unless the subscriber can show facts making it so.⁸⁷

Where a number of similar subscriptions are made on separate lists, it is not a material alteration to cut and paste them all under one heading, so as to make one list.⁸⁸

Knowledge of the treasurer that the individual subscription of the president has been altered so as to make it for a larger number of shares will not be notice of that fact to the president in his individual capacity so as to estop him from setting up such alteration as a defense. *Hardee v. Tietjen*, 140 Ga. 527, 79 S. E. 117.

⁸³ *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *Union Agricultural & Stock Ass'n v. Neill*, 31 Iowa 95; *Southern Hotel Co. v. Newman*, 30 Mo. 118; *Burrows v. Smith*, 10 N. Y. 550.

⁸⁴ *Union Agricultural & Stock Ass'n v. Neill*, 31 Iowa 95.

The fact that a subscription paper is altered after the defendant signs it, by drawing lines through the name of a subscriber preceding his and placing opposite such name the words "By agree't, Mar. 5, '73," will not release the subscriber in the absence of proof that he was induced to subscribe because the person whose name was so canceled had done so. *Whitlesey v. Frantz*, 74 N. Y. 456.

⁸⁵ *Union Agricultural & Stock Ass'n v. Neill*, 31 Iowa 95.

⁸⁶ *United States. Glenn v. Springs*, 26 Fed. 494. See also *Priest v. Glenn*, 51 Fed. 401, aff'g 48 Fed. 19, 47 Fed. 472.

Georgia. Howard v. Glenn, 85 Ga.

238, 21 Am. St. Rep. 156, 11 S. E. 610.

Maine. *Bucksport & B. R. Co. v. Buck*, 68 Me. 81.

Missouri. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481; *Haskell v. Sells*, 14 Mo. App. 91.

New Jersey. *Delaware & A. R. Co. v. Irick*, 23 N. J. L. 321.

Tennessee. *Greenville & P. R. Narrow Gauge R. Co. v. Johnson*, 8 Baxt. 332.

Wisconsin. *Racine County Bank v. Ayres*, 12 Wis. 512.

A change from "The Co-operative Furniture Manufacturing Company" to "Co-operative Furniture & Coffin Mfg. Company." *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

⁸⁷ It is incumbent on the subscriber to plead and prove such facts. *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

⁸⁸ *Sodus Bay & C. R. Co. v. Hamlin*, 24 Hun (N. Y.) 390.

The detaching of the names signed to one of two subscription papers and attaching them to the other is not an alteration of the latter, where the two are substantially the same and taken together constitute a single contract. *Davis v. Campbell*, 93 Iowa 524, 61 N. W. 1053.

Of course an alteration of a subscription paper may always be explained. It will not operate as a discharge if it was due to accident or mistake, or if made by a stranger without the consent of the corporation, or by the corporation with the consent of the subscriber.⁸⁹ But the burden is on the corporation to show that the alteration was made under circumstances which will not release the subscriber.⁹⁰

In order to raise a presumption that the alteration was made after the execution of the contract and without the subscriber's consent, however, and to put the company to proof explaining it, it must plainly appear from the face of the contract that it has been altered.⁹¹

The rule obtaining in some states which permits a recovery upon the original consideration as upon an original oral agreement, disregarding the written contract, applies only where the alteration is made without fraud in fact.⁹²

The subscriber may be estopped to set up the alteration of the contract as against creditors.⁹³

§ 646. Discharge by nonperformance of conditions precedent or special terms. When a subscription is made upon a condition precedent, the condition must be performed before the subscriber can be held liable on his subscription, unless he waives the condition, or is estopped, and, if there is a breach of the condition, he is discharged from his contract.⁹⁴

He is discharged, in the absence of a waiver or estoppel, if the condition is not performed within the time, if any, specified in the contract, or within a reasonable time, if no time is specified.⁹⁵

If a subscription is not upon a condition precedent, but upon special terms, and the special terms constitute a mere independent and collateral undertaking on the part of the corporation, failure of the corporation to perform such special terms will not generally operate to discharge the subscriber from liability on his subscription, but his remedy is by an action or counterclaim against the corporation to

⁸⁹ *Johnson v. Wabash & Mt. V. Plank Road Co.*, 16 Ind. 389; *Rensselaer & W. Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56.

⁹⁰ *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

⁹¹ "It is not sufficient that it is probable that an alteration has been made, but it must be manifest to the inspection of the jury that it has been made." *Ellison v. Mobile & O. R. Co.*,

36 Miss. 572. In this case it is doubted whether the presumption applies to subscription contracts in any event.

⁹² *Bohn v. Burton-Lingo Co.*, — Tex. Civ. App. —, 175 S. W. 173.

⁹³ See § 716, *infra*.

⁹⁴ See § 579, *supra*.

As to waiver and estoppel, see §§ 598, 599, *supra*.

⁹⁵ See § 582, *supra*.

recover damages for its breach of contract.⁹⁶ If the special term, however, or undertaking on the part of the corporation, forms substantially the whole consideration for the subscription, a breach thereof by the corporation before the subscription is paid will discharge the subscriber, except as against creditors, on the ground that there is a failure of consideration. Where a landowner subscribed for stock in a turnpike company, in consideration of the company's promise to run its road along a certain route, and, before the subscription was paid in full, the road was laid out along a different route, so as to "subvert and destroy the consideration" which induced the subscription, it was held that the subscriber was discharged, and that he could maintain a suit in equity to enjoin the company from collecting a judgment for assessments on the subscription recovered prior to the breach, and to recover assessments which he had paid.⁹⁷

There are many other cases in which subscribers for stock in railroad and turnpike companies upon condition or stipulation that the road should be constructed along a certain route, or between certain termini, have been allowed to defeat a recovery on their subscriptions by setting up the defense that the company failed to construct the road as agreed, or afterwards changed its location.⁹⁸

⁹⁶ See §§ 601, 629, *supra*.

⁹⁷ *Frankfort & S. Turnpike Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159. See also *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363.

Where a corporation sells stock on credit under an agreement that the purchaser shall be elected its superintendent at a certain salary, and refuses to elect him superintendent, he may tender back the stock, and recover what he has paid on it. *Seymour v. Detroit Copper & Brass Rolling Mills*, 56 Mich. 117, 23 N. W. 186, 22 N. W. 317.

⁹⁸ *Mississippi. Champion v. Memphis & C. R. Co.*, 35 Miss. 692.

New York. *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294; *Buffalo, C. & N. Y. R. Co. v. Pottle*, 23 Barb. 21; *Rensselaer & W. Plank Road Co. v. Wetsel*, 6 How. Pr. 68.

Ohio. *Railway Co. v. Fisher*, 39 Ohio St. 330.

Pennsylvania. *Moore v. Hanover*

Junction & S. R. Co., 94 Pa. St. 324; *Caley v. Philadelphia & C. County R. Co.*, 80 Pa. St. 363.

Tennessee. *Nashville & N. W. R. Co. v. Jones*, 2 Cold. 574.

Wisconsin. *Noesen v. Town of Port Washington*, 37 Wis. 168.

Compare *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350; *Central Plankroad Co. v. Clemens*, 16 Mo. 359; *White Hall & P. R. Co. v. Myers*, 16 Abb. Pr. N. S. (N. Y.) 34. Mere intention on the part of the corporation to depart from the route laid out in the charter is no defense. *Ex parte Booker*, 18 Ark. 338.

To work a discharge, the alteration must be one which removes the inducement to subscribe, or which essentially changes the duties or responsibilities of the company. *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. (Ky.) 314.

Of course there is no discharge if the change of location is authorized

The same is true of subscriptions for stock in a bridge company, where the company changes the location of the bridge,⁹⁹ and of a contract of subscription for stock in a manufacturing company, the articles of association of which require its plant to be located at a particular place, and which establishes the same at a different place.¹

It is no defense to an action on a subscription that the corporation has guaranteed to pay interest on stock "as soon as paid," and that it has suspended operations, for there can be no breach of the guaranty before the subscription is paid.²

§ 647. Discharge by alteration or amendment of charter. If a corporation, after subscriptions to its capital stock, procures or accepts an alteration or amendment of its charter, whereby its character,

by the charter or contract of subscription; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Beckner v. Riverside & B. G. Turnpike Co.*, 65 Ind. 468; *Railback v. Liberty & A. Turnpike Co.*, 2 Ind. 656; *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. (Ky.) 314; *State v. Atchafalaya Railroad & Banking Co.*, 5 Rob. (La.) 63; *Williamsport & H. Turnpike Co. v. Hollman*, 8 Gill & J. (Md.) 75; *Ellison v. Mobile & O. R. Co.*, 36 Miss. 572; or if there is no condition in the subscription against a change of route, *Colvin v. Liberty & A. Turnpike Co.*, 2 Ind. 511; *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43; *Smith v. Gower*, 2 Duv. (Ky.) 17; *Greenville & C. R. Co. v. Coleman*, 5 Rich. (S. C.) 118; *Greenville & P. R. Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332; or if the subscriber expressly or impliedly consents to the change, *North Carolina R. Co. v. Leach*, 4 Jones (N. C.) 340.

One who subscribes for stock in a turnpike company after a survey has been made will not be released by subsequent changes in the route, where his subscription is unconditional and no representations were made to him as to the final location of the road. *Colvin v. Liberty & A. Turnpike Co.*, 2 Ind. 511.

An unconditional subscriber to the stock of a turnpike company is not discharged because the road is located on a route different from the one which he believed would be adopted, in the absence of fraud. *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43.

The deviation from the route fixed by the charter or contract of subscription must be a material deviation to operate as a discharge. *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. (Ky.) 314; *Williamsport & H. Turnpike Co. v. Hollman*, 8 Gill & J. (Md.) 75; *Greenville & C. R. Co. v. Coleman*, 5 Rich. (S. C.) 118.

Mere formal irregularity in relocation of the road does not discharge subscribers. *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79.

See *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897, construing statutory provisions providing for the discharge of the subscribers under certain circumstances where there has been a change of route.

⁹⁹ *Freemont Ferry & Bridge Co. v. Fuhrman*, 8 Neb. 99.

¹ *Auburn Bolt & Nut Works v. Shultz*, 143 Pa. St. 256, 22 Atl. 904.

² *Miller v. Pittsburgh & C. R. Co.*, 40 Pa. St. 237, 80 Am. Dec. 570.

object or powers are materially or fundamentally changed, there is a material alteration of the contracts of the subscribers, and it follows that those who do not assent to the change are discharged from liability on their subscriptions. And they may set up the alteration or amendment as a defense in an action to enforce their subscriptions, whether the action is brought by the corporation itself, or by creditors, or by a receiver or assignee in bankruptcy.³

³ **United States.** *Nugent v. Board Sup'rs Putnam Co.*, 19 Wall. 241, 22 L. Ed. 83; *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604; *Pope v. Board Com'rs Lake Co.*, 51 Fed. 769; *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582.

Arkansas. *Mississippi, O. & R. River R. Co. v. Gaster*, 24 Ark. 96; *Witter v. Mississippi, O. & R. River R. Co.*, 20 Ark. 463.

Connecticut. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Florida. *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299; *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713.

Georgia. *Youngblood v. Georgia Improvement Co.*, 83 Ga. 797, 10 S. E. 124; *Snook v. Georgia Improvement Co.*, 83 Ga. 61, 9 S. E. 1104; *Academy of Music v. Flanders*, 75 Ga. 14; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *May v. Memphis Branch R. Co.*, 48 Ga. 109; *Wilson v. Wills Valley R. Co.*, 33 Ga. 466; *Winter v. Muscogee R. Co.*, 11 Ga. 438. See also *Atlanta Steel Co. v. Mynahan*, 138 Ga. 668, 75 S. E. 980.

Illinois. *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *Board Sup'rs Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 338; *Banet v. Alton & S. R. Co.*, 13 Ill. 504. See also *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220.

Indiana. *Shelbyville & R. Turnpike Co. v. Barnes*, 42 Ind. 498; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Booe v. Junction R. Co.*, 10 Ind.

93; *McCray v. Junction R. Co.*, 9 Ind. 358; *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407; *Sparrow v. Evansville & C. R. Co.*, 7 Ind. 369.

Iowa. *Burlington & M. R. Co. v. White*, 5 Iowa 409.

Kentucky. *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Metc. 314.

Maine. *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

Maryland. See *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. *Middlesex Turnpike Corporation v. Swan*, 10 Mass. 384, 6 Am. Dec. 139; *Middlesex Turnpike Corporation v. Locke*, 8 Mass. 268.

Michigan. *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

Mississippi. *Champion v. Memphis & C. R. Co.*, 35 Miss. 692; *Hester v. Memphis & C. R. Co.*, 32 Miss. 378; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

New Hampshire. *Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32.

New York. *Troy & R. R. Co. v. Kerr*, 17 Barb. 581; *Hartford & N. H. R. Co. v. Crowell*, 5 Hill 383, 40 Am. Dec. 354.

North Carolina. *First Nat. Bank v. City of Charlotte*, 85 N. C. 433; *Thompson v. Guion*, 5 Jones Eq. 113.

Ohio. *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57.

Pennsylvania. *Southern Pennsylvania Iron & Railroad Co. v. Stevens*, 87 Pa. St. 190; *Manheim, P. & L.*

"The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract."⁴

As was said in substance in an early New Hampshire case: "Every individual owner of shares expects, and indeed stipulates, with the other owners, as a corporate body, to pay them his proportion of the expense, which a majority may please to incur, in the promotion of the particular object of the corporation. By acquiring an interest in the corporation, therefore, he enters into an obligation with it, in the nature of a special contract, the terms of which contract are limited by the specific provisions, rights and liabilities, detailed in the act of incorporation. To make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation, on one part, can assent by a vote of the majority; the individual, on the other part, by his own personal act. However the corporation, then, may be bound by the assent to the additional acts, a dissenting subscriber, in his individual capacity, having never consented thereto, is under no obligations to the corporation, except what he incurred by becoming a member under the first act."⁵

The mere fact that an amendatory act is clearly beneficial to the corporation and the stockholders, or that it is for a laudable object of public utility, cannot render it binding upon a dissenting stockholder, for he has a right to stand strictly upon the terms of his contract of membership. Notwithstanding the laudable object and great utility of the amendment, still, if it effects a material change, a dis-

Turnpike or Plank Road Co. v. Arndt, 31 Pa. St. 317; Indiana & E. Turnpike Road Co. v. Phillips, 2 Penr. & W. 184.

Vermont. Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

Virginia. Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877.

West Virginia. Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305.

Wisconsin. Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

The liability of a subscriber on a promissory note given to the corpora-

tion is not affected by alterations in the charter made after he has ceased to be a stockholder. Mitchell v. Rome R. Co., 17 Ga. 574.

⁴ Nugent v. Board Sup'rs Putnam Co., 19 Wall. (U. S.) 241, 22 L. Ed. 83.

⁵ Union Locks & Canals v. Towne, 1 N. H. 44, 8 Am. Dec. 32.

The contract cannot be fundamentally altered except by consent of all the parties to it. Academy of Music v. Flanders Bros., 75 Ga. 14; Burlington & M. R. Co. v. White, 5 Iowa 409.

sending stockholder, when sued upon his subscription, is able to say: "*Non haec in federa veni.*"⁶

According to the weight of authority, a subscriber is discharged by a material and fundamental alteration or amendment of the charter of the corporation, even when the legislature has the reserved power to alter, amend or repeal the charter, for such a reservation of power is not construed as authorizing the legislature or a majority of the stockholders to bind a dissenting stockholder by an amendment which is radical or fundamental, so as to make the corporation or the undertaking something essentially different from what was intended by the subscribers at the time of their subscriptions.⁷

There is no discharge of dissenting subscribers, however, by an alteration or amendment of the charter of the corporation, under the reserved power to alter, amend or repeal, or even where there is no such reserved power, where it does not fundamentally or materially change the character, objects or powers of the corporation, but is merely in furtherance of the original purpose.⁸ Nor is there any dis-

⁶ Woodbury, J., in *Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32.

⁷ Snook v. Georgia Improvement Co., 83 Ga. 61, 9 S. E. 1104; Troy & R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

See many other cases in the first note under this section. And see chapter on Amendment and Repeal of Charters, *infra*.

The reserved power cannot be so exercised as to impair contract obligations or destroy vested rights. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56. But see *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547, where it was held that a subscriber was not released by an amendment increasing the liability of stockholders.

⁸ *United States*. *Nugent v. Board Sup'rs Putnam Co.*, 19 Wall. 241, 22 L. Ed. 83; *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604; *Glenn v. Springs*, 26 Fed. 494; *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864; *Payson v. Stoeber*, 2 Dill. 427, Fed. Cas. No. 10,863.

Arkansas. *Jacks v. Helena*, 41 Ark. 213; *Witter v. Mississippi*, O. & R. River R. Co., 20 Ark. 463.

Connecticut. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Delaware. *Delaware R. Co. v. Tharp*, 1 Houst. 149.

Florida. *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299.

Georgia. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610; *Wilson v. Wills Valley R. Co.*, 33 Ga. 466.

Illinois. *Mayfield v. Alton Railway, Gas & Electric Co.*, 198 Ill. 528, 65 N. E. 100, aff'g 100 Ill. App. 614; *Illinois River R. Co. v. Beers & Sims*, 27 Ill. 185; *Terre Haute & A. R. Co. v. Earp*, 21 Ill. 291; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Indiana. *Hanna v. Cincinnati & Ft. W. R. Co.*, 20 Ind. 30; *Hayworth v. Junction R. Co.*, 13 Ind. 348.

charge of a subscriber by reason of an alteration or amendment which is authorized by the charter of the corporation or by a general law in force at the time of his subscription, for in such a case the right of a majority to bind him by the amendment is a term of his contract.⁹

Iowa. Peoria & R. I. R. Co. v. Preston, 35 Iowa 115.

Kentucky. Glover v. Myer, 3 Ky. L. Rep. 181; Fry's Ex'r v. Lexington & B. S. R. Co., 2 Mete. 314.

Louisiana. Fairfax v. Bloch, 130 La. 761, 58 So. 563; Casanas v. Audubon Hotel Co., 124 La. 786, 50 So. 714.

Maine. Bucksport & B. R. Co. v. Buck, 68 Me. 81; South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

Maryland. Taggart v. Western Maryland R. Co. 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. Agricultural Branch R. Co. v. Winchester, 13 Allen 29.

Missouri. Pacific R. Co. v. Hughes, 22 Mo. 291, 64 Am. Dec. 265; Pacific R. Co. v. Renshaw, 18 Mo. 210.

New Jersey. Delaware & A. R. Co. v. Irick, 23 N. J. L. 321.

New York. Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun 371; Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336; Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102; Troy & R. R. Co. v. Kerr, 17 Barb. 581. See also Poughkeepsie & S. P. Plank Road Co. v. Griffin, 24 N. Y. 150, rev'g on other grounds 21 Barb. 454.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Jewett v. Valley Ry. Co., 34 Ohio St. 601; Milford & C. Turnpike Co. v. Brush, 10 Ohio 111, 36 Am. Dec. 78; Pennsylvania & O. Canal Co. v. Webb, 9 Ohio 136.

Pennsylvania. Cross v. Peach Bottom Ry. Co. 90 Pa. St. 392; Com. v. Pittsburgh, 41 Pa. St. 278; Irvin v. Susquehanna & P. Turnpike Co., 2 Penr. & W. 466, 23 Am. Dec. 53; Clark v. Monongahela Nav. Co., 10 Watts

364; Gray v. Monongahela Nav. Co., 2 Watts & S. 156, 37 Am. Dec. 500.

South Carolina. Greenville & C. R. Co. v. Coleman, 5 Rich. 118.

Vermont. Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Connecticut & P. Rivers R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181.

It is presumed that each subscriber "agrees to do, and consents to have done, whatever may be supposed will and is intended to make the undertaking a success, and the investment a profitable one." Sprague v. Illinois River R. Co., 19 Ill. 174.

⁹ **United States.** Nugent v. Board Sup'rs Putnam Co., 19 Wall. 241, 22 L. Ed. 83.

Arkansas. Witter v. Mississippi, O. & R. River R. Co., 20 Ark. 463.

Illinois. Mayfield v. Alton Railway, Gas & Electric Co., 198 Ill. 528, 65 N. E. 100, aff'g 100 Ill. App. 614; Edwards v. People, 88 Ill. 340.

Indiana. Bish v. Johnson, 21 Ind. 299; Sparrow v. Evansville & C. R. Co., 7 Ind. 369.

Iowa. Burlington & M. R. Co. v. White, 5 Iowa 409.

Kansas. Atchison, C. & P. R. Co. v. Board Com'rs Phillips Co., 25 Kan. 261.

Kentucky. Fry v. Lexington & B. S. R. Co., 2 Mete. 314.

Louisiana. Fairfax v. Bloch, 130 La. 761, 58 So. 563.

New York. Myers v. Sturgis, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

Ohio. Jewett v. Valley Ry. Co., 34 Ohio St. 601; Mansfield, C. & L. M. R. Co. v. Stout, 26 Ohio St. 241; Mansfield, C. & L. M. R. Co. v. Brown, 26 Ohio St. 223.

Nor are subscribers discharged where they expressly or impliedly consent to the alteration or amendment at the time it is made, or afterwards.¹⁰

If a subscriber with knowledge fails to give notice of his dissent within a reasonable time, it is equivalent to consent.¹¹ And it has been held that his consent will be presumed unless he affirmatively shows his dissent.¹²

Wisconsin. Port Edwards, C. & N. Ry. Co. v. Arpin, 80 Wis. 214, 49 N. W. 828.

¹⁰ Pope v. Board Com'rs Lake Co., 51 Fed. 769; Witter v. Mississippi, O. & R. River R. Co., 20 Ark. 463; Martin v. Pensacola & G. R. Co., 8 Fla. 370, 73 Am. Dec. 713; Snook v. Georgia Improvement Co., 83 Ga. 61, 9 S. E. 1104; May v. Memphis Branch R. Co., 48 Ga. 109.

Assent may be proven by circumstances, by acts, by acquiescence. May v. Memphis Branch R. Co., 48 Ga. 109.

A subscriber is not discharged where he moves the adoption of the amendment, which received his unqualified and express approval in open meeting. Casanas v. Audubon Hotel Co., 124 La. 786, 50 So. 714.

A subscriber who votes at the organization meeting and for the election of directors after the passage of an act reducing the amount of the capital stock is liable notwithstanding such reduction though he does not actually know of it, since he is chargeable with knowledge of the terms of the charter. Bedford R. Co. v. Bowser, 48 Pa. St. 29.

In Massachusetts, where it is held, as we shall see, that no promise to pay assessments is to be implied from the mere fact of a subscription to shares in a corporation, the charter of which gives the corporation a special remedy by sale of shares for nonpayment of assessments, and that an express promise, therefore, is necessary to sustain an action of assumpsit to recover as-

sessments, it has been held that consent of a subscriber for shares in a corporation to an alteration by the legislature of its object will not render him liable to the corporation on an express promise to pay assessments made before the alteration, and his consent thereto, but that the only remedy of the corporation is to sell his shares. Middlesex Turnpike Corporation v. Swan, 10 Mass. 384, 6 Am. Dec. 139. The court, however, might very well have held in this case that, in consenting to the alteration of the road, the subscriber impliedly, not as a matter of law merely, but as a matter of fact (for such would seem clearly to have been the intention), consented to a corresponding alteration of his express promise to pay assessments.

¹¹ May v. Memphis Branch R. Co., 48 Ga. 109.

The change is binding on the subscriber unless he expressly dissents therefrom before any debts are contracted or rights inure to third parties in carrying out the new design or enterprise. Martin v. Pensacola & G. R. Co., 8 Fla. 370, 73 Am. Dec. 713.

In Fairfax v. Bloch, 130 La. 761, 58 So. 563, it was held that a subscriber was not discharged, where he did not object for five years and paid interest on his subscription note in the meantime.

¹² Martin v. Pensacola & G. R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Dissent and notice thereof must be shown by the subscriber in an action on his subscription. It is not incum-

A subscriber will also be deemed to have assented to the alteration or amendment if he subsequently pays calls or assessments,¹³ unless they are merely for the purpose of meeting preliminary expenses.¹⁴

There is no discharge in any case unless the alteration or amendment is actually made. The mere passage of an act amending the charter of a corporation by conferring additional powers, or authorizing an amendment, does not release subscribers, where the corporation does not accept the same, or does not attempt or is not permitted to take advantage of it.¹⁵ And especially is this true where the amendment has lapsed and become inoperative by its terms at the time of the trial because the powers therein conferred have not been exercised within the time prescribed.¹⁶

A subscriber is not relieved from liability on a note for the amount of the initial payment on his subscription by a fundamental change in the charter made after his stock has been forfeited.¹⁷

Whether the alteration is such a one as will release the subscriber is a question of law.¹⁸

It has been said that no general rule can be laid down for determining what is a material or fundamental change, but that each case

bent upon the corporation to show his assent. *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713. But see *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57.

¹³ *May v. Memphis Branch R. Co.*, 48 Ga. 109.

That he is thereby estopped to set up such alteration as a defense, see § 716, *infra*.

¹⁴ Payment of assessments on railroad stock made to meet the expense of a survey of the route of the road will not constitute acquiescence. *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

¹⁵ *Georgia. Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

Kentucky. *Fry v. Lexington & B. S. R. Co.*, 2 Metc. 314.

Louisiana. *State v. Atchafalaya Railroad & Banking Co.*, 5 Rob. 63.

Mississippi. *Hawkins v. Mississippi & T. R. Co.*, 35 Miss. 688.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

See also *Peoria & O. R. Co. v. Elting*, 17 Ill. 429.

The subscriber is not discharged unless the amendment is accepted in such a way as to render it valid and binding upon the corporation. *Mississippi, O. & R. River R. Co. v. Gaster*, 24 Ark. 96.

In a Mississippi case it was held that a subscriber for stock in a railroad company was not discharged by its acceptance of an amendment authorizing it to build a branch, where it had not proposed to build it. *Hawkins v. Mississippi & T. R. Co.*, 35 Miss. 688.

¹⁶ *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

¹⁷ *Mitchell v. Rome R. Co.*, 17 Ga. 574.

¹⁸ *Snook v. Georgia Improvement Co.*, 83 Ga. 61, 9 S. E. 1104; *Winter v. Muscogee R. Co.*, 11 Ga. 438.

must be determined upon its own state of facts.¹⁹ The question of acquiescence, on the other hand, is generally one of fact for the jury.²⁰

In determining the question whether the subscriber has been discharged, the motives which actuated him in making the subscription cannot be considered.²¹

The question as to what particular alterations are material or fundamental will be considered at length in a subsequent chapter, in treating generally of the power of the majority of the stockholders to bind the minority, for as to this question there is no difference between cases in which the alteration is set up as a defense in an action against a dissenting stockholder on his subscription and cases in which a dissenting stockholder sues to enjoin the corporation from accepting or making the alteration.²²

§ 648. Discharge by formation of a different corporation from that contemplated. Where a person subscribes for stock in a corporation to be subsequently formed, and a corporation of a different character from that contemplated, or with different powers, is formed, without his consent to the change, he is not liable on his subscription. This, however, is not a case of release or discharge from liability, for there has never been any contract at all.²³

§ 649. Discharge by consolidation. A subscriber for stock in a corporation is discharged from any liability on his subscription if the corporation is consolidated with another under a statute passed after the subscription, where the state has not reserved the power to alter, amend or repeal the charter, if he does not consent to the consolidation.²⁴ And by the weight of authority he is discharged, even

¹⁹ *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56; *Snook v. Georgia Improvement Co.*, 83 Ga. 61, 9 S. E. 1104.

²⁰ *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

²¹ *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

²² See chapter on Stock and Stockholders, *infra*.

²³ See § 524, *supra*.

²⁴ *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *Board Sup'rs Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 338; *Shelbyville & R. Turnpike Co. v. Barnes*, 42 Ind. 498; *State v. Bailey*,

16 Ind. 46, 79 Am. Dec. 405; *Martin v. Junction R. Co.*, 12 Ind. 605; *Booe v. Junction R. Co.*, 10 Ind. 93; *McCray v. Junction R. Co.*, 9 Ind. 358; *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407; *Sparrow v. Evansville & C. R. Co.*, 7 Ind. 369; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

In *Mayfield v. Alton Railway, Gas & Electric Co.*, 198 Ill. 528, 65 N. E. 100, *aff'g* 100 Ill. App. 614, it is said, by way of dictum, that a statute authorizing consolidation passed after a subscription has been made cannot be made to operate to compel the subscriber to transfer his subscription to

though the power to alter, amend or repeal the charter has been reserved, if the consolidated corporation is radically different from the original corporation in its nature, constitution or powers.²⁵

There is no discharge, however, where the power to alter, amend or repeal the charter has been reserved, and the consolidation does not make a radically different corporation, but merely carries out the objects originally intended.²⁶ Nor is there any discharge from liability if the consolidation is authorized by the charter of the corporation, or by a general law in force at the time the subscription was made,²⁷ provided the consolidation is effected in substantial conformity to the law;²⁸ nor where the consolidation is authorized by the contract of subscription.²⁹

The subscriber is not discharged if he expressly or impliedly con-

the consolidated company, because to do so would impair the obligation of his contract.

²⁵ *Shelbyville & R. Turnpike Co. v. Barnes*, 42 Ind. 498; *Martin v. Junction R. Co.*, 12 Ind. 605; *Booe v. Junction R. Co.*, 10 Ind. 93.

This is true where the consolidation wholly changes the character of the enterprise. *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237.

²⁶ *Hanna v. Cincinnati & Ft. W. R. Co.*, 20 Ind. 30.

See *Bishop v. Brainerd*, 28 Conn. 289, where a subscriber to one railroad company was held to be a debtor to the consolidated company, and hence not subject to garnishment as a debtor of the original company, in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment, and where the legislature, after the subscription, confirmed the consolidation.

²⁷ *United States. Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744; *Nugent v. Board Sup'rs Putnam Co.*, 19 Wall. 241, 22 L. Ed. 83; *Pope v. Board Com'rs Lake Co.*, 51 Fed. 769.

Illinois. Mayfield v. Alton Railway, Gas & Electric Co., 198 Ill. 528,

65 N. E. 100, aff'g 100 Ill. App. 614; *Edwards v. People*, 88 Ill. 340; *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313; *Sprague v. Illinois River R. Co.*, 19 Ill. 174.

Indiana. Bish v. Johnson, 21 Ind. 299; *Sparrow v. Evansville & C. R. Co.*, 7 Ind. 369. See also *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407.

Kansas. Atchison, C. & P. R. Co. v. Board Com'rs Phillips Co., 25 Kan. 261.

Ohio. Mansfield, C. & L. M. R. Co. v. Stout, 26 Ohio St. 241; *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223.

In such case the law forms a part of the contract, and the subscriber impliedly consents to the change. *Pope v. Board Com'rs Lake Co.*, 51 Fed. 769.

²⁸ Otherwise he is discharged although the procedure is such as to make the consolidated company a corporation de facto. *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

²⁹ *Cork & Y. R. Co. v. Paterson*, 18 C. B. 414, 37 Eng. L. & Eq. 398.

Such is the rule where the subscription contract expressly permits the consolidation. *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407.

sents to the consolidation;³⁰ and it has been held that failure to give notice of dissent within a reasonable time,³¹ or making payments on the subscription with knowledge of the consolidation,³² is equivalent to consent. Nor is the subscriber discharged by an ultra vires attempt to consolidate.³³

§ 650. Special agreements with, release or withdrawal of, or non-payment by, other subscribers. A subscriber, when sued upon his subscription, cannot set up as a defense that the corporation has made special agreements with other stockholders, or has released other stockholders, unless his subscription is voidable for fraud in its procurement,³⁴ for if the special agreement or release is in fraud of his rights, it is void as against him, and if it is valid, he has no ground for complaint.³⁵

³⁰ Hayworth v. Junction R. Co., 13 Ind. 348; Fisher v. Evansville & C. R. Co., 7 Ind. 407.

³¹ Where the subscriber fails to object to the consolidation, or to pursue the remedy given by the statute to dissenting stockholders, especially if he has also dealt with the consolidated corporation, he cannot avoid his subscription as against creditors. Hamilton v. Clarion, M. & P. R. Co., 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53. See also Martin v. Pensacola & G. R. Co., 8 Fla. 370, 73 Am. Dec. 713.

³² Hayworth v. Junction R. Co., 13 Ind. 348.

As to estoppel by making payments, see § 716, *infra*.

³³ Illinois Midland R. Co. v. Town of Barnett, 85 Ill. 313.

³⁴ As to the effect of fraud, see §§ 610-636, *supra*.

³⁵ United States. In re Republic Ins. Co., 3 Biss. 452, Fed. Cas. No. 11,704; Swatara R. Co. v. McKim, Fed. Cas. No. 13,681.

Alabama. Hall v. Selma & T. R. Co., 6 Ala. 741.

Arkansas. Jones v. Dodge, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828.

Florida. Dorman v. Jacksonville & A. Plank-Road Co., 7 Fla. 265.

Georgia. Howard v. Glenn, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610; Beck v. Henderson, 76 Ga. 360; Macon & A. R. Co. v. Vason, 57 Ga. 314. See also Chicago Bldg. & Mfg. Co. v. Summerour, 101 Ga. 820, 29 S. E. 291.

Illinois. Galena & S. W. R. Co. v. Ennor, 116 Ill. 55, 4 N. E. 762; Jewell v. Rock River Paper Co, 101 Ill. 57; Fey v. Peoria Watch Co., 32 Ill. App. 618.

Indiana. Anderson v. Newcastle & R. R. Co., 12 Ind. 376, 74 Am. Dec. 218; Western Plank-Road Co. v. Stockton, 7 Ind. 500.

Massachusetts. Hastings Lumber Co. v. Edwards, 188 Mass. 587, 75 N. E. 57; Nickerson v. English, 142 Mass. 267, 8 N. E. 45.

Missouri. Chouteau Ins. Co. v. Floyd, 74 Mo. 286.

New York. Whittlesey v. Frantz, 74 N. Y. 456; Armstrong v. Danahy, 75 Hun 405, 27 N. Y. Supp. 60.

Ohio. Jewett v. Valley Ry. Co., 34 Ohio St. 601.

Pennsylvania. Bristol Iron & Steel Co. v. Selliez, 175 Pa. St. 18, 34 Atl. 309; Crawford County v. Pittsburgh & E. R. Co., 32 Pa. St. 141.

Vermont. Connecticut & Passump-

A subscriber is not discharged by failure of other subscribers to pay their subscriptions;³⁶ nor because it is impossible to collect from some of them;³⁷ nor by the fact that they were permitted to make

sic *Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

Virginia. *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837, 30 S. E. 492.

This is especially true where he fails to take steps to have his subscription canceled within a reasonable time. *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

That a subscription was erased before the articles were filed is no defense, where it was done with the knowledge of the defendant, and all of the directors, and at the subscriber's request. *Rensselaer & W. Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56.

It is no defense to an action by a receiver that he has collected only a part of the amount due from other subscribers, he having compromised with them in good faith. *Brown v. Allebach*, 166 Fed. 488.

Especially where it appears that the entire liability of every stockholder would have to be exhausted to pay the outstanding debts. *Bennett v. Glenn*, 55 Fed. 956.

That a trustee for creditors has settled with several stockholders and released them from liability is no defense to an action brought by him against another stockholder on his subscription, unless the liability of the latter is thereby increased. *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610.

In *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25, it was held that where the company abandoned the enterprise and released some of the subscribers and returned what they had paid, the other subscribers were

released unless they consented to such action. And see *Rutz v. Esler & Ropiquet Mfg. Co.*, 3 Ill. App. 83.

Of course the rule stated in the text does not apply so as to prevent a subscriber, whose subscription is upon condition that a certain amount of stock shall be subscribed or paid, from showing nonperformance of the condition. See § 693, *infra*. And see *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *New York Exch. Co. v. De Wolf*, 31 N. Y. 273.

As to the validity and effect of special terms, see §§ 601-609, *supra*.

36 Georgia. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Kentucky. *Cook v. Hopkinsville, N. & B. Turnpike Road Co.*, 17 Ky. L. Rep. 839, 32 S. W. 748; *Hamilton v. Tarlton*, 3 Ky. L. Rep. 471.

Massachusetts. *Little v. O'Brien*, 9 Mass. 423.

Virginia. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

Washington. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

See also *Pacific Mill Co. v. Inman*, 46 Ore. 352, 80 Pac. 424.

Where there is an express agreement to take and pay for the shares. *Hastings Lumber Co. v. Edwards*, 188 Mass. 587, 75 N. E. 57.

The fact that the plaintiff has not paid his own subscription is no defense to a suit by a stockholder to recover unpaid subscriptions for the benefit of the corporation. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

37 Brown v. Allebach, 166 Fed. 488; *Bennett v. Glenn*, 55 Fed. 956.

payment in depreciated currency,³⁸ or in property of a value less than the amount of their subscriptions.³⁹

Where the subscriptions are regarded as mere offers on the part of the subscribers, which may be withdrawn at any time before they are accepted, the withdrawal of one subscriber will not release the others.⁴⁰

§ 651. Exercise of powers granted by charter or general law. It is clear that a subscriber is not discharged from liability on his subscription by the exercise by the corporation of any power which is conferred upon it, either expressly or impliedly, by its charter, or by a general law in force at the time of the subscription, for the provisions of the charter or law enter into and form a part of the contract of subscription. Every subscriber for stock in a corporation contracts with reference to the powers conferred upon the corporation at the time of the subscription.⁴¹

It has been held, therefore, that a subscriber for stock in a railroad company is not discharged from liability by the fact that the company has leased its road,⁴² or sold the whole or a part of its road,⁴³ or mortgaged or pledged its property,⁴⁴ or purchased connecting lines,⁴⁵ or changed the route of its road,⁴⁶ in pursuance of a power conferred upon it prior to the subscription. And it has also been held that, under similar circumstances, a subscriber is not released because

³⁸ *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

³⁹ *Wilke v. Avary*, 12 Ga. App. 148, 76 S. E. 1039.

⁴⁰ *National Bank of Union Point v. Amoss*, 144 Ga. 425, 87 S. E. 406.

As to the right of subscribers to withdraw under such circumstances, see § 563, *supra*.

⁴¹ *Illinois. People v. Town of Barnett*, 91 Ill. 422; *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313; *Ottawa, O. & F. R. Val. R. Co. v. Black*, 79 Ill. 262; *Chandler v. Northern Cross R. Co.*, 18 Ill. 190.

Indiana. White v. Butler University, 78 Ind. 585.

Kansas. Ginrich v. Patrons' Mill Co., 21 Kan. 61.

Massachusetts. City Hotel in Worcester v. Dickinson, 6 Gray 586.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

Wisconsin. Port Edwards, C. & N. Ry. Co. v. Arpin, 80 Wis. 214, 49 N. W. 828; *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255.

⁴² *Ottawa, O. & F. R. Val. R. Co. v. Black*, 79 Ill. 262; *Hays v. Ottawa, O. & F. R. Val. R. Co.*, 61 Ill. 422.

⁴³ *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

⁴⁴ *Chandler v. Northern Cross R. Co.*, 18 Ill. 190.

As that it has issued bonds and given a trust deed of its property as security therefor. *Whitney v. Chicago, A. & N. R. Co.*, 133 Iowa 508, 110 N. W. 912.

⁴⁵ *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313.

⁴⁶ See § 524, *supra*.

the corporation has increased⁴⁷ or reduced⁴⁸ its capital stock. Nor will the purchase of its own stock by a corporation discharge a subscriber, where such purchase is not prohibited and hence is lawful.⁴⁹

§ 652. Mismanagement of the corporation, illegal election of officers, etc. If the affairs of a corporation are mismanaged by the directors or other officers, or by the majority of the stockholders, stockholders not participating in the fraudulent or wrongful acts or neglect have a remedy in equity by suit for an injunction, or to hold the guilty officers or stockholders liable to the corporation for any damages sustained by the corporation; but mismanagement of a corporation does not discharge a stockholder from liability on his subscription, and is no defense in an action thereon.⁵⁰ So a subscriber

⁴⁷Port Edwards, C. & N. Ry. Co. v. Arpin, 80 Wis. 214, 49 N. W. 828.

⁴⁸Myers v. Sturges, 197 N. Y. 526, 90 N. E. 1162, aff'g 123 App. Div. 470, 108 N. Y. Supp. 528.

⁴⁹Chetlin v. Republic Life Ins. Co., 86 Ill. 220.

As to the right of a corporation to purchase its own stock, see Chap. 30.

⁵⁰United States. In re Republic Ins. Co., 3 Biss. 452, Fed. Cas. No. 11,704. See also American Alkali Co. v. Campbell, 113 Fed. 398, aff'd 125 Fed. 207.

Alabama. Smith v. Tallassee Branch of Central Plank-Road Co., 30 Ala. 650.

Florida. Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illinois. People v. Town of Barnett, 91 Ill. 422; Chetlain v. Republic Life Ins. Co., 86 Ill. 220; People v. Board Sup'rs Logan Co., 63 Ill. 374.

Indiana. Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; Hornaday v. Indiana & I. Cent. Ry. Co., 9 Ind. 263.

Iowa. Goff v. Hawkeye Pump & Windmill Co., 62 Iowa 691, 18 N. W. 307; Merrill v. Reaver, 50 Iowa 404; Courtright v. Deeds, 37 Iowa 503.

Kentucky. Oldham v. Mt. Sterling Improvement Co., 103 Ky. 529, 20

Ky. L. Rep. 207, 45 S. W. 779; Cook v. Hopkinsville, N. & B. Turnpike Road Co., 17 Ky. L. Rep. 839, 32 S. W. 748.

Louisiana. First Municipality City of New Orleans v. Orleans Theatre Co., 2 Rob. 209.

Maryland. Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810.

Minnesota. Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266.

Missouri. Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Hannibal, R. C. & P. Plank-Road Co. v. Menefee, 25 Mo. 547.

Nebraska. American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493; Hards v. Platte Val. Improvement Co., 46 Neb. 709, 65 N. W. 781.

Oregon. Pacific Mill Co. v. Inman, 46 Ore. 352, 80 Pac. 424.

South Carolina. Glenn v. Rosborough, 48 S. C. 272, 26 S. E. 611.

A subscriber cannot "set up an unlawful act of the directors as an excuse for the nonpayment of his subscription, for it is within his own power to prevent such an abuse of authority." Caley v. Philadelphia & C. C. R. Co., 80 Pa. St. 363.

The fact that the stock of the company has been depreciated, or even destroyed in value, through the bad

is not discharged because the directors have made fraudulent contracts;⁵¹ or have fraudulently mortgaged the corporate property with a design of fraudulently misappropriating a part of the proceeds;⁵² or have given away stock for the fraudulent purpose of depriving the stockholders of dividends, or of destroying the value of their shares, or to prevent them from exercising their legal power of control over the corporation in the election of directors or otherwise;⁵³ or have compromised and paid with their own money the debts of the corporation for their private gain;⁵⁴ or because the directors or promoters have made secret profits out of transactions with the corporation;⁵⁵ or because the corporation has taken a large land subscription to its stock at an exorbitant price;⁵⁶ or because certain moneys received by the corporation under certain other subscription contracts have not been used by the corporation in accordance with its agreement with its stockholders, but have been misapplied, wasted or dissipated by its officers;⁵⁷ or because the officers intend to apply the money collected from the subscriber to some purpose foreign to that for which it was subscribed.⁵⁸

Irregularity or illegality in the election of the directors of a corporation or other officers, or disqualification, while it may be ground for quo warranto proceedings to oust them, does not discharge sub-

or fraudulent management of any of its officers, is no defense. *People v. Town of Barnett*, 91 Ill. 422.

⁵¹Subscribers to the stock of a railroad company are not discharged because its directors have fraudulently made a contract to pay an excessive amount for the construction of the road. *People v. Board Sup'rs Logan Co.*, 63 Ill. 374. Nor because of misconduct on the part of its officers in contracting for the construction of the road with a construction company of which they were members. *Sedalia, W. & S. Ry. Co. v. Abell*, 17 Mo. App. 645.

⁵²*People v. Board Sup'rs Logan Co.*, 63 Ill. 374.

⁵³*People v. Board Sup'rs Logan Co.*, 63 Ill. 374.

⁵⁴The directors will not be permitted to profit thereby, but the corporation is entitled to any profit made

by them. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286.

⁵⁵The injury occasioned by such a fraud is an injury to the corporation and not to the stockholder. *Townsend v. Bissell*, 4 Hun (N. Y.) 297.

The stockholder cannot repudiate the transaction on behalf of the company, and cannot defend an action on his subscription because of the fraud on the company. *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810.

As to the right to rescind for false representations by the promoter that property can be bought for the corporation for a certain sum when the price so named includes a secret profit to the promoter, see § 166, *supra*.

⁵⁶*Hornaday v. Indiana & I. C. R. Co.*, 9 Ind. 263.

⁵⁷*Pacific Mill Co. v. Inman*, 46 Ore. 352, 80 Pac. 424.

⁵⁸*Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237.

scribers, or constitute any defense in actions on subscriptions.⁵⁹ Nor is a subscriber released because there has been no election of directors since the organization of the company.⁶⁰

The same is true of irregularities in adopting by-laws⁶¹ or the adoption of by-laws in excess of the corporate powers,⁶² as, for example, the adoption of an illegal by-law restricting the right of subscribers to vote,⁶³ or other irregularities occurring after the election of directors in respect to matters which are merely collateral to the direct proceedings necessary to enable the company to collect subscriptions.⁶⁴

§ 653. Failure to comply with provisions of charter or general law; ultra vires acts. As we have seen, there is no liability upon subscriptions for stock in a corporation to be formed, in the absence of an estoppel, unless the corporation is legally formed as contemplated. And therefore a failure to comply with conditions precedent to incorporation prescribed by the legislature may be set up as a defense in an action on a preliminary subscription.⁶⁵ It is very different, however, where a corporation has acquired a legal existence, and has since failed to comply with conditions subsequent;⁶⁶ or to comply with provisions of its charter or the general law under which it was organized, which are merely directory;⁶⁷ or where it has engaged in acts constituting a misuser or abuse of its powers. While the state may institute proceedings to forfeit the charter of a corporation for failure to comply with conditions subsequent prescribed therein ..

59 Indiana. Atherton v. Sugar Creek & P. Turnpike Co., 67 Ind. 334; Steinmetz v. Versailles & O. Turnpike Co., 57 Ind. 457; Eakright v. Logansport & N. I. R. Co., 13 Ind. 404; Johnson v. Crawfordsville, F. K. & Ft. W. R. Co., 11 Ind. 280; Covington, C. C. & J. Plank Road Co. v. Moore, 3 Ind. 510.

Kansas. Ginrich v. Patrons' Mill Co., 21 Kan. 61.

Missouri. Central Plank Road Co. v. Clemons, 16 Mo. 359.

Nevada. Ross v. Bank of Gold Hill, 20 Nev. 191, 19 Pac. 243.

New York. Trustees of Vernon Society v. Hills, 6 Cow. 23, 16 Am. Dec. 429.

Ohio. Dickason v. Grafton Sav. Bank Co., 27 Ohio Cir. Ct. R. 357.

60 Oldham v. Mt. Sterling Improvement Co., 103 Ky. 529, 20 Ky. L. Rep. 207, 45 S. W. 779.

61 Ginrich v. Patrons' Mills Co., 21 Kan. 61.

62 Chandler v. Northern Cross R. Co., 18 Ill. 190.

63 Chandler v. Northern Cross R. Co., 18 Ill. 190.

64 Atherton v. Sugar Creek & P. Turnpike Co., 67 Ind. 334.

65 See §§ 586-588, supra.

66 See § 586, supra.

67 As a failure to comply with a statutory provision requiring it to fix and limit the amount of its capital stock at the first meeting. City Hotel in Worcester v. Dickinson, 6 Gray (Mass.) 586.

or in the general law, or for nonuser of its franchises, or for misuser or abuse thereof by engaging in ultra vires acts, and while a stockholder may sue to enjoin ultra vires acts, it is well settled that neither noncompliance by a corporation with conditions subsequent in its charter nor the general law, nor ultra vires acts, can be relied upon by a stockholder as a discharge from liability on his subscription,⁶⁸ unless by express legislative provision such noncompliance or abuse on the part of the corporation ipso facto terminates its corporate existence, so that there is no longer any corporation to enforce the subscription.⁶⁹

68 Alabama. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

Arkansas. *Mississippi, O. & R. River R. Co. v. Cross*, 20 Ark. 443; *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204; *Ex parte Booker*, 18 Ark. 338.

Connecticut. *Naugatuck Water Co. v. Nichols*, 58 Conn. 403, 8 L. R. A. 637, 20 Atl. 315.

Georgia. *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350; *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

Illinois. *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *People v. Board Sup'rs Logan Co.*, 63 Ill. 374; *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

Indiana. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Thornburgh v. New-castle & D. R. Co.*, 14 Ind. 499; *Hornaday v. Indiana & I. Cent. Ry. Co.*, 9 Ind. 263.

Iowa. *Goff v. Hawkeye Pump & Windmill Co.*, 62 Iowa 691, 18 N. W. 307; *Merrill v. Reaver*, 50 Iowa 404; *Courtright v. Deeds*, 37 Iowa 503.

Louisiana. *First Municipality City of New Orleans v. Orleans Theatre Co.*, 2 Rob. 209.

Maine. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

Maryland. *Musgrave v. Morrison*, 54 Md. 161; *Taggart v. Western Mary-*

land R. Co., 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. *City Hotel in Worcester v. Dickinson*, 6 Gray 586.

Michigan. *Toledo & A. A. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492.

Missouri. *McDermott v. Donegan*, 44 Mo. 85; *Hannibal, R. C. & P. Plank Road Co. v. Menefee*, 25 Mo. 547; *Central Plank Road Co. v. Clemens*, 16 Mo. 359.

New York. *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *Troy & R. R. Co. v. Kerr*, 17 Barb. 581.

Ohio. *Voorhees v. Bank of Circleville*, 19 Ohio 463.

Pennsylvania. *Hanover Junction & S. R. Co. v. Haldeman*, 82 Pa. St. 36.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Vermont. *Connecticut & Passumpsic Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

But see *Macedon & B. Plank Road Co. v. Lapham*, 18 Barb. (N. Y.) 312, where subscribers to the stock of a plank road company were held to be released by an unauthorized extension of the road and an unauthorized increase of stock.

⁶⁹ *Sodus Bay & C. R. Co. v. Lapham*,

If for such a cause the charter of the corporation is subject to forfeiture, it is exclusively a question between the state and the corporation, and if the state sees fit to waive the forfeiture, no one else can take advantage of it.⁷⁰ Thus, a subscriber is not discharged from liability by failure of a corporation to comply with a statutory provision that its capital stock shall be paid within two years after incorporation, and that, for breach of such condition, it shall be dissolved;⁷¹ or that its corporate existence shall cease unless it is properly organized within a specified time;⁷² or by failure of a railroad company to comply with a charter requirement that it shall expend a certain amount in the construction of its road within a certain time, or forfeit its charter; or that it shall commence the construction of its road within a certain time;⁷³ or by reason of the fact that in constructing its line it departs from the route prescribed by its charter;⁷⁴ or that it changes its terminus or its principal office;⁷⁵ or by failure

43 Hun (N. Y.) 314; *Greencastle & M. L. Turnpike & Plank Road Co. v. Davidson*, 39 Pa. St. 435; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Bywaters v. Paris & G. N. Ry. Co.*, 73 Tex. 624, 11 S. W. 856.

Where a charter has become void and the corporation has ceased to exist by reason of noncompliance with a condition subsequent, so that subscriptions are discharged, they cannot be afterwards revived and rendered binding by an act of the legislature without the subscribers' consent. *Greencastle & M. L. Turnpike & Plank Road Co. v. Davidson*, 39 Pa. St. 435.

As to when such noncompliance or abuse ipso facto terminates the corporate existence, see the chapter on Forfeiture, Dissolution, etc., *infra*.

Even in such a case, a court of equity could enforce payment of subscriptions for the benefit of creditors. See the chapter on Stock and Stockholders, *infra*.

⁷⁰ *Musgrave v. Morrison*, 54 Md. 161; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, and

other cases in note 4, *supra*. See also *Lehman, Durr & Co. v. Warner*, 61 Ala. 455.

For a full discussion of this question, see the chapter on Forfeiture, Dissolution, etc., *infra*.

⁷¹ *Musgrave v. Morrison*, 54 Md. 161.

⁷² *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

⁷³ *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Hanover Junction & S. R. Co. v. E. Haldeman & Co.*, 2 Chest. Co. Rep. (Pa.) 256; *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

⁷⁴ See opinion of Walker, J., in *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92.

See also *Mississippi, O. & R. R. R. Co. v. Cross*, 20 Ark. 443; *Ex parte Booker*, 18 Ark. 338; *Central Plank Road Co. v. Clemens*, 16 Mo. 359. But see *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897, construing a statute providing for the release of subscribers in case of certain changes.

⁷⁵ *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350.

of a corporation to file a certificate of organization;⁷⁶ or to perfect its organization by the election of officers;⁷⁷ or by the fact that the corporation has violated a prohibition in its charter against entering into a contract or engaging in other business before subscription or payment, or both, of the whole or a certain percentage of its capital stock;⁷⁸ or by the fact that it has issued stock as fully paid up when in fact it was not fully paid;⁷⁹ or has accepted subscriptions which it had no authority to accept;⁸⁰ or has permitted certain subscribers to pay their subscriptions in depreciated currency;⁸¹ or by the fact that it has made an ultra vires lease or conveyance of its property;⁸² or an ultra vires purchase of the property of another corporation;⁸³ or that it has issued stock in excess of the amount allowed by the statute or its charter, or illegally attempted to increase its capital

⁷⁶ *Forest Glen Brick & Tile Co. v. Gade*, 55 Ill. App. 181, appeal dismissed 158 Ill. 39, 42 N. E. 65, aff'd 165 Ill. 367, 46 N. E. 286.

⁷⁷ *Oregon Cent. R. Co. v. Scoggins*, 3 Ore. 161.

⁷⁸ *Naugatuck Water Co. v. Nichols*, 58 Conn. 403, 8 L. R. A. 637, 20 Atl. 315; *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29; *McDermott v. Donegan*, 44 Mo. 85.

A charter or statutory requirement that a certain percentage of the cost shall be subscribed before a railroad company shall commence the construction of any section of its road does not affect the organization of the company, and noncompliance therewith is no defense in an action to collect assessments on subscriptions. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

Bonds given in payment for the capital stock of an insurance company, on which the company issued certificates of stock and engaged in business, will not be relieved against in equity because the capital stock was not in good faith paid in, and the company violated the express provisions of its charter in embarking in business. *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480, 64 Am. Dec. 467.

⁷⁹ Where he knows on what basis the stock has been subscribed and paid for, and himself subscribes and pays on the same basis. *Goff v. Hawk-eye Pump & Windmill Co.*, 62 Iowa 691, 18 N. W. 307.

⁸⁰ *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

⁸¹ *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

⁸² *Illinois Midland Ry. Co. v. Town of Barnett*, 85 Ill. 313; *Hays v. Ottawa, O. & F. R. Val. R. Co.*, 61 Ill. 422; *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

That the company has exceeded its powers by giving a perpetual lease of its property instead of one for years. *People v. Board Sup'rs Logan Co.*, 63 Ill. 374, 387.

That the corporation has sold its business is no defense to a claim for a valid call made before such sale. *Plate Glass Universal Ins. Co. v. Sunley*, 8 El. & Bl. 47, 120 Eng. Reprint 18. Nor is the fact that a railroad company has made an ultra vires sale and transfer of its powers to another company. *Ottawa, O. & F. R. Val. R. Co. v. Black*, 79 Ill. 262.

⁸³ Purchase by a railroad company of certain other railroads. *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313.

stock since the subscription, the increase being void;⁸⁴ or illegally issued bonds;⁸⁵ or preferred stock;⁸⁶ or purchased stock in another corporation and an expensive building beyond its means;⁸⁷ or engaged in a business not authorized by its charter;⁸⁸ or engaged in an illegal business by joining a trust, or otherwise;⁸⁹ or has placed its entire business and management in the hands of other companies and has thereby defeated competition, in violation of its charter;⁹⁰ or has made an allowance to a certain person upon his retirement.⁹¹

The pendency of quo warranto proceedings to test the right of the persons claiming to compose a corporation to exercise the corporate franchises is no defense to an application for mandamus to compel a county to subscribe to its stock in pursuance of a statutory provision requiring it to do so, although it may be ground for staying such proceeding.⁹²

§ 654. Nonuser or abandonment of enterprise. Upon the principle stated in the preceding section, mere nonuser of its franchises by a corporation, although it may be such as to render its charter liable to forfeiture in proceedings by the state, cannot be set up by a subscriber as a discharge from liability on his subscription. There cannot be a shadow of doubt as to the soundness of this proposition

⁸⁴ *Merrill v. Reaver*, 50 Iowa 404; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

. Compare *Merrill v. Gamble*, 46 Iowa 615, holding that the fact that the company had issued stock greatly in excess of the amount permitted by its charter was a good defense, where certificates for the illegal stock had been issued and were beyond the control of the company, and the illegal stock could not be distinguished from the legal, so that the company could not issue legal stock to the defendant.

That subscriptions to stock are upon the implied condition that the corporation has power to issue the stock subscribed for, see § 589, *supra*.

That an unauthorized increase of stock is void and persons subscribing thereto are not bound by their subscriptions, see § 568, *supra*.

⁸⁵ *Merrill v. Reaver*, 50 Iowa 404.

⁸⁶ *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350.

⁸⁷ *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220.

⁸⁸ *Bunn v. Farmers' Warehouse Co.*, — Ga. App. —, 90 S. E. 78.

⁸⁹ *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350; *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729.

⁹⁰ *Russell v. Alabama Midland Ry. Co.*, 94 Ga. 510, 20 S. E. 350.

⁹¹ *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416.

⁹² *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354.

where there are creditors to be paid. And it is equally well settled that it applies as between the subscriber and the corporation.⁹³

The adoption by a corporation of a resolution to discontinue business will not deprive it of the right to recover unpaid subscriptions;⁹⁴ nor will the fact that at the time of the trial it is not actively engaged in the business for which it was organized.⁹⁵

A subscriber is not released because the corporation has become insolvent,⁹⁶ or has been placed in the hands of a receiver,⁹⁷ or has been discharged in bankruptcy proceedings and has since held no meetings and has ceased to do business.⁹⁸

Nor is it a defense to an action on a subscription to the stock of a railroad company that its road has been seized by the governor, where its charter has not been forfeited, especially where the seizure takes place after such action is brought.⁹⁹

Nor is a subscriber discharged by delay on the part of the corporation in constructing its works or otherwise carrying out its objects, where there has been no abandonment of the enterprise;¹ or by the

⁹³ *Arkansas. Mississippi, O. & R. River R. Co. v. Cross*, 20 Ark. 443; *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

Kentucky. McMillan v. Maysville & L. R. Co., 15 B. Mon. 218, 61 Am. Dec. 181.

Missouri. Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828.

Ohio. Gibson v. Columbia & N. R. Turnpike & Bridge Co., 18 Ohio St. 396.

Tennessee. Anderson v. Middle & East Tennessee Cent. R. Co., 91 Tenn. 44, 17 S. W. 803.

⁹⁴ *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

⁹⁵ *Huster v. Newkirk Creamery & Ice Co.*, 42 Okla. 440, L. R. A. 1915 A 390, 141 Pac. 790.

⁹⁶ *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Smith v. Gower*, 2 Duv. (Ky.) 17; *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353. See also *Morgan County v. Thomas*, 76 Ill. 120.

That it has been compelled by financial embarrassment to suspend business will not relieve subscribers of their liability to creditors. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Nor will the fact that it has become insolvent and abandoned all action under its charter. *Henry v. Vermillion & A. R. Co.*, 17 Ohio 187.

⁹⁷ *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

The receiver has the power to issue stock on payment of subscriptions, and the fact of receivership, therefore, is no defense in an action on a subscription by an assignee thereof. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

⁹⁸ *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

See also the chapter on Bankruptcy, *infra*.

⁹⁹ *Mullins v. North & South R. Co.*, 54 Ga. 580.

¹ *Iowa. First Nat. Bank v. Hurford*, 29 Iowa 579.

Kentucky. McMillan v. Maysville

fact that the corporation has temporarily abandoned the enterprise,² or permanently abandoned a part of it.³ So the failure of a railroad company to complete its road, or the nonuser or abandonment of a part of it, constitutes no defense to an action on a subscription to its stock, unless such failure or nonuser violates some condition to that effect expressed in the subscription.⁴

It has been held that the sale of a railroad on foreclosure of a mortgage thereon does not discharge subscribers.⁵ But it is sometimes provided by statute that it shall do so where the purchasers form a new corporation to operate the road, in the absence of an agreement to the contrary with the subscriber.⁶

& L. R. Co., 15 B. Mon. 218, 61 Am. Dec. 181.

Missouri. Pickering v. Templeton, 2 Mo. App. 424.

Ohio. Gibson v. Columbia & N. R. Turnpike & Bridge Co., 18 Ohio St. 396.

Pennsylvania. Miller v. Pittsburgh & C. R. Co., 40 Pa. St. 237, 80 Am. Dec. 570.

It is no defense that the corporate enterprise is not being pushed or that it has been unduly delayed. Oldham v. Mt. Sterling Improvement Co., 103 Ky. 529, 20 Ky. L. Rep. 207, 45 S. W. 779.

²McMillan v. Maysville & L. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

A temporary partial abandonment will not discharge a subscriber. Dallas Cotton & Woolen Mills v. Clancey, — Tex. Civ. App. —, 15 S. W. 194.

A sale of the corporate property and a suspension of business activity for the time being will not discharge the subscriber, where there is no showing that there has been a total and final abandonment of the enterprise, and it does not appear but that the company may resume business upon payment of the unpaid subscriptions. Milwaukee Smelting & Refining Co. v. Lindenberger, 142 Wis. 273, 124 N. W. 272.

A temporary injunction against pro-

ceeding with its works is no defense in an action on a subscription. Crossman v. Penrose Ferry Bridge Co., 26 Pa. St. 69.

³Florida. Dorman v. Jacksonville & A. Plank-Road Co., 7 Fla. 265.

Louisiana. Vicksburg, S. & T. R. Co. v. McKean, 12 La. Ann. 638.

New York. Buffalo & Jamestown R. Co. v. Gifford, 87 N. Y. 294.

Ohio. Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

Texas. Dallas Cotton & Woolen Mills v. Clancey (Tex. App.), 15 S. W. 194.

⁴Smith v. Gower, 2 Duv. (Ky.) 17; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

A subscriber is not discharged because the company has stopped the construction of its line at a point twelve miles short of the terminus named in its articles, where there is no proof that the rest of the line has been permanently or formally abandoned, or that the company has taken any action which will disable it from completing the road. Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294, aff'g 22 Hun (N. Y.) 359.

⁵Smith v. Gower, 2 Duv. (Ky.) 17; Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294, aff'g 22 Hun (N. Y.) 359.

⁶Board Com'rs Hamilton Co. v. State, 115 Ind. 64, 17 N. E. 855.

In the above case such a provision

Even a permanent abandonment or failure of the enterprise will not discharge a subscriber where payment of his subscription is necessary for the satisfaction of debts of the corporation, or for adjustment as between the stockholders.⁷ But a permanent abandonment or total failure will operate as a discharge as between the subscriber and the corporation, where there are no debts, nor any question as to the rights of the different stockholders.⁸ And, similarly, a dis-

was held applicable to a subscription by a quasi municipal corporation pursuant to authority conferred by a subsequent statute.

7 Illinois. *Dill v. Wabash Valley R. Co.*, 21 Ill. 91.

Indiana. *Bish v. Bradford*, 17 Ind. 490; *Hardy v. Merriweather*, 14 Ind. 203.

Kentucky. *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. 218, 61 Am. Dec. 181.

Missouri. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286.

New York. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Troy & R. R. Co. v. Kerr*, 17 Barb. 581.

Ohio. *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St. 208; *Henry v. Vermillion & A. R. Co.*, 17 Ohio St. 187.

Creditors may rely upon subscriptions for the payment of their claims though the company may have abandoned all proceedings under its charter on account of its insolvency. *Morgan County v. Thomas*, 76 Ill. 120.

Subscribers for stock in a railroad company are not released from liability by the facts that the company has suspended operations upon the road, and that it will require a large additional expenditure of labor and money to complete its construction, or even by the fact that the means of the company are wholly inadequate to accomplish its object. *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; *Anderson v. Middle & East Tennessee Cent. R. Co.*, 91 Tenn. 44, 17 S. W. 803.

⁸ *Blake v. Brown*, 80 Iowa 277, 45 N. W. 751; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *Delaware River & L. R. Co. v. Rowland (Pa.)*, 9 Atl. 929.

If the corporation delays for a long time under such circumstances as to lead subscribers to believe that it has abandoned the work, and they act upon such belief, they are discharged as between them and the corporation. *United States Wind-Engine & Pump Co. v. Davis*, 2 Kan. App. 611, 42 Pac. 590; *Fountain Ferry Turnpike-Road Co. v. Jewell*, 8 B. Mon. (Ky.) 140; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770.

Subscribers are discharged by abandonment of the object of the corporation and reorganization without their consent. *Bank of China, Japan & The Straits v. Morse*, 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

Nonconsenting subscribers to the stock of a railroad company are discharged where the company, without authority, sells the road and discontinues the railroad business. *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230.

Subscribers for stock in a railroad company are not discharged by a sale of all its property to another company, where the sale is rescinded. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

To discharge the subscribers it must

solution of the corporation which results in the termination of its legal existence will discharge subscribers from further liability except as to creditors,⁹ but the subscription may still be enforced for the benefit of the latter.¹⁰

§ 655. Delay in making calls. Lapse of time without making calls upon subscriptions does not operate to discharge a subscriber from liability on his subscription,¹¹ unless it is sufficient to show an abandonment of the enterprise,¹² or to bring the case within the statute of limitations,¹³ for "lapse of time, not amounting to the bar of limitations, is not a defense to an action at law."¹⁴

§ 656. Statute of limitations. In the absence of a special charter or statutory provision, an action on a subscription for stock, not under seal, is within the statute limiting the time for commencing actions upon contracts express or implied.¹⁵

appear that the project has been abandoned, and that the money is not required for the purpose of discharging indebtedness. A mere allegation, admitted by demurrer, that the subscriber believes that it has been abandoned is not sufficient. *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237.

Whether there has been an abandonment is a question for the jury. *Delaware River & L. R. Co. v. Rowland (Pa.)*, 9 Atl. 929.

⁹ *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

The subscriber may show that the corporation has ceased to exist since the subscription was made, but he must allege in his answer facts showing how this came about, and has the burden of proving such facts. *Ft. Wayne & B. Turnpike Co. v. Deam*, 10 Ind. 563.

See chapter on Stock and Stockholders, *infra*.

¹⁰ The rights of corporate creditors and the liability of the stockholders in respect to the payment of the creditors are not affected by a judgment of ouster in quo warranto proceedings. *Rowland v. Meader Furniture Co.*, 38

Ohio St. 269; *Gaff v. Flesher*, 33 *Ohio St.* 107.

¹¹ *Union Sav. Bank of San José v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

When an assessment to pay debts has been made, subscribers cannot object that the corporate duty in this regard had not been earlier discharged. *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

¹² See § 654, *supra*.

¹³ See § 656, *infra*.

¹⁴ *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

¹⁵ *Arkansas*. *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

Georgia. *Georgia Manufacturing & Paper Mill Co. v. Amis*, 53 Ga. 228.

Iowa. See *First Nat. Bank v. Greene*, 64 Iowa 445, 20 N. W. 754, 17 N. W. 86.

Ohio. *Bauman v. Kiskadden*, — *Ohio St.* —, 113 N. E. 588.

South Carolina. *South Carolina Mfg. Co. v. Bank of State*, 6 Rich. Eq. 227.

The statute necessarily commences to run, in the absence of special circumstances, as soon as the right to maintain an action accrues, and not before. If a subscription is payable immediately, without any necessity for a call, or if it is payable on a day certain, the statute begins to run at once, or from the day when it becomes payable, as the case may be.¹⁶ And if it is payable on the performance of certain conditions, the statute commences to run when the conditions are performed and not until they are performed.¹⁷

On the other hand, when a subscription is only payable upon a call

Washington. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

Where the subscription is made by signing articles of association containing an express promise by the subscribers to pay the amounts set opposite their names, the contract is wholly in writing, and the statute governing contracts wholly in writing rather than governing contracts partially in writing and partially in parol, applies. *Falmouth & L. Turnpike Co. v. Shawhan*, 107 Ind. 47, 5 N. E. 408.

The relation of the stockholder who has not paid for his stock, to the corporation or its creditors, is that of debtor. The unpaid subscription is not a trust for the benefit of creditors so as to make the statute inapplicable. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271; *Springer v. Schultz*, 105 Ill. App. 544, aff'd 205 Ill. 144.

Though a subscriber successfully defends an action to recover calls on the ground of limitations, he cannot compel the corporation to issue certificates of stock to him unless he pays such calls. *Johnson v. Albany & S. R. Co.*, 54 N. Y. 416, 13 Am. Rep. 607, aff'g 5 Laus. (N. Y.) 222, which rev'd 40 How. Pr. (N. Y.) 193.

¹⁶ **United States.** See *Wyman v. Bowman*, 127 Fed. 257.

Alabama. *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611; *Curry v. Woodward*, 53 Ala. 371.

Kansas. *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Maryland. *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641; *Williams v. Waters*, 97 Md. 113, 54 Atl. 767.

New Jersey. *Kruse v. Hudson County Consumers Brewing Co.*, 79 N. J. Eq. 392, 82 Atl. 104.

Pennsylvania. See *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799; *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941; *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 23 Atl. 53.

Virginia. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

Washington. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

Where the subscription is payable in fixed monthly instalments, the statute begins to run against them as they severally mature. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691.

¹⁷ When a note given for the amount of a subscription to stock in a railroad company is payable when the board of directors decide that the road has been completed to a certain point and publish notice of that fact, the statute does not commence to run until these conditions have been performed. *Garnier v. Hall*, 122 Ala. 221, 25 So. 187, 114 Ala. 166, 21 So. 835.

or assessment by the directors of the corporation, a call or assessment is necessary before the corporation can maintain any action against the subscriber.¹⁸ And it is therefore generally held that, in such a case, the statute of limitations does not commence to run until a valid call or assessment is made, and it then runs against that call or assessment only.¹⁹

¹⁸ See § 669, *infra*.

¹⁹ **United States.** Glenn v. Marbury, 145 U. S. 499, 36 L. Ed. 790; Glenn v. Liggett, 135 U. S. 533, 34 L. Ed. 262; Hawkins v. Glenn, 131 U. S. 319, 33 L. Ed. 184; Brown v. Allebach, 166 Fed. 488; Bausman v. Denny, 73 Fed. 69; Dorsheimer v. Glenn, 51 Fed. 404, *aff'g* 48 Fed. 19, 47 Fed. 472; Priest v. Glenn, 51 Fed. 400, *aff'g* 48 Fed. 19, 47 Fed. 472; Liggett v. Glenn, 51 Fed. 381, *rev'g* on other grounds 47 Fed. 472; Glenn v. McAllister's Ex'rs, 46 Fed. 883; Glenn v. Foote, 36 Fed. 824; Glenn v. Macon, 32 Fed. 7; Glenn v. Soule, 22 Fed. 417. See also Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Wyman v. Bowman, 127 Fed. 257.

Alabama. Harris v. Gateway Land Co., 128 Ala. 652, 29 So. 611; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; Lehman, Durr & Co. v. Glenn, 87 Ala. 618, 6 So. 44; Glenn v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Curry v. Woodward, 53 Ala. 371.

California. Union Sav. Bank of San José v. Leiter, 145 Cal. 696, 79 Pac. 441; Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Harmon v. Page, 62 Cal. 448.

Connecticut. See Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 51 (where the same rule was applied to a subscription to a guaranty fund payable upon assessment).

District of Columbia. Glenn v. Sothoron, 4 App. Cas. 125.

Georgia. Howard v. Glenn, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E.

610; Glenn v. Howard, 81 Ga. 383, 12 Am. St. Rep. 318, 8 S. E. 636; Cherry v. Lamar, 58 Ga. 541.

Illinois. Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214, *rev'g* 23 Ill. App. 72; Great Western Tel. Co. v. Barker, 56 Ill. App. 402, *aff'd* 166 Ill. 150, 46 N. E. 1153.

Kansas. West v. Topeka Sav. Bank, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Kentucky. Otter View Land Co.'s Receiver v. Bolling's Ex'x, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Maryland. Glenn v. Williams, 60 Md. 93; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Baltimore & H. de G. Turnpike Co. v. Barnes, 6 Har. & J. 57.

Missouri. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

Nebraska. Fitzgerald's Estate v. Union Sav. Bank, 65 Neb. 97, 90 N. W. 994.

Nevada. Thompson v. Reno Sav. Bank, 19 Nev. 171, 3 Am. St. Rep. 881, 7 Pac. 870.

New Jersey. McCarter v. Ketcham, 72 N. J. L. 247, 62 Atl. 693.

New York. Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288, *rev'g* 41 Hun 545.

North Carolina. Western Ry. Co. v. Avery, 64 N. C. 491.

Ohio. Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84; Kilbreath v. Gaylord, 34 Ohio St. 305; Gibson v. Columbia & N. R. Turnpike & Bridge Co., 18 Ohio St. 396.

Pennsylvania. Cook v. Carpenter, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723,

“Until such call, there is no obligation on the stockholder to pay. It may never be made. If the enterprise is successful and profitable from the start, or the provision for capital has been larger than actual needs require, the duty of payment is only a reserve duty for possible contingencies, and until they happen, either by calls by the corporation on the subscriptions, or by the rights of creditors, there is no duty of the subscriber to pay, no right of action against him for non-payment, and no starting point for the statute of limitations.”²⁰

The same rule applies where a note given for the amount of a subscription is payable only on call,²¹ or where it is sought to hold

61 Atl. 799; *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *Sinkler v. Turnpike Co.*, 3 Penr. & W. 149. See also *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941.

Tennessee. *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Marr v. Bank of West Tennessee*, 4 Lea 578; *Moses v. Ocoll Bank*, 1 Lea 398.

Vermont. *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

Virginia. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Lewis' Adm'r v. Glenn*, 84 Va. 947. See also *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

Washington. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

Canada. *In re Haggert Bros. Mfg. Co.*, 19 App. R. Ont. 582.

The liability is contingent until the call is made. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

“Each call is a separate cause of action, and the statutes run against it from its date only, not from the date of prior calls.” *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994. See also *Baltimore & H. de G. Turnpike Co. v. Barnes*, 6 Har. & J. (Md.) 57.

It is for the amount of the assess-

ment made that the right of action accrues. *Glenn v. Williams*, 60 Md. 93.

The adoption of a resolution levying an assessment, which is subsequently vacated, no part of the assessment being paid, does not start the running of the statute as to valid assessments, thereafter levied. *Union Sav. Bank of San José v. Leiter*, 145 Cal. 696, 79 Pac. 441.

In *Snydacker v. Swan Land & Cattle Co.*, 154 Ill. 220, 40 N. E. 466, rev'g 51 Ill. App. 211, it is held that a claim against a decedent's estate is barred, except as to property not inventoried or accounted for, unless exhibited within two years after the grant of letters, though the call is not made until after that time.

²⁰ *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799. And see, to the same effect, *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Glenn v. Williams*, 60 Md. 93; *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

As to the purpose and effect of calls generally, see § 670, *infra*.

²¹ *Kilbreath v. Gaylord*, 34 Ohio St. 305.

A note given to a corporation in payment of stock is not a demand note where it is “payable in such instalments and at such time or times as the

the original subscriber liable for the unpaid portion of his subscription after he has assigned his stock.²²

According to the better opinion, it is not necessary that calls be made within the period fixed by the statute for commencing actions on subscriptions.²³

There are some cases, however, which apparently hold that the call must be made within a reasonable time after the subscription contract is entered into, and that the action is barred if it is not made until after the statute has run,²⁴ this on the theory that the corporation

directors may require, notice thereof being published agreeably to the charter," which requires thirty days' publication in a newspaper, and the statute of limitations against an action thereon does not begin to run from its date. *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

²² Under such circumstances, the statute begins to run from the date when the call matures and not from the date of the assignment. *Priest v. Glenn*, 51 Fed. 400, aff'g 48 Fed. 19, 47 Fed. 472.

²³ *Brown v. Allebach*, 166 Fed. 488.

The statute does not commence to run from the time when a call becomes possible. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

See *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760, where it is held that delay in making calls, not amounting to the bar of limitations, will not bar an action to recover the amount thereof.

It is not necessary that calls be made within six years from the date when a subscription is made in order that the right to maintain suit on the subscription may exist, where the instalments become payable only as calls therefor are made by the corporation. *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799. See also the following note.

²⁴ *Great Western Tel. Co. v. Purdy*,

83 Iowa 430, 50 N. W. 45, aff'd on other grounds 162 U. S. 329, 40 L. Ed. 986, apparently adopts the rule stated in the text as a general one applicable in all cases, but it is to be noted that the action was brought in 1889 by a receiver appointed in 1874 pursuant to a decree ordering an assessment which was entered in 1886. The limitation was ten years, and since the action was evidently brought more than ten years after the appointment of the receiver, the case might be distinguished as being merely an application of the rule, obtaining in a number of jurisdictions that where the corporation becomes insolvent and ceases to be a going concern, as where a receiver is appointed or an assignment made, the creditors' right of action accrues and the statute begins to run immediately, though no call has been made. See also *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653, 44 N. W. 797.

For statements and applications of the rule where the corporation is insolvent, see *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252; *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941.

In *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941, the court, in the course of its opinion, says: "Whether there is a third rule that, if demand is neces-

has the power, at any time, to acquire the right to maintain an action upon the subscription by making the required demand or giving the required notice, and that the law will not permit a party, by his own inaction, to defeat the running of the statute.²⁵

sary, it must be made within six years from the contract, has been both affirmed and denied in our cases, which are much at variance on the question. It was asserted in *La Forge v. Jayne*, 9 Pa. St. 410, and expressly held in *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. St. 77, and *Franklin Sav. Bank v. Bridges*, 20 Wkly. Notes Cas. (Pa.) 43, 8 Atl. 611. On the other hand, it was denied generally in *Taylor v. Whitman*, 3 Grant (Pa.) 138, and expressly rejected in *Girard Bank v. Bank of Penn Tp.*, 39 Pa. St. 92, 80 Am. Dec. 507; *Smith v. Bell*, 107 Pa. St. 352, and other cases, on the distinction, however, between obligations for the simple payment of money and deposits and bailments, a distinction now well established. It was on this distinction that the case of *La Forge v. Jayne*, 9 Pa. St. 410, was said to be overruled in *In re Finkbone's Appeal*, 86 Pa. St. 368." The court then expressly refuses to decide the question on the ground that it is not necessarily involved.

In *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799, the court quotes a part of the above extract from the opinion in *Swearingen v. Sewickley Dairy Co.*, supra, and, after reviewing the cases there cited and some others, holds that it is not necessary that the call be made within six years from the date of the subscription. In respect to the Pennsylvania cases holding the contrary, it says: "We conclude * * * that

Pittsburgh & C. R. Co. v. Byers, 32 Pa. St. 22, 72 Am. Dec. 770; *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25; *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. St. 77, and the cases which have followed them, are not authorities for a general rule in cases of subscriptions to corporate stock, but must be sustained, if at all, as exceptions, resting on their own peculiar facts of abandonment of the corporate enterprise, which released the subscriber's contract to pay further."

In *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770, and *McCully v. Pittsburgh & C. R. Co.*, 32 Pa. St. 25, it is held that, under its charter, a railroad company was bound, from an analogy to the statute of limitations, to call in payments on stock subscriptions within six years from their date, and that if it did not do so and the delay was not satisfactorily accounted for, the subscribers would be at liberty, after that lapse of time, to consider the enterprise abandoned and their subscriptions canceled.

See also *Allibone v. Hager*, 46 Pa. St. 48; *Shackamaxon Bank v. Dougherty*, 4 Pa. Co. Ct. 201, 20 Wkly. Notes Cas. (Pa.) 297.

In *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221, it is said that even if the call must have been made within a reasonable time, "it would be incumbent on the defendant to show, as a matter of fact, when such reasonable time expired, or to show a state of facts upon which the law would assume a limit to such reasonable time."

²⁵ *Great Western Tel. Co. v. Purdy*,

Refusal to pay a call starts the running of limitations as to that call,²⁶ but since each call creates a distinct liability against the stockholders, a refusal to pay one call does not set the statute running against the liability for the portion of the stock remaining uncalled for.²⁷

As in the case of other debts, the statute does not run while the subscriber resides out of the state, so that no action can be maintained against him.²⁸ The running of the statute is, of course, arrested by payment,²⁹ or by the commencement of an action to recover the amount due;³⁰ but the filing of a creditor's bill against the corporation will not arrest the running of limitations where, under the statute, it is not a suit against the stockholders to recover their unpaid subscriptions, nor will the entry of a decree by the chancery court calling for the payment of the amount remaining unpaid on the subscriptions and appointing a receiver with full power to sue for and recover the same, where under the statute the chancery court has no power to pass a final decree which will bind the stockholders, but their liability can only be determined in an action at law.³¹ Nor is the running of the statute interrupted as to existing creditors by an amendment of the charter making stock on which fifty per cent. had been paid, paid up and nonassessable as to debts and liabilities contracted after such amendment.³²

A judgment that an action to recover an assessment is barred by the statute of limitations is not an adjudication that the right to recover a subsequent assessment is also barred.³³

In some jurisdictions it has been held that, regardless of the statute of limitations, the right to enforce the subscription may be barred by prescription, or, in other words, by a presumption of payment arising

83 Iowa 430, 50 N. W. 45, *aff'd* on other grounds 162 U. S. 329, 40 L. Ed. 986.

²⁶ *Dorsheimer v. Glenn*, 51 Fed. 404, *aff'g* 48 Fed. 19, 47 Fed. 472.

²⁷ *Dorsheimer v. Glenn*, 51 Fed. 404, *aff'g* 48 Fed. 19, 47 Fed. 472.

²⁸ *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653, 44 N. W. 797; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

²⁹ *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691.

³⁰ *Liggett v. Glenn*, 51 Fed. 381, *rev'g* on other grounds 47 Fed. 472;

Hawkins v. Donnerberg, 40 Ore. 97, 66 Pac. 691; *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177.

An action is deemed commenced within the meaning of this rule when the defendant is served with process or voluntarily appears. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691.

³¹ *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641; *Williams v. Watters*, 97 Md. 113, 54 Atl. 767.

³² *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641.

³³ *Priest v. Glenn*, 51 Fed. 405, *aff'g* 48 Fed. 19, 47 Fed. 472.

from lapse of time, and that such a defense is sustained by proof that more than twenty years have elapsed without any recognition by the subscriber of liability on his part.³⁴ Under this rule, nothing short of a recognition of right or admission of liability or the institution of legal proceedings against the stockholder sought to be charged, within twenty years, will prevent the presumption of payment from becoming absolute.³⁵

Questions relating to the statute of limitations, including the question at what time the cause of action accrues, are governed by the *lex fori*, and are to be determined in accordance with the legislation of the state where the action is brought, as construed by its highest courts.³⁶

Where the right of action is deemed to accrue on refusal to pay the call, the statute of limitations in force on the date of such refusal is applicable rather than the one in force on the date of the subscription.³⁷

The effect of the statute of limitations as against the right of creditors, or of a receiver or assignee, to enforce payment of subscriptions, will be considered in a subsequent chapter.³⁸

VI. REMEDIES OF CORPORATION AGAINST SUBSCRIBERS

§ 657. Actions on subscriptions—In general. In all jurisdictions, a corporation may maintain an action of assumpsit to recover the amount of an unpaid and due subscription, or of an assessment or call thereon, if there is an express promise to pay the same, either

³⁴ *Sample v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

³⁵ *Sample v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

³⁶ *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g 83 Iowa 430, 50 N. W. 45.

When the action accrues is not a federal question, but a local question. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g 83 Iowa 430, 50 N. W. 45.

In *Brown v. Allebach*, 166 Fed. 488, it is said that the law of the forum determines the time within which the action must be brought, but that it is not so well settled what law gov-

erns in determining the time when the cause of action accrues, and attention is called to the apparent conflict in the holdings of the two supreme court cases above cited.

But in *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262, it was held that the law governing the substantive rights of the parties controlled in determining whether the liability of a subscriber became fixed, for the purposes of the statute of limitations, by the insolvency and dissolution of the corporation.

³⁷ *Macon & A. R. Co. v. Vason*, 52 Ga. 326.

³⁸ See chapter on Stock and Stockholders, *infra*.

in the subscription paper itself, or in a promissory note given by the subscriber, or otherwise.³⁹

In several of the New England states it has been held that, to sustain an action on a subscription for stock (at least when a remedy by forfeiture is given by statute),⁴⁰ there must be an express promise to pay, and that no promise will be implied, the only remedy in the case of nonpayment, in the absence of an express promise, being by forfeiture or sale of the delinquent subscriber's shares.⁴¹ But even

39 Florida. *Kirksey v. Florida & G. Plank Road Co.*, 7 Fla. 23, 68 Am. Dec. 426; *Barbee v. Jacksonville & A. Plank Road Co.*, 6 Fla. 262.

Illinois. *Klein v. Alton & S. R. Co.*, 13 Ill. 514.

Maine. *Skowhegan & A. R. Co. v. Kinsman*, 77 Me. 370; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Bangor Bridge Co. v. McMahon*, 10 Me. 478.

Massachusetts. *Hastings Lumber Co. v. Edwards*, 188 Mass. 587, 75 N. E. 57; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79; *Taunton & S. B. Turnpike Corporation v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124; *Andover & M. Turnpike Corporation v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *City Hotel v. Dickinson*, 6 Gray 586; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23.

Mississippi. *Smith v. Natchez Steamboat Co.*, 1 How. 479.

New Hampshire. *Shattuck v. Robins*, 68 N. H. 565, 44 Atl. 694; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *White Mountains R. R. v. Eastman*, 34 N. H. 124; *New Hampshire Cent. R. R. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

New York. *Buffalo & N. Y. Cent. R. Co. v. Dudley*, 14 N. Y. 336; *Burrows v. Smith*, 10 N. Y. 550, 566; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238, 7 Am. Dec. 459;

Goshen & M. Turnpike Road v. Hurting, 9 Johns. 217, 6 Am. Dec. 273.

Oklahoma. *Muskogee Industrial Development Co. v. Ayers*, — Okla. —, 154 Pac. 1170.

Texas. *McCord v. Southwestern Sundries Co.*, — Tex. Civ. App. —, 158 S. W. 226.

Vermont. *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

Such a promise may be enforced by motion under Va. Code, § 3211. *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

The corporation is not confined to an action for damages, in which it may recover the difference between the price agreed to be paid for the stock and its then market value, less any payments made by the subscriber. *McCord v. Southwestern Sundries Co.*, — Tex. Civ. App. —, 158 S. W. 226.

⁴⁰ See § 658, *infra*.

⁴¹ **Delaware.** *Odd Fellows' Hall Co. v. Glazier*, 5 Harr. 172.

Maine. *Belfast & M. Lake Ry. Co. v. Moore*, 60 Me. 561; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470; *Bangor Bridge Co. v. McMahon*, 10 Me. 478.

Massachusetts. *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Mechanics' Foundry & Machine Co. v. Hall*, 121 Mass. 272; *Middlesex Turnpike Corporation v. Swan*, 10 Mass. 384, 6 Am. Dec. 139; *New Bedford & B. Turnpike Corporation v. Adams*, 8

where this rule obtains, an obligation to pay created by the charter has been treated as the equivalent of an express promise.⁴² And the same has been held to be true of an agreement to "take and fill" the number of shares set opposite the subscriber's name.⁴³

Mass. 138, 5 Am. Dec. 81; Andover & M. Turnpike Corporation v. Gould, 6 Mass. 40, 4 Am. Dec. 80; City Hotel v. Dickinson, 6 Gray 586; Salem Mill Dam Corporation v. Ropes, 6 Pick. 23.

New Hampshire. White Mountains R. R. v. Eastman, 34 N. H. 124; New Hampshire Cent. R. R. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Franklin Glass Co. v. Alexander, 2 N. H. 380, 9 Am. Dec. 92. See also Littleton Mfg. Co. v. Parker, 14 N. H. 543.

Vermont. There is dictum to this effect in Connecticut & P. Rivers R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181, but it is mere dictum; and the contrary was held in Windsor Elec. Light Co. v. Tandy, 66 Vt. 248, 44 Am. St. Rep. 838, 29 Atl. 248.

In Essex Bridge Co. v. Tuttle, 2 Vt. 393, the text rule was held not to apply where there was no remedy by forfeiture, the Massachusetts and New Hampshire cases being distinguished on this ground.

"It is only where a subscriber for stock agrees to take a specified number of shares, without expressly promising to pay the amount of the same or the assessments, that he cannot be personally sued on the contract until his shares have been sold to pay the assessment." Shattuck v. Robins, 68 N. H. 565, 44 Atl. 694.

"If the contract provides for a personal liability, that liability may be enforced by an action, as in any other contract. If it contains no promise of payment, * * * the only remedy is that provided by the charter. The liability by the contract is one thing, that by the charter is another, and is separate and distinct from the former." Belfast

& M. L. R. Co. v. Moore, 60 Me. 561.

The rule is not changed by the fact that the charter renders the subscriber personally liable for any deficiency remaining after a sale of his shares. Belfast & M. L. R. Co. v. Moore, 60 Me. 561.

A statute permitting the company to sue in assumpsit in the absence of an express promise does not apply to subscriptions made before its passage, even though it is to be regarded as an amendment to the charter. Belfast & M. L. R. Co. v. Moore, 60 Me. 561.

⁴² Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764; Anglo-American Land, Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416.

A statutory provision that all moneys payable by any member in pursuance of the articles of the company shall be deemed a debt due by such member implies a promise to pay from a subscription to the shares, and obviates the necessity of proving an express promise. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764; Anglo-American Land, Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416.

Where the subscription is expressly made subject to the articles of incorporation, and the articles provide that stock shall be paid for after a certain number of shares have been subscribed, which it appears has been done, this constitutes an express promise to pay. Waukon & M. R. Co. v. Dwyer, 49 Iowa 121.

⁴³ The word "fill" imports a prom-

On the other hand, it has been held that an agreement "to take" shares is not an express promise to pay for them,⁴⁴ though there is authority to the contrary.⁴⁵

In most states, however, the courts have taken a different view of a contract of subscription, and one which is more in consonance with the manifest intention of the parties, and have held that the mere fact of a subscription for shares of stock, and its acceptance by the corporation, raise an implied promise on the part of the subscriber to pay all valid assessments, upon which the corporation may maintain an action of assumpsit.⁴⁶

ise to pay assessments, and is sufficient to support an action of assumpsit. *York & C. R. Co. v. Pratt*, 40 Me. 447; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Buckfield Branch R. Co. v. Irish*, 39 Me. 44; *Bangor Bridge Co. v. McMahon*, 10 Me. 478.

⁴⁴ *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185; *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Andover & Medford Turnpike Co. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80.

⁴⁵ A promise to "take" the shares is a promise not only to take but also to pay for them. *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457, note; *Belton Compress Co. v. Saunders*, 70 Tex. 669; *McCord v. Southwestern Sundries Co.*, — Tex. Civ. App.—, 158 S. W. 226. See also *Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs*, 21 Barb. (N. Y.) 541.

⁴⁶ *United States. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764; *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *In re Grand Rapids Furniture Co.*, 209 Fed. 483; *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

Alabama. *Planters' & Merchants'*

Independent Packet Co. v. Webb, 156 Ala. 551, 16 Ann. Cas. 529, 46 So. 977, 144 Ala. 666, 39 So. 562; *Gayle v. Cahawba & M. R. Co.*, 8 Ala. 586; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660.

Arkansas. *Snodgrass v. E. A. Zander & Co.*, 106 Ark. 462, 154 S. W. 212.

California. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Ventura & Ojai Val. Ry. Co. v. Collins* (Cal.), 46 Pac. 287; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

Connecticut. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 500.

Florida. *Kirksey v. Florida & G. Plank Road Co.*, 7 Fla. 23, 68 Am. Dec. 426.

Georgia. *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128.

Illinois. *Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Ionica & P. R. Co. v. McNeely*, 21 Ill. 71; *Tonica v. Wabash R. Co.*, 18 Ill. 88. See also *Parkhurst v. Mexican Southeastern R. Co.*, 102 Ill. App. 507.

Indiana. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

Iowa. *Nulton v. Clayton*, 54 Iowa

By the subscription, said the Kentucky court in an early case, the subscriber becomes ipso facto a member of the corporation, and the rights and immunities which attach to him in that capacity constitute a sufficient consideration to impose upon him a legal obligation to pay according to the terms upon which shares were authorized. When, therefore, the corporation has been duly organized, the directors duly elected, and they have, as authorized by the act of incorporation, prescribed that an instalment of a certain amount upon each share subscribed shall be paid by a certain day, and the subscriber has due notice thereof, he becomes legally liable to pay the amount of such instalment upon the shares held by him; and whenever there is a

425, 37 Am. Rep. 213; Waukon & M. R. Co. v. Dwyer, 49 Iowa 121.

Kansas. Crissey v. Cook, 67 Kan. 20, 72 Pac. 541; McCormick v. Great Bend Gas & Fuel Co., 48 Kan. 614, 29 Pac. 1147.

Kentucky. Instone v. Frankfort Bridge Co., 2 Bibb 576, 5 Am. Dec. 638; Mt. Sterling Coal Road Co. v. Little, 14 Bush 429; Gill's Adm'r v. Kentucky & C. Gold & Silver Min. Co., 7 Bush 635; Fry's Ex'r v. Lexington & B. S. R. Co., 2 Mete. 314.

Louisiana. Cucullu v. Union Ins. Co., 2 Rob. 573.

Maryland. Hughes v. Antietam Mfg. Co., 34 Md. 316.

Michigan. Carson v. Aretie Min. Co., 5 Mich. 288; Dexter & M. Plank Road Co. v. Millord, 3 Mich. 91.

New Jersey. American Pig Iron Storage Co. v. State Board of Assessors, 56 N. J. L. 389, 29 Atl. 160. See also Grasse Isle Hotel Co. v. I'Anson's Ex'rs, 42 N. J. L. 10, aff'd 43 N. J. L. 442.

New York. Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194, aff'g 58 App. Div. 436, 69 N. Y. Supp. 295, 68 N. Y. Supp. 141; Phoenix Warehousing Co. v. Badger, 67 N. Y. 294; Dayton v. Borst, 31 N. Y. 435; Rensselaer & W. Plank Road Co. v. Barton, 16 N. Y. 457, note; Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; Buffalo & N. Y. C. R. Co.

v. Dudley, 14 N. Y. 336; Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs, 21 Barb. 541; Rensselaer & W. Plank Road Co. v. Wetsel, 21 Barb. 56; Troy & B. R. Co. v. Tibbits, 18 Barb. 297; Spear v. Crawford, 14 Wend. 20, 28 Am. Dec. 513. See also Burrows v. Smith, 10 N. Y. 550, 566.

North Dakota. German Mercantile Co. v. Wanner, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

Oklahoma. Muskogee Industrial Development Co. v. Ayers, — Okla. —, 154 Pac. 1170.

Pennsylvania. Merrimac Min. Co. v. Levy, 54 Pa. St. 227, 93 Am. Dec. 697; Bavington v. Pittsburgh & S. R. Co., 34 Pa. St. 358.

South Carolina. Columbia Corporation v. Harrison, 2 Mill 213.

Tennessee. Chase v. East Tennessee, V. & G. R. Co., 5 Lea 415; East Tennessee & V. R. Co. v. Gammon, 5 Sneed 567; Mobile & O. R. Co. v. Yandal, 5 Sneed 294.

Texas. Belton Compress Co. v. Saunders, 70 Tex. 699, 6 S. W. 134.

Vermont. Windsor Elec. Light Co. v. Tandy, 66 Vt. 248, 44 Am. St. Rep. 838, 29 Atl. 248; Essex Bridge Co. v. Tuttle, 2 Vt. 393.

West Virginia. Kimmins v. Wilson, 8 W. Va. 584.

"The contract of subscription is an agreement to pay the unpaid part thereof from time to time as it is

legal liability, the law creates a promise upon which an action of assumpsit will lie.⁴⁷

Statutes in some states expressly provide that subscriptions to the stock of a corporation about to be formed are to be held for the benefit of the corporation when it is formed, and may be enforced by it,⁴⁸ or that the corporation may sue in courts of law for unpaid subscriptions and collect the same in the same manner and form as it might sue and recover a debt owing to it by any third person.⁴⁹

The right of action against a stockholder for the amount due on his subscription is purely a legal one.⁵⁰

The corporation may either sue for the amount of each call as it becomes due, or may wait until the whole amount has been called for and then sue for the full amount of the subscription,⁵¹ but all instalments which are due must be recovered in a single action.⁵²

called for by the board of directors.” Wyman v. Bowman, 127 Fed. 257.

“The original subscriber at common law is liable for all instalments of, or assessments on, his stock subscription, agreeably to his contract, implied from his accepting and holding the certificate of stock, even though it be not express.” Gold v. Paynter, 101 Va. 714, 44 S. E. 920.

“A subscription to stock imports a promise by the subscriber to pay the face value of the shares of stock subscribed for, in compliance with assessments lawfully made, for the recovery of which the corporation may maintain a suit at law.” American Pig Iron Storage Co. v. State Board of Assessors, 56 N. J. L. 389, 29 Atl. 160. See also Grosse Isle Hotel Co. v. I’Anson’s Ex’rs, 42 N. J. L. 10, aff’d 43 N. J. L. 442.

“The relation of stockholder and company implies a promise to pay such assessments as are legally assessed, and the common law furnishes a remedy for a violation of this engagement by action in assumpsit, or indebitatus assumpsit.” Williams v. Lowe, 4 Neb. 382, aff’d 94 U. S. 650, 24 L. Ed. 216.

This is equally true in the case of

one to whom the stock has been transferred by the original subscriber. Campbell v. American Alkali Co., 125 Fed. 207, aff’g 113 Fed. 398; Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194, aff’g 58 N. Y. App. Div. 436, 69 N. Y. Supp. 295, 68 N. Y. Supp. 141.

See also chapter on Stock and Stockholders, *infra*.

⁴⁷ Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

⁴⁸ Okla. Stat. 1893, § 942; Chicago Bldg. & Mfg. Co. v. Lyon, 10 Okla. 704, 64 Pac. 6.

⁴⁹ Mo. Rev. St. 1909, § 3003, in effect, so provides; Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828.

The action may be brought before a justice of the peace when within his jurisdiction as to the amount involved. Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828.

⁵⁰ Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828.

⁵¹ Utah Hotel Co. v. Madsen, 43 Utah 285, 134 Pac. 577.

⁵² After the last call or assessment has been made, the cause of action

A provision of the by-laws giving the corporation a lien on the stock for the amount of unpaid calls does not deprive it of its right to sue on the indebtedness.⁵³

If the grounds of liability are present, the action may be maintained by a foreign corporation in the state where the stockholder resides.⁵⁴

The right of a stockholder who has paid his subscription to sue to compel the payment of unpaid subscriptions will be considered in a subsequent chapter.⁵⁵

§ 658. — Effect of remedy by forfeiture or sale of shares. The fact that the charter of a corporation or the general law gives it a special remedy against shareholders who are delinquent in the payment of assessments, by allowing it to forfeit or sell their shares, does not, if the charter or statute is merely affirmative, prevent it from maintaining an action of assumpsit on the express or implied promise of the shareholder to pay his subscription, instead of pursuing the special remedy. In such a case, the special remedy is merely cumulative,⁵⁶

cannot be split by bringing separate actions for each instalment. *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 552.

⁵³ It does not create a mortgage within the meaning of Code Civ. Proc. § 726, so as to limit the corporation to its remedy by foreclosure, and it may enforce payment without foreclosing such lien. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

⁵⁴ See chapter on Actions by and against Corporations, *infra*.

⁵⁵ See chapter on Stock and Stockholders, *infra*.

⁵⁶ **United States.** *Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, *aff'g* 108 Fed. 764; *Rockville & W. Turnpike Road Co. v. Maxwell*, 2 Cranch C. C. 451, Fed. Cas. No. 11,985; *Campbell v. American Alkali Co.*, 125 Fed. 207, *aff'g* 113 Fed. 398.

Alabama. *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398; *Selma & T. R. Co. v. Tipton*,

5 Ala. 787, 39 Am. Dec. 344; *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70; *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660.

California. Civ. Code, § 349; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Lankershim Ranch Land & Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134.

Colorado. *Denver Chamber of Commerce & Board of Trade v. Green*, 8 Colo. App. 420, 47 Pac. 140.

Connecticut. *Mann v. Cooke*, 20 Conn. 178; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499.

District of Columbia. *Glenn v. Busey*, 5 Mackey 233.

Florida. *Kirksey v. Florida & G. Plank-Road Co.*, 7 Fla. 23, 68 Am. Dec. 426; *Barbee v. Jacksonville & A. Plank Road Co.*, 6 Fla. 262.

Georgia. *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

and the corporation may, at its election, pursue either remedy,

Illinois. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204; *Raymond v. Caton*, 24 Ill. 123 (where the contract of subscription provided for forfeiture); *Peoria & O. R. Co. v. Elting*, 17 Ill. 429; *Klein v. Alton & S. R. Co.*, 13 Ill. 514.

Iowa. *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

Kentucky. *Instone v. Frankfort Bridge Co.*, 2 Bibb 576, 5 Am. Dec. 638; *Gill's Adm'x v. Kentucky & C. Gold & Silver Min. Co.*, 7 Bush 635.

Louisiana. *New Orleans, F. & H. Steamship Co. v. Briggs*, 27 La. Ann. 318; *Mexican Gulf Ry. Co. v. Viavant*, 6 Rob. 305.

Maryland. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Murphy v. Patapsco Ins. Co.*, 6 Md. 99.

Michigan. *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466, 56 N. W. 858; *International Fair & Exposition Ass'n of Detroit v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; *Dexter & Mason Plank Road Co. v. Millerd*, 3 Mich. 91.

Mississippi. *Freeman v. Winchester*, 10 Smedes & M. 577.

Nebraska. *Williams v. Lowe*, 4 Neb. 382, aff'd 94 U. S. 650, 24 L. Ed. 216.

New York. *Rensselaer v. Washington Plank Road Co. v. Barton*, 16 N. Y. 457, note; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Small v. Herkimer Mfg. Co.*, 2 N. Y. 339; *Small v. Herkimer Manufacturing & Hydraulic Co.*, 2 N. Y. 330; *Ogdensburg, R. & C. R. Co. v. Frost*, 21 Barb. 541; *Rensselaer & W. Plank Road Co. v. Wetsel*, 21 Barb. 56; *Troy & B. R. Co. v. Tibbits*, 18

Barb. 297; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238, 7 Am. Dec. 459; *Goshen & M. Turnpike Road v. Hurtin*, 9 Johns. 217, 6 Am. Dec. 273 (distinguishing and explaining *Union Turnpike Co. v. Jenkins*, 1 Caines Cas. 381).

North Carolina. *Western Ry. Co. v. Avery*, 64 N. C. 491; *Tar River Nav. Co. v. Neal*, 3 Hawks 520.

North Dakota. *Jensen v. Northwestern Underwriters' Ass'n*, — N. D. —, 159 N. W. 611 (under the express provision of Comp. Laws 1913, § 4526).

Oklahoma. *Muskogee Industrial Development Co. v. Ayers*, — Okla. —, 154 Pac. 1170. *Oklahoma Comp. Laws* 1909, art. 6, c. 20, providing for the levying of assessments on stock, and for a forfeiture and sale thereof for nonpayment was abrogated by Const. art. 9, § 39, and hence a failure to levy assessments as therein provided will not prevent the corporation from maintaining an action to recover an unpaid subscription. *Muskogee Industrial Development Co. v. Ayers*, — Okla. —, 154 Pac. 1170.

Pennsylvania. *Delaware & S. Canal Navigation v. Sansom*, 1 Binn. 70.

South Carolina. *Northeastern R. Co. v. Rodrigues*, 10 Rich. 278; *Greenville & C. R. Co. v. Cathcart*, 4 Rich. 89; *South Carolina Mfg. Co. v. Bank of State*, 6 Rich. Eq. 227.

Tennessee. *Stokes v. Lebanon & S. Turnpike Co.*, 6 Humph. 241.

Vermont. *Windsor Elec. Light Co. v. Tandy*, 66 Vt. 248, 44 Am. St. Rep. 838, 29 Atl. 248 (overruling dictum in *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, to the effect that assumpsit would only lie where there was an express promise); *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

Virginia. *Brokenbrough v. James*

though not both.⁵⁷ As we have seen, however, in some of the states, there must be an express promise to pay the assessment in order that an action may be maintained,⁵⁸ and while in these states the existence of a remedy by forfeiture or sale will not prevent the corporation from maintaining an action of assumpsit, where there is an express promise to pay,⁵⁹ in the absence of such a promise the subscriber cannot be personally sued on the contract,⁶⁰ at least until his shares have been sold to pay the call.⁶¹

Of course the legislature has power to make the remedy by forfeiture

River & Kanawha Co., 1 Patt. & H. 94.

Washington. Puget Sound & C. R. Co. v. Ouellette, 7 Wash. 265, 34 Pac. 929.

West Virginia. See *White v. McCullagh*, 74 W. Va. 160, 81 S. E. 720.

⁵⁷ *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398; *Small v. Herkimer Manufacturing & Hydraulic Co.*, 2 N. Y. 330; *Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs*, 21 Barb. (N. Y.) 541; *N. D. Comp. Laws* 1913, § 4526; *Jensen v. Northwestern Underwriters' Ass'n*, — N. D. —, 159 N. W. 611.

⁵⁸ See § 657, *supra*.

⁵⁹ **Maine.** *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Bangor Bridge Co. v. McMahon*, 10 Me. 478.

Massachusetts. *Hastings Lumber Co. v. Edwards*, 188 Mass. 587, 75 N. E. 57; *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416; *Mechanics' Foundry & Machine Co. v. Hall*, 121 Mass. 272; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79; *Taunton & S. B. Turnpike Corporation v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124; *Andover & M. Turnpike Corporation v. Gould*, 6 Mass. 40, 4 Am. Dec.

80; *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *City Hotel v. Dickinson*, 6 Gray 586; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23.

New Hampshire. *Shattuck v. Robbins*, 68 N. H. 565, 44 Atl. 694; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *White Mountains R. R. v. Eastman*, 34 N. H. 124; *New Hampshire Cent. R. R. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92.

Oklahoma. See also *Muskogee Industrial Development Co. v. Ayers*, — Okla. —, 154 Pac. 1170.

⁶⁰ **Maine.** *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Bangor Bridge Co. v. McMahon*, 10 Me. 478.

Massachusetts. *Mechanics' Foundry & Machine Co. v. Hall*, 121 Mass. 272; *Andover & M. Turnpike Corporation v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *City Hotel v. Dickinson*, 6 Gray 586; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23.

New Hampshire. *White Mountains R. R. v. Eastman*, 34 N. H. 124; *Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92.

⁶¹ *Shattuck v. Robbins*, 68 N. H. 565, 44 Atl. 694. See also *New Hampshire Cent. R. R. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

exclusive, and hence the determination of the question must depend upon the language of the statute.⁶²

Where the charter gives the corporation either remedy, it is not obliged to notify the subscriber in advance which one it intends to pursue.⁶³

Whether or not an action can be maintained on a subscription after a sale or forfeiture of the shares for nonpayment of assessments is considered in a subsequent section.⁶⁴

§ 659. — Pleading. The complaint in an action by a corporation on a stock subscription, or to recover the amount of a call, must show the incorporation and organization of the plaintiff,⁶⁵ though as a rule it is sufficient to allege these facts generally.⁶⁶ And it must also show that the corporation is one which is authorized to have a capital stock and to take subscriptions to the same,⁶⁷ and that the defendant subscribed for the stock in question.⁶⁸

Proof of the defendant's written subscription is not necessary

⁶² Parkhurst v. Mexican Southeastern R. Co., 102 Ill. App. 507.

⁶³ New Albany & S. R. Co. v. Pickens, 5 Ind. 247.

⁶⁴ See § 665, *infra*.

⁶⁵ Banty v. Buckles, 68 Ind. 49; Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317.

⁶⁶ Henderson & N. R. Co. v. Leavell, 16 B. Mon. (Ky.) 358; Rensselaer & W. Plank Road Co. v. Barton, 16 N. Y. 457, note.

"The declaration need not specially allege a compliance with every particular circumstance relating to its organization, which is required in order to its becoming invested with the privileges and powers conferred by its charter. Although it may be necessary to prove these matters specially, the allegation may be more general." Selma & T. R. Co. v. Tip-ton, 5 Ala. 787, 39 Am. Dec. 344, quoted in Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 So. 562. And see Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48, to the same effect.

An allegation that the company was

duly incorporated is not rendered ineffectual because of a further statement, evidently made by inadvertence, that it was incorporated under a statute having no reference to the subject. Kohlmetz v. Calkins, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031.

⁶⁷ Minneapolis Harvester Works v. Libby, 24 Minn. 327. See also Duluth Club v. MacDonald, 74 Minn. 254, 73 Am. St. Rep. 344, 76 N. W. 1128.

⁶⁸ See Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317, where the allegations in this regard were held to be sufficient.

In any action by a creditor against a stockholder to recover the amount of his unpaid subscription, it is sufficient to allege that the defendant holds stock which has never been paid up. It is for him to allege any circumstances excusing him from the implied liability to make good the difference. Atlantic Trust Co. v. Osgood, 116 Fed. 1019.

Where subscribers agreed to pay the amount subscribed only in case half the cost of a certain undertaking should be equal to the amount subscribed, and if half of such cost should

where the declaration does not declare on the writing as the foundation of the action but rather on his statutory liability to pay assessments on the stock for which he has subscribed.⁶⁹

It is not necessary to allege that the defendant had authority to make the contract sued on. If he was laboring under any disability, that is a matter of defense.⁷⁰ But if only certain persons designated by the charter are authorized to receive subscriptions, it must be alleged by whom the subscription was received.⁷¹

Even if the subscription is within the statute of frauds, it need not be alleged that it was in writing, at least when the question is first raised after verdict and judgment.⁷²

Where the obligations which the subscription imposes on the subscriber are created and prescribed by the charter, they are matters of law and hence need not be stated.⁷³

The plaintiff must allege performance of conditions precedent to liability, or a readiness to perform them.⁷⁴

Some courts hold that where subscription to the full amount or a certain percentage of the capital stock,⁷⁵ or payment of a certain

be less than the amount subscribed then to pay only such amount as would equal half the cost, it was held necessary to negative the hypothesis that half of such cost was less than the amount subscribed in order to show what amount of stock the subscribers agreed to take. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

⁶⁹ *Mississippi, O. & R. River R. Co. v. Gaster*, 20 Ark. 455.

⁷⁰ Where trustees of a town have power to subscribe upon being authorized to do so by a vote of the citizens, it is not necessary to allege that they were so authorized. *Shelbyville Trustees v. Shelbyville & E. Turnpike Co.*, 1 Mete. (Ky.) 54.

⁷¹ *Corydon Steam Mill Co. v. Pell*, 4 Blackf. (Ind.) 472.

⁷² *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440.

⁷³ *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358.

⁷⁴ *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801; *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. (Ky.) 314; *Mathis v.*

Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

A general averment of performance is sufficient. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358.

⁷⁵ *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487. See *Banty v. Buckles*, 68 Ind. 49; *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. (Ky.) 314; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

The complaint in an action for specific performance of an executory contract to take stock is insufficient where it shows on its face that all of the stock has not been subscribed and contains no offer to subscribe for the remainder. *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880.

If it is alleged and admitted that at the time when the subscription was made the plaintiff was a duly organized and existing corporation, authorized to issue and receive subscriptions for stock, and to carry on business, the court is authorized to assume, on motion to direct a verdict,

percentage of the capital,⁷⁶ is essential to liability, such subscription or payment must be alleged. Others, however, take a contrary view, and hold that subscription⁷⁷ or payment⁷⁸ need not be alleged under such circumstances, but that noncompliance with such requirements is a matter of defense to be averred by the defendant if relied on. Some courts hold that no such allegation is necessary where the receiving of a certain amount of subscriptions is not expressly made a condition precedent to liability,⁷⁹ but that if there is such an express condition precedent, compliance therewith must be averred.⁸⁰

It has also been held that a complaint is not demurrable for failure to allege that the full amount has been subscribed, where it is alleged that the plaintiff is and has been during all the times mentioned in the complaint a duly-organized and existing corporation.⁸¹

that the required amount has been subscribed for and paid in, though not expressly so alleged. *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

An allegation that the entire amount required by the articles of organization was subscribed is sufficient, at least in the absence of an objection by motion for uncertainty. *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440. See also *La Crosse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225, where the allegations in this regard were held to be sufficient.

⁷⁶ *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

In *La Crosse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225, the allegations in this regard were held to be sufficient.

⁷⁷ *Myers v. Sturgis*, 123 N. Y. App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162. See also *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

If the defendant claims that his subscription was conditioned on a

certain amount being subscribed, he must plead that fact as a defense. *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

The reason for this rule is that the complete subscription to all the stock offered is not a condition precedent without which the defendant's subscription is void, though the fact that all of it has not been subscribed for may entitle him to avoid liability at his election. *Myers v. Sturgis*, 123 N. Y. App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

⁷⁸ *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

⁷⁹ That the minimum amount was not subscribed, or that some of the subscriptions were colorable only, or that some of the subscribers had been released, so that the corporation did not in fact have subscriptions for the minimum amount, should be set up by way of defense. *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

⁸⁰ *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

⁸¹ *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

In any event it is not necessary to allege that the subscriptions to the required amount were made in good faith by solvent parties, not infants or married women, but that they were not so made is matter of defense.⁸²

An allegation of payment in cash is not necessary where the statute authorizes stock to be issued in consideration of labor or services.⁸³

A general allegation of waiver of the defense that the full amount of the capital was not subscribed is good as against a general demurrer.⁸⁴

It must be alleged that a call or assessment was made,⁸⁵ and notice thereof given,⁸⁶ in the manner prescribed in the statute, charter or

⁸² *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁸³ *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

⁸⁴ It is subject to motion, however, if it does not set out the particular things done or omitted which are claimed to constitute that waiver. *McFarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

⁸⁵ *Banty v. Buckles*, 68 Ind. 49; *McClasky v. Grand Rapids & I. R. Co.*, 16 Ind. 96; *Gebhart v. Junction R. Co.*, 12 Ind. 484; *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583. See also *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

If the right to make calls depends on certain contingencies, it must be alleged that they have occurred. *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373.

An allegation that calls were "duly" made is sufficient. *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

An allegation that calls were made by the board of directors is sufficient without alleging that a board of directors was elected and qualified. *Miller v. Wild Cat Gravel Road Co.*,

52 Ind. 51, followed in *Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 457.

An allegation that the directors of the plaintiff made the "three several calls or assessments pursuant to the by-laws of said company, and pursuant to the power and authority in them vested," and for the purpose of meeting "the needs of said corporation," is sufficient. *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

An averment that "the corporation was organized," and that "the board of directors of said corporation made assessments," is a sufficient allegation of the existence of the board of directors. *Mississippi, O. & R. River R. Co. v. Gaster*, 20 Ark. 455.

As to the necessity for a call or assessment, see § 669, *infra*.

⁸⁶ *Alabama*. *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70.

Arkansas. *Mississippi, O. & R. River R. Co. v. Gaster*, 22 Ark. 361, 20 Ark. 455; *Mississippi, O. & R. River R. Co. v. Turrentine*, 21 Ark. 445; *Mississippi, O. & R. River R. Co. v. Chesnutt*, 20 Ark. 461.

Illinois. *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429.

Indiana. *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31; *Corydon Steam Mill Co. v. Pell*, 4 Blackf. 472.

by-laws. The particulars in regard to the by-laws on the subject of calls and notice and as to compliance therewith may be pleaded according to their legal effect.⁸⁷ It must also appear that the calls or assessments sought to be recovered were due and payable when the action was commenced.⁸⁸

Of course, a demand for payment of the subscription in money need not be alleged where the contract provides for payment in property.⁸⁹

In an action to recover in money the amount of a subscription which was to be paid by the conveyance of land of an agreed value, it is not necessary to allege a promise to pay money.⁹⁰

A readiness to perform conditions subsequent need not be alleged.⁹¹

The complaint need not negative defenses, such as an extinguishment of the original liability of the subscriber,⁹² or that the calls were made at shorter intervals than permitted by the charter or

Maryland. *Scarlett v. Academy of Music*, 43 Md. 203.

Washington. *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

Wisconsin. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

A general allegation of notice is sufficient. *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70.

An allegation that the defendant was "duly" notified (*Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317), or that he had due and personal service of the said calls or assessments (*La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225), is sufficient.

Where the statute provides for the giving of such notice as the by-laws prescribe, it must appear from the complaint that the call was made by giving such notice as the by-laws prescribed. *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

Since the notice is not the foundation of the action, it need not be made a part of the complaint. *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31.

In *Edinburgh, L. & N. Ry. Co. v. Hebblewhite*, 6 M. & W. 707, it was held that it was unnecessary to allege notice in view of a provision in the charter prescribing the form of the declaration.

As to the necessity for notice, see § 683, *infra*.

⁸⁷ *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

⁸⁸ *Bethel & H. Toll-Bridge Co. v. Bean*, 58 Me. 89.

⁸⁹ *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63.

⁹⁰ *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63.

⁹¹ *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358.

⁹² Thus it need not negative the defense that the action is barred by the statute of limitations. *French v. Busch*, 189 Fed. 480.

The complaint need not show affirmatively that the original subscription liability has not been extinguished by a transfer of the stock and an acceptance of the transferee in place of the original subscriber. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

statute.⁹³ And for the same reason it is not subject to general demurrer for failure to show that the defendant was named in the articles of incorporation as a subscriber.⁹⁴

That the original liability of the subscriber has been extinguished in any way,⁹⁵ as by a transfer of the stock and an acceptance of the transferee in place of the original subscriber,⁹⁶ is a matter of defense to be set up by the answer. And the same is true of the fact that the corporation was never legally incorporated;⁹⁷ or that the calls under which a recovery is sought were made at shorter intervals than permitted by the charter or statute;⁹⁸ or the fact that the defendant's name did not appear among the list of subscribers in the articles of incorporation,⁹⁹ though advantage may be taken of the latter defense by general demurrer if the complaint affirmatively shows that his name did not so appear.¹

Fraud must be pleaded if relied on.² A mere general allegation of fraud is insufficient, but the facts constituting the fraud must be averred.³

That a proposed corporation was never legally organized is an affirmative defense which must be specially pleaded.⁴ That the full amount of stock has not been subscribed cannot be shown under a gen-

⁹³ *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

⁹⁴ *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

⁹⁵ Where it is alleged that the defendant holds stock which has never been paid up, any circumstances excusing him from the implied contract to make good the deficiency are matters of defense to be alleged by the defendant, since they are more peculiarly within his knowledge. *Atlantic Trust Co. v. Osgood*, 116 Fed. 1019.

⁹⁶ *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

⁹⁷ *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

⁹⁸ *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

⁹⁹ That the name of the subscriber does not appear in the articles is a matter of defense which must be set

up by answer. The complaint in an action on the subscription is not subject to general demurrer because it does not show that the defendant was named in the articles, though the contrary is true if it shows that he was not so named. *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

¹ *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

² *Hays v. Ottawa, O. & F. R. Val. R. Co.*, 61 Ill. 422.

A plea of fraud is bad where it does not allege that the representations were false and fraudulent. *Hays v. Ottawa, O. & F. R. Val. R. Co.*, 61 Ill. 422.

³ *Cole v. Joliet Opera-House Co.*, 79 Ill. 96; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240.

⁴ *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

eral denial;⁵ and the fact that some of the subscriptions were made by insolvent persons, or by infants or married women, must be specially pleaded.⁶

§ 660. — Evidence and burden of proof; variance. The admissibility and sufficiency of evidence to show that a particular subscription was made, or that a certain amount was subscribed,⁷ or that a call was made and the amount thereof,⁸ is considered in other sections.

Proof of a subscription and of a call duly made makes a *prima facie* case for the recovery of the amount embraced in the call,⁹ and the burden of proving payment is then on the defendant.¹⁰

Evidence as to the value of the stock or of any other stock is irrelevant.¹¹

The burden of proving performance of conditions precedent is on the plaintiff,¹² and the burden of proving fraud is on the defendant.¹³

If the action is based solely on a written contract of subscription, recovery must be had upon that instrument or not at all, since suit cannot be brought on one cause of action and recovery had upon another.¹⁴ And, for the same reason, where the action is based upon an express contract, recovery cannot be had on the theory of an implied contract.¹⁵ So, if the complaint states a cause of action on contract, alleging that the defendant subscribed for stock and expressly agreed to pay par for the same, a recovery cannot be had on the theory that the stock was issued unlawfully, and that the defendant, who was a

⁵ McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.

⁶ Shick v. Citizens' Enterprise Co. 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁷ See § 569, *supra*.

⁸ See § 682, *infra*.

⁹ Crawford v. Roney, 130 Ga. 515, 61 S. E. 117, 126 Ga. 763, 55 S. E. 499; Rich v. Park, — Tex. Civ. App. —, 177 S. W. 184.

If the execution of an unconditional contract is proved, and it is introduced in evidence, and no defense is set up, a verdict is properly directed for the plaintiff. Justice v. Chattooga Oil Mill Co., 13 Ga. App. 389, 79 S. E. 223.

¹⁰ Crawford v. Roney, 126 Ga. 763, 55 S. E. 499; Justice v. Chattooga Oil

Mill Co., 13 Ga. App. 389, 79 S. E. 223.

¹¹ South Georgia & F. R. Co. v. Ayres, 56 Ga. 230.

¹² Belfast & M. L. R. Co. v. Cottrell, 66 Me. 185; Central Turnpike Corporation v. Valentine, 10 Pick. (Mass.) 142.

¹³ See § 610 *et seq.*, *supra*.

¹⁴ Taussig v. Glenn, 51 Fed. 409, *rev'd* 47 Fed. 472.

¹⁵ Where it appears that the express contract declared on has been fully executed in that the stock had been issued for services previously rendered, recovery cannot be had upon the theory of an implied contract to pay the full par value of the stock. Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62.

director of the company, had wrongfully converted it and hence was liable on an implied agreement to pay for it.¹⁶

§ 661. — Set-off and counterclaim by subscriber. When a subscriber is sued upon his subscription by the corporation, he may set up, by way of set-off or counterclaim, a debt due him from the corporation.¹⁷ By the weight of authority, however, as we shall see in a subsequent chapter, he cannot do so when the corporation is insolvent, and it is sought to enforce the subscription for the benefit of its creditors.¹⁸

§ 662. Forfeiture and sale of shares—The right and power in general. A corporation has no power to forfeit or sell shares of its stock for nonpayment of assessments or calls, unless the power has been expressly conferred upon it by its charter or the general law, or by a provision in the articles of association, or otherwise by consent of the stockholders.¹⁹ Unless authorized, a majority of the stockholders cannot confer the power upon the corporation, as against a stockholder who does not assent, by enacting a by-law to such effect.²⁰ It

¹⁶ *Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82, rev'g 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

¹⁷ *Bausman v. Denny*, 73 Fed. 69; *Boulton Carbon Co. v. Mills*, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290; *Singer v. Given*, 61 Iowa 93, 15 N. W. 858; *Agate v. Sands*, 73 N. Y. 620; *Barnett's Case*, L. R. 19 Eq. 449.

¹⁸ See chapter on Stock and Stockholders, *infra*.

¹⁹ *Kentucky*. *Gill v. Kentucky & C. Gold & Silver Min. Co.*, 7 Bush 635.

Michigan. *Copland v. Minong Min. Co.*, 33 Mich. 2; *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

Minnesota. *Minnehaha Driving Park Ass'n v. Legg*, 50 Minn. 333, 52 N. W. 892.

Nebraska. *Williams v. Lowe*, 4 Neb. 382, aff'd 94 U. S. 650, 24 L. Ed. 216.

New Jersey. In re *St. Lawrence Steamboat Co.*, 44 N. J. L. 529; *Downing v. Potts*, 23 N. J. L. 66; *Bordentown & S. A. Turnpike Co. v. Imlay*, 4 N. J. L. 285.

New York. In re *Election of Direc-*

tors of Long Island R. Co., 19 Wend. 37, 32 Am. Dec. 429.

North Carolina. *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

Oregon. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Pennsylvania. *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240; *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Wisconsin. *Edgerton Tobacco Mfg. Co. v. Croft*, 69 Wis. 256, 34 N. W. 143.

England. See *Barton's Case*, 4 De G. & J. 46; *Kirk v. Nowill*, 1 T. R. 118.

²⁰ In re *Election of Directors of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; *Kirk v. Nowill*, 1 T. R. 118.

is perfectly competent, however, even in the absence of any provision in the charter or general law, for a stockholder to expressly agree to a forfeiture or sale for nonpayment, as by a provision in the contract of subscription, or indorsed on the certificate of stock.²¹

All the stockholders may undoubtedly pass a by-law, by unanimous vote, giving the corporation the right to forfeit or sell their shares. And even when a by-law to this effect is adopted without the unanimous consent of all the stockholders, those who do consent will not be heard to complain of a forfeiture or sale of their shares in accordance with its provisions.²²

The corporation cannot forfeit stock which has been delivered to a subscriber merely because of the breach of a collateral agreement made by him with it, nor because of his breach of an agreement between him and another stockholder.²³

Generally, the power to forfeit or sell the shares of delinquent stockholders is expressly conferred upon a corporation by its charter or the general law.²⁴ And since such a statute relates to the remedy,

²¹ See *Raymond v. Caton*, 24 Ill. 123; *Lesseps v. Architects' Co. of New Orleans*, 4 La. Ann. 316; *Weeks v. Silver Islet Consol. Min. Co.*, 23 Jones & S. (N. Y.) 1; *Jensen v. Northwestern Underwriters' Ass'n.* — N. D. —, 159 N. W. 611.

²² *Lesseps v. Architects' Co. of New Orleans*, 4 La. Ann. 316.

²³ A party subscribed for the entire capital of a corporation. A portion of this he turned back to the corporation to be sold by it for development purposes. Another portion he transferred to plaintiff, the corporation issuing a certificate to plaintiff therefor, plaintiff giving a receipt for the certificate, and then turning it over to the corporation under a pooling agreement into which the stockholders had entered. The court held that the stock of the plaintiff could not be forfeited by the corporation on the ground that plaintiff had failed to pay a certain sum to the corporation for the stock as he had agreed. *Falk v. A. F. Schmitz Alaska Dredging & Mining Co.*, 44 Wash. 612, 87 Pac. 927.

²⁴ *United States*. *Nashua Sav.*

Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764; *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398 (New Jersey statute).

Alabama. *Tutwiler v. Tuskaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398; *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660.

California. Civ. Code, §§ 331, 349; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244; *National Paraffine Oil Co. v. Chappellet*, 4 Cal. App. 505, 88 Pac. 506. These sections apply whether the assessment is for unpaid subscriptions, or, in other words, is a call, or an assessment on fully paid stock. See *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661.

Colorado. *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

Georgia. *Hightower v. Thornton*, 8 Ga. 486, 501, 52 Am. Dec. 412. Georgia Code 1911, § 2396, giving a right of forfeiture to insurance companies, applies only to subscriptions for original stock, and not to subscriptions for an

it may be made applicable to subscriptions made prior to its passage.²⁵

If a corporation is given a remedy in the alternative, either to forfeit shares for nonpayment of assessments, or to maintain an action, it cannot forfeit shares after it has brought an action and obtained a judgment.²⁶

Under some statutes, the directors may elect to abandon the forfeiture proceedings after they have reached a certain stage, and to proceed by action to recover the amount of the assessment.²⁷

If the charter of a corporation or a general law confers upon the corporation the power to enact by-laws providing for the sale or forfeiture of shares of delinquent stockholders, a valid by-law is an essential prerequisite to the power to declare a forfeiture or make a sale. A forfeiture or sale in pursuance of a mere resolution of the board of directors is invalid.²⁸ And the same is true of a forfeiture or sale under by-laws which are void because in conflict with the statute.²⁹ But it has been held that a provision that the directors

increase of stock. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

Illinois. *Klein v. Alton & S. R. Co.*, 13 Ill. 514.

North Carolina. *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

North Dakota. *Jensen v. Northwestern Underwriters' Ass'n*, — N. D. —, 159 N. W. 611.

Ohio. *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84.

Oregon. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Pennsylvania. *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546.

Texas. *Nicholson-Watson Shoe & Clothing Co. v. Urquhart*, 32 Tex. Civ. App. 527, 75 S. W. 45.

Power to forfeit is conferred by a statute authorizing the directors, by by-law, to prescribe penalties for nonpayment. *Ibester v. Murphy Mfg. Co.*, 95 Ill. App. 105.

Oklahoma Comp. Laws 1909, art. 6, c. 20, providing for the levying of assessments on stock and for a forfeiture and sale thereof for nonpay-

ment, was abrogated by Const. art. 9, § 39. *Muskogee Industrial Development Co. v. Ayres*, — Okla. —, 154 Pac. 1170.

²⁵ *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398.

²⁶ *Giles v. Hutt*, 3 Exch. 18.

²⁷ See § 664, *infra*.

²⁸ *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659; *Clise Inv. Co. v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575.

A resolution providing for the sale of the stock of a single stockholder who is in default is not justified by a statute authorizing the corporation to make by-laws "not inconsistent with any existing law," for the sale of stock for unpaid assessments. Any by-law enacted under such a provision must be general, and must affect every delinquent subscriber and all delinquent stock alike. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

²⁹ A sale is invalid when made under a by-law providing that sales may be made upon four weeks' notice where the statute requires thirty days' notice. And this is true though thirty

shall require subscribers to pay their subscriptions in such manner and instalments as the by-laws provide, does not make the adoption of a by-law regulating such payments an essential step in a declaration of forfeiture.³⁰

§ 663. — Necessity for default. Of course, in order that a forfeiture or sale of shares for nonpayment of calls or assessments may be valid, the shareholder must be in default.³¹ And it follows that the calls or assessments must be valid, for this is necessary to put the shareholder in default.³² So there cannot be a valid forfeiture for failure to comply with a demand for payment in amounts or at times different from those specified in the subscription contract,³³ or where the corporation has failed to comply with a valid condition precedent, and hence has no right to make a demand for payment.³⁴

A sale or forfeiture for nonpayment of several calls or assessments is invalid if one of the calls or assessments is invalid.³⁵

If the amount legally due on the shares has been tendered to the corporation and refused, the shareholder is not in default, and a forfeiture or sale is invalid.³⁶ And the same is true where the amount of the call is paid before a forfeiture has been declared, at least where there is no offer to return the amount so paid.³⁷ But a tender of the amount due after a regular sale or forfeiture is too late to have any effect.³⁸

days' notice is in fact given where the statute itself does not authorize or provide for a sale, but merely authorizes the adoption of by-laws providing for sales. *Anthony v. Hillsboro Gold Min. Co.*, 58 Ore. 258, 114 Pac. 95, 113 Pac. 442.

³⁰ *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

³¹ *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346; *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

³² *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376; *Somerset R. Co. v. Clarke*, 61 Me. 379; *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

As to the necessity for and the validity of calls, see § 669 et seq., *infra*.

³³ As for a failure to comply with a demand for payment of the entire unpaid balance, where the contract pro-

vided for its payment in monthly instalments. *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346.

³⁴ *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346. See also *Grand Valley Irrigation Co. v. Fruita Improvement Co.*, 37 Colo. 483, 86 Pac. 324; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

³⁵ *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277.

³⁶ *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280; *Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62; *Sweny v. Smith*, L. R. 7 Eq. 324.

³⁷ *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, 59 Eng. Reprint 900.

³⁸ *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546.

§ 664. — Procedure to effect forfeiture. When a statute giving a corporation the power to forfeit or sell shares for nonpayment of assessments, or the articles of association in pursuance thereof prescribe the conditions under which, and the mode in which, the power shall be exercised, the prescribed conditions must exist, and the provisions of the statute as to the mode must be strictly complied with, or the sale or forfeiture will be invalid as against the stockholders,³⁹

39 California. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Occidental Building & Loan Ass'n v. Sullivan*, 62 Cal. 394; *Raisch v. M., K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662; *Ruek v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194.

Idaho. *Coreoran v. Sonora Mining & Milling Co.*, 8 Idaho 651, 71 Pac. 127.

Kansas. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

Maine. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *York & C. R. Co. v. Ritchie*, 40 Me. 425.

Massachusetts. *Portland, S. & P. R. Co. v. Graham*, 11 Mete. 1.

New Jersey. *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 72 Atl. 1119; *Downing v. Potts*, 23 N. J. L. 66.

New York. *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280, 47 How. Pr. 218; *In re Election of Directors of New York & W. Town Site Co.*, 145 App. Div. 623, 130 N. Y. Supp. 414; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155.

North Dakota. *Jensen v. Northwestern Underwriters' Ass'n*, — N. D. —, 159 N. W. 611.

Oregon. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Pennsylvania. *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240;

Germantown Passenger Ry. Co. v. Fittler, 60 Pa. St. 124, 100 Am. Dec. 546.

Texas. *Nicholson-Watson Shoe & Clothing Co. v. Urquhart*, 32 Tex. Civ. App. 527, 75 S. W. 45.

Utah. *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940; *Raht v. Sevier Mining & Milling Co.*, 18 Utah 290, 54 Pac. 889.

Washington. *Clise Inv. Co. v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575.

England. *Garden Gully United Quartz Min. Co. v. McLister*, 1 App. Cas. 39; *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687; *Clarke v. Hart*, 6 H. L. Cas. 633; *Edinburgh, L. & N. Ry. Co. v. Hebblewhite*, 6 M. & W. 707.

In California, "the procedure for levying and collecting an assessment, and for the sale of delinquent stock, is the same whether it be a 'call' for subscription or an 'assessment' on paid-up stock to pay debts and expenses * * *." Civ. Code, §§ 331-349, govern in either case. *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

If the statutory provisions are not complied with, the attempted forfeiture is ineffectual and does not deprive the stockholder of the right to vote at corporate meetings. *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

Parol evidence is not admissible to show that the necessary steps have been taken in the assessment and sale of the stock where the statute re-

although such may not be the case as against the corporation.⁴⁰

If no mode of procedure is provided, such a course must be adopted as is reasonable and just to the stockholder.⁴¹

If the power to forfeit is vested in the directors, the forfeiture must be declared by a legally constituted board whose members have been duly elected, and by the number required to conduct the corporate business,⁴² and such directors cannot delegate their powers and duties in the premises.⁴³

Under some statutes, the directors may elect to abandon the forfeiture proceedings after they have reached a certain stage and to proceed by action to recover the amount of the assessment.⁴⁴

quires the corporate records to show those facts. *Corcoran v. Sonora Mining & Milling Co.*, 8 Idaho 651, 71 Pac. 127.

In an action by a receiver to recover unpaid subscriptions, a plea setting up that the sole remedy is by a forfeiture is bad where it does not allege that the directors had ever declared the stock forfeited. *Grayes v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

⁴⁰ The corporation cannot treat a forfeiture as invalid because of irregularity in declaring the same, and hold the stockholder liable as if no forfeiture had been declared. *Patterson v. Brown & Campion Ditch Co.*, 3 Colo. App. 511, 34 Pac. 769; *In re Phosphate of Lime Co. (Austin's Case)*, 24 L. T. R. (N. S.) 932.

⁴¹ *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541. See also *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001, and *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, where the modes adopted were held to be reasonable.

⁴² *Jensen v. Northwestern Underwriters' Ass'n.*, — N. D. —, 159 N. W. 611.

The forfeiture must have been declared by a legally constituted board. *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Garden Gully United Quartz Min. Co. v. McLister*, 1 App. Cas. 39.

A sale by a board of directors il-

legally elected and under an invalid assessment will not determine the relation of the stockholder to the corporation. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376.

A forfeiture declared at a meeting of the board at which less than a quorum is present is invalid. *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

Forfeiture is a corporate act involving the exercise of judgment and discretion, and not a ministerial act which the secretary may perform. *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

⁴³ *Jensen v. Northwestern Underwriters' Ass'n.*, — N. D. —, 159 N. W. 611.

⁴⁴ The Civil Code of California, § 349, provides that, "On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment, and the costs and expenses already incurred, or any part or portion thereof." *Stockton Combined Harvester & Agri-*

A stockholder is entitled to reasonable notice before a sale or forfeiture of his shares for nonpayment of assessments, whether it is

cultural Works v. Houser, 109 Cal. 1, 41 Pac. 809; San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; San Joaquin Land & Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Marshall v. Wentz, 28 Cal. App. 540, 153 Pac. 244; Ward v. California Celery Produce Co., 15 Cal. App. 84, 113 Pac. 888; Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994; Union Sav. Bank of San José v. Rinaldo, 6 Cal. App. 637, 92 Pac. 873; National Paraffine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506; San Gabriel Valley Land & Water Co. v. Dennis, 4 Cal. Unrep. Cas. 272.

A strict compliance with this provision is essential to the recovery of a personal judgment against the stockholder. National Paraffine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506; San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

A resolution, "Resolved, that the president and secretary are hereby ordered to commence suit immediately to enforce the collection of assessment No. 5 on the following delinquent stock" in the company, followed by a description of the stock and the name of the owner, sufficiently indicates the intention of the corporation to waive further proceedings under the statute and to proceed by action. The resolution need not expressly state that it is the intention of the board to waive further proceedings. San Gabriel Valley Land & Water Co. v. Dennis, 4 Cal. Unrep. Cas. 272.

"The right of the corporation to recover the amount of the assessment by an action against the stockholder depends upon the condition that it shall have elected to 'waive' its right to collect it by a sale of the stock upon which the assessment is delinquent; and if, at the time it elected

to proceed by action, it had no authority to make such sale there was no existing right which it could waive," and it therefore has no right to proceed by action. National Paraffine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506.

"This waiver must be made at a time when the power to exercise the right waived is in existence, as there can be no waiver of a right that has been lost. Unless there are two existing remedies, both open to the corporation at the time there can be no election." Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994. To the same effect see San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

In order to sustain a personal action, therefore, it must appear from the complaint that the corporation, at the time when the election was made, could have proceeded to make a valid sale of the stock because of an assessment properly levied which was then delinquent for nonpayment. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994; Shively v. Eureka Tulluirm Gold-Min. Co., 129 Cal. 293, 61 Pac. 939.

So there can be no election and no personal action can be maintained where the board of directors has lost jurisdiction by reason of a failure to publish the statutory notice of sale. San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

This provision is equally applicable in the case of calls for unpaid subscriptions and in the case of assessments on stock which has been fully paid. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994.

Hence, though some of the cases above cited deal with assessments of the latter class, the rules therein laid

expressly required by the charter, statute or by-laws or not;⁴⁵ but it is generally expressly required. Any provision of the statute or articles of association as to notice of calls before a forfeiture or sale, or as to notice of the forfeiture or sale, etc., must be strictly followed.⁴⁶

down would of necessity be equally applicable in case the action was based on a call.

⁴⁵ *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁴⁶ *United States. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764.

Arkansas. Mississippi, O. & R. R. Co. v. Gaster, 20 Ark. 455.

California. Shannon v. Tooker, 167 Cal. 484, 140 Pac. 10; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 Pac. 707. See also *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

Georgia. Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

Kansas. Crissey v. Cook, 67 Kan. 20, 72 Pac. 541.

Maine. Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; *York & C. R. Co. v. Pratt*, 40 Me. 447.

Massachusetts. Lexington & W. C. R. Co. v. Staples, 5 Gray 520.

New Jersey. New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co., 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 72 Atl. 1119.

New York. Sands v. Sanders, 26 N. Y. 239; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *In re Election of Directors of New York & W. Town Site Co.*, 145 App. Div. 623, 130 N. Y. Supp. 414.

Pennsylvania. Morris v. Mettalline Land Co., 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240, collecting cases.

Texas. Nicholson-Watson Shoe &

Clothing Co. v. Urquhart, 32 Tex. Civ. App. 527, 75 S. W. 45.

Vermont. Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

England. Watson v. Eales, 23 Beav. 294; *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687.

It is for the board of directors to declare whether notice of forfeiture shall be given and when, even though the statute does not expressly so declare. *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

In California, under Civ. Code, § 337, the notice of sale must be published in the same paper as the notice of assessment, unless otherwise ordered by the board of directors; but the board may order the notices to be published in different papers, and if it does so, and they are regularly so published, the requirements of the statutes are complied with. *Stockton Combined Harvester & Agricultural Works v. Houser*, 109 Cal. 1, 41 Pac. 809.

Under Indiana R. S. 1881, § 3896, if notice of the calls is given and demand for payment made, a further notice of forfeiture is unnecessary. *Hill v. Nisbet*, 100 Ind. 341.

In Kansas, the statute requires that a written notice be given before the forfeiture can become effective. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

A sale is invalid when made under a by-law providing for four weeks' notice where the statute requires thirty days' notice. And this is true though thirty days' notice is in fact given, where the statute itself does not authorize or provide for a sale, but mere-

Provisions in the by-laws for giving notice by mail and which, neither directly nor by implication, make that form of notice exclusive, have been held to be directory merely, so that personal notice is nevertheless sufficient.⁴⁷

If the company has notice of the death of a member, it cannot bind his estate by a notice mailed to him at his registered address.⁴⁸

The notice must describe the shares to be sold, but in the absence of any specific provision on the subject, any description which clearly shows what shares are intended to be the subject of sale is sufficient.⁴⁹

When the statute prescribes a certain notice, no other or further notice is necessary.⁵⁰

The notice should be completed before the declaration of forfeiture is made,⁵¹ but a failure to so complete it does not invalidate the proceeding or make it more than voidable.⁵²

The right to postpone the date fixed for the sale depends upon the terms of the charter or statute.⁵³ When permitted, notice of the

ly authorizes the adoption of by-laws providing for sales. *Anthony v. Hillsboro Gold Min. Co.*, 58 Ore. 258, 114 Pac. 95, 113 Pac. 442.

Where the articles of an unincorporated association provided that the directors should have authority to make a requisition for payment of instalments upon shares by giving thirty days' notice in newspapers published in the cities of Philadelphia and Detroit, and that after such time they might forfeit the shares of all persons failing to pay the instalments, it was held that a forfeiture based upon a publication of such notice in one only of such cities was void. *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240.

⁴⁷ *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. (Mass.) 311.

⁴⁸ Where a corporation has notice of the death of a member, it cannot bind his estate by posting to him at the address registered on its books a notice preliminary to forfeiting his shares for nonpayment of calls, although its articles provide for service of such notices by post. *Allen v. Gold*

Reefs of West Africa, [1899] 2 Ch. 40.

⁴⁹ *York & C. R. Co. v. Pratt*, 40 Me. 447.

⁵⁰ *Germantown Passenger Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546.

The fact that the subscriber did not see the published notice is immaterial where he admits receiving a notice sent to him by mail. *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

⁵¹ *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

⁵² *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

⁵³ In California, under Civ. Code, § 345, the days of delinquency and sale may be postponed from time to time, and, where this is done, the requirement of § 334, that the date of delinquency must not be more than sixty days from the time of making the order levying the assessment, does not apply. *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525.

In *National Paraffine Oil Co. v. Chapellet*, 4 Cal. App. 505, 88 Pac. 506, it was held that Civ. Code, § 345,

postponement must be given in the manner prescribed by the charter or general law.⁵⁴

It is sometimes expressly provided that in case of any substantial error or omission in the proceedings for the collection of an assessment, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew.⁵⁵

If the statute or articles expressly require the shares to be sold at public auction or at a particular place, a private sale, or a sale at a different place, is void.⁵⁶

§ 665. — Effect of sale or forfeiture. After shares have been regularly forfeited or sold for nonpayment of an assessment or call, the former owner is clearly no longer a stockholder, and he has no further interest or rights, as such, against the corporation.⁵⁷ If the sale or

authorizing an extension of the time fixed for the sale "from time to time for not more than thirty days," does not authorize an indefinite number of extensions, provided each is for a period of less than thirty days, but must be construed as limiting the right of extension to thirty days in the aggregate.

In Idaho, under Rev. Codes, § 2764, the time may be postponed from time to time for not more than thirty days. *Mantle v. Jack Waite Min. Co.*, 24 Idaho 13, 136 Pac. 1130, 135 Pac. 854.

⁵⁴In California, under Civ. Code, § 345, the days of delinquency and sale fixed in the original order may be postponed from time to time by merely republishing the original notice thereof, with the order of postponement appended. *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525.

In Idaho, Rev. Codes, § 2764, providing for published notice is mandatory, and noncompliance therewith renders the sale void. *Mantle v. Jack Waite Min. Co.*, 24 Idaho 613, 136 Pac. 1130, 135 Pac. 854.

⁵⁵Cal. Civ. Code, § 346. Under this provision, in case of such an error or omission, the days of delinquency and sale may be fixed anew at any later date, without any order of postpone-

ment, by making a new order fixing new dates and making an entirely new publication thereof. *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525.

Where this is done, § 334, providing that the day of delinquency must not be more than sixty days from the time of making the order levying the assessment, has no application. *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525.

The notice of sale must be published anew or the sale will be irregular and voidable. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

⁵⁶*Dewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Portland, S. & P. R. Co. v. Graham*, 11 Mete. (Mass.) 1.

⁵⁷Georgia. *Mitchell v. Rome R. Co.*, 17 Ga. 574.

Illinois. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204; *St. Louis & S. Coal & Mining Co. v. Sandoval Coal & Mining Co.*, 116 Ill. 170, 5 N. E. 370.

Kansas. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

New York. *Ford v. Chase*, 189 N. Y. 504, 81 N. E. 1164, aff'g 118 App.

forfeiture is regular, a court of equity cannot relieve the stockholder by setting the same aside and restoring him to membership, even though he may tender the amount due.⁵⁸

Since a stockholder is no longer such after a regular sale or forfeiture of his shares for nonpayment of assessments, he is not afterwards subject to any statutory liability to creditors on the insolvency of the corporation.⁵⁹

Whether or not a corporation or its creditors can maintain an action to recover a balance due on a subscription after the shares have been regularly forfeited or sold for nonpayment of an assessment depends upon the terms of the statute authorizing the forfeiture or sale; and the effect thereof. As a general rule, after the shares are regularly forfeited for nonpayment of an assessment, and belong to the corporation, so that it may reissue the same, there is no further liability on the part of the subscriber, either to the corporation or to its creditors in case of insolvency.⁶⁰ The right to maintain an action, however,

Div. 605, 103 N. Y. Supp. 30; *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518; *Small v. Herkimer Manufacturing & Hydraulic Co.*, 2 N. Y. 330; *Hanna v. People's Nat. Bank*, 76 App. Div. 224, 78 N. Y. Supp. 516, modified 179 N. Y. 107, 71 N. E. 778.

Pennsylvania. *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

England. *Stocken's Case*, L. R. 3 Ch. 412, aff'g L. R. 5 Eq. 6; *Sparks v. Proprietors of Liverpool Water Works*, 13 Ves. 428.

His assent is not necessary to the validity of amendments to the charter subsequently made, and the fact that he does not assent to them will not relieve him from liability on a note given by him for the initial payment on his subscription. *Mitchell v. Rome R. Co.*, 17 Ga. 574.

When a corporation increases its capital stock, and afterwards reduces the same to the original amount, refunding the amounts paid by the subscribers for the increased stock, a subscriber for such stock, whose

shares have been duly forfeited before the reduction for nonpayment of an instalment is not entitled to the refund of what he has paid. *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518. But see *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

⁵⁸ *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Sparks v. Proprietors of Liverpool Water Works*, 13 Ves. 428.

⁵⁹ *Mills v. Stewart*, 41 N. Y. 384. See also *Macaulay v. Robinson*, 18 La. Ann. 619.

⁶⁰ **United States.** *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582.

Alabama. *Allen v. Montgomery R. Co.*, 11 Ala. 437.

Georgia. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Illinois. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

Kansas. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

Louisiana. *Macaulay v. Robinson*, 18 La. Ann. 619.

Massachusetts. *Mechanics' Foun-*

in such a case, notwithstanding the forfeiture, may be expressly conferred by the charter of the corporation, or by a general law.⁶¹

It has been held that the right to maintain an action against a delinquent stockholder after a valid forfeiture of his shares for nonpayment of an assessment cannot be conferred upon a corporation by a mere by-law.⁶² It is otherwise, however, if it is expressly given the power to adopt by-laws providing for the forfeiture or sale of shares.⁶³ In any event, a forfeiture, to relieve a stockholder from

dry & Machine Co. v. Hall, 121 Mass. 272; Athol & E. R. Co. v. Inhabitants of Prescott, 110 Mass. 213.

New York. Mills v. Stewart, 41 N. Y. 384; Small v. Herkimer Manufacturing & Hydraulic Co., 2 N. Y. 330, rev'g 21 Wend. 273; Northern R. Co. v. Miller, 10 Barb. 260.

Pennsylvania. Germantown Passenger Ry. Co. v. Fidler, 60 Pa. St. 124, 100 Am. Dec. 546.

Vermont. Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

England. Stocken's Case, L. R. 3 Ch. 412, aff'g L. R. 5 Eq. 6; In re Phosphate of Lime Co. (Austin's Case), 24 L. T. R. (N. S.) 932.

A subscriber may plead a forfeiture for nonpayment of a call in bar of a pending action to recover the amount of a prior call. Small v. Herkimer Manufacturing & Hydraulic Co., 2 N. Y. 330.

Where the stock is canceled, the consideration for a note given for the price thereof fails, and no recovery thereon can be had. Jensen v. Northwestern Underwriters' Ass'n, — N. D. —, 159 N. W. 611.

Where a corporation exercises its power to forfeit the stock of a subscriber for the nonpayment of a call, it cannot afterwards recover on a note given by him for a previous unpaid assessment on the stock. Ashton v. Burbank, 2 Dill. 435, Fed. Cas. No. 582.

Because of this rule, it has been held that creditors may object to a forfeiture and invoke the interposi-

tion of a court of equity to prevent it or set it aside where the money is needed to pay their claims. Germantown Passenger Ry. Co. v. Fidler, 60 Pa. St. 124, 100 Am. Dec. 546.

⁶¹ **Connecticut.** Mann v. Cooke, 20 Conn. 178.

Illinois. Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

Maine. Belfast & M. L. R. Co. v. Cottrell, 66 Me. 185; Somerset R. Co. v. Clarke, 61 Me. 379; York & C. R. Co. v. Pratt, 40 Me. 447.

Massachusetts. Lexington & W. C. R. Co. v. Chandler, 13 Mete. 311.

Ohio. Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84.

Tennessee. Stokes v. Lebanon & S. Turnpike Co., 6 Humph. 241.

England. Great Northern Ry. Co. v. Kennedy, 4 Exch. 417; Creyke's Case, L. R. 5 Ch. 63. See In re China Steamship & L. C. Co. (Dawes' Case), 38 L. J. Ch. 512; Stocken's Case, L. R. 3 Ch. 412, aff'g L. R. 5 Eq. 6; and In re Phosphate of Lime Co. (Austin's Case), 24 L. T. R. (N. S.) 932, where the articles provided that a stockholder whose shares had been forfeited should be liable for calls owing at the time of the forfeiture.

⁶² Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

⁶³ Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

liability to creditors, must have been in good faith. If there was fraud or collusion, the stockholder remains liable.⁶⁴

There is dictum to the effect that if shares are sold for nonpayment of assessments (not forfeited and reacquired by the corporation), the corporation has no further remedy against the subscriber, and if the amount realized from the sale is insufficient to pay the amount due on the shares, the corporation cannot maintain an action for the deficiency.⁶⁵ This proposition, however, cannot be sustained unless the statute clearly shows an intent to make the sale of the shares and an action on the subscription alternative remedies. As a rule, when a statute authorizes a corporation to sell the shares of delinquent subscribers, it merely gives it a security in the nature of a pledge or mortgage. If the sale should bring more than is due on the shares, the shareholder would be entitled to the surplus. And if it brings less, he remains liable for the deficiency, and the corporation may maintain an action therefor, notwithstanding the sale.⁶⁶ And power to sue for the deficiency is sometimes expressly conferred on the corporation by its charter or the statute under which it is organized.⁶⁷

When the charter or statute, however, allows the corporation to either forfeit or sell shares for nonpayment of assessments, or to maintain an action to recover the amount of the assessment, making the remedy by forfeiture or sale an alternative remedy, the corporation, after declaring a forfeiture or making a sale, has no further remedy. It cannot afterwards maintain an action to recover assessments.⁶⁸

⁶⁴ *Mills v. Stewart*, 41 N. Y. 384; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Walters' Second Case*, 3 De G. & S. 244; *Stewart's Case*, L. R. 1 Ch. 511; *Stanhope's Case*, L. R. 1 Ch. 161; *Spackman v. Evans*, L. R. 3 H. L. 171. See also *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

⁶⁵ *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

⁶⁶ *Colorado. Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

Connecticut. Danbury & N. R. Co. v. Wilson, 22 Conn. 435.

Louisiana. Succession of Thomson, 46 La. Ann. 1074, 15 So. 379.

Michigan. Merrimac Min. Co. v. Bagley, 14 Mich. 501; *Carson v. Arctic Min. Co.*, 5 Mich. 288.

Ohio. Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84.

England. Great Northern Ry. Co. v. Kennedy, 4 Exch. 417.

And see the dictum in *Small v. Herkimer Manufacturing & Hydraulic Co.*, 2 N. Y. 330.

See also *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001, where the sale was under a by-law which the corporation was authorized to enact.

⁶⁷ *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

To authorize a recovery under such a provision there must be a legal assessment, notice and sale, and an ascertained balance must be proved. *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

⁶⁸ *Great Northern Ry. Co. v. Ken-*

The corporation is certainly not precluded from maintaining an action to recover assessments on subscriptions by the fact that it has so far pursued the statutory remedy by way of sale of the shares as to exhibit or offer them for sale, if no sale has been made.⁶⁹ Nor is it precluded by a mere resolution to forfeit shares, where they have not yet been forfeited.⁷⁰

The corporation acts as the agent of the delinquent stockholder in making the sale. The purchaser is not regarded as purchasing the stock directly from the corporation, but he takes the title of the delinquent stockholder, and no other, and takes it subject to liability for the unpaid subscription price.⁷¹

The time when the forfeiture is to be deemed perfected depends upon the provisions of the charter or general laws governing the subject, and therefore varies in the different jurisdictions.⁷²

A mere notice of forfeiture to be had in the future is not, in itself, a forfeiture, and does not relieve the subscriber from liability on his subscription.⁷³ And the same is true of a mere threat to forfeit if payment is not made.⁷⁴

It has been held that a sale is not necessary to complete the forfeiture where the statute does not require it.⁷⁵

§ 666. — Remedy in case of unauthorized or irregular forfeiture or sale. If a corporation sells or forfeits shares when it has no power to do so, or without complying with charter or statutory requirements, or otherwise wrongfully, the shareholder has several remedies.⁷⁶

nedy, 4 Exch. 417; *Giles v. Hutt*, 3 Exch. 18; *Inglis v. Great Northern Ry. Co.*, 1 Macq. H. L. Cas. 112; *Edinburgh, L. & N. Ry. Co. v. Hebblewhite*, 6 M. & W. 707.

⁶⁹ *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638; *Grays v. Lynchburg & S. Turnpike Co.*, 4 Rand. (Va.) 578.

⁷⁰ *Hays v. Franklin County Lumber Co.*, 35 Neb. 511, 53 N. W. 381. And see *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Minnehaha Driving Park Ass'n v. Legg*, 50 Minn. 333, 52 N. W. 898.

⁷¹ *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

⁷² *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁷³ *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911.

⁷⁴ That the calls state that the stock "will be forfeited" if payment is not made does not, without more, constitute a forfeiture. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

⁷⁵ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁷⁶ If the stock is forfeited and sold on the mistaken assumption that the subscriber is in default, the latter may, at his election, treat the subscription contract as rescinded and sue for a return of the money paid; treat it as repudiated and sue for damages for its breach; or treat it as alive and sue for performance. *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346.

He may maintain a suit in equity to set the forfeiture or sale aside, and compel the corporation to admit him to his rights as a stockholder, and, in case of a sale, to enjoin a transfer of the shares to the purchaser.⁷⁷ Or he may treat the forfeiture or sale as a conversion of his stock by the corporation, and maintain an action of trover to recover his damages.⁷⁸ In a proper case he may sue in equity, tendering payment of any assessments that may be due,⁷⁹ to enjoin a threatened forfeiture or sale.⁸⁰

⁷⁷ *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662; *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Sweny v. Smith, L. R.* 7 Eq. 324. See also *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Falk v. A. F. Schmitz Alaska Dredging & Mining Co.*, 44 Wash. 612, 87 Pac. 927.

It is not necessary for the complaint in such an action to allege the value of the stock or that the plaintiff has been injured. *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662.

In *Buker v. Leighton Lea Ass'n*, 164 N. Y. 557, 58 N. E. 1085, rev'g 18 N. Y. App. Div. 548, 46 N. Y. Supp. 25, it was held that a forfeiture would be set aside where the nonpayment was due to a refusal to permit the subscribers to examine the corporate books and accounts, its affairs having previously been fraudulently managed. See also *Buker v. Leighton Lea Ass'n*, 63 N. Y. App. Div. 507, 71 N. Y. Supp. 610.

⁷⁸ *California*. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

Minnesota. *Carpenter v. American Building & Loan Ass'n*, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95; *Allen v. American Building & Loan Ass'n*, 49 Minn. 544, 32 Am. St. Rep. 574, 52 N. W. 144.

North Carolina. *Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62.

Oregon. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Texas. *Nicholson-Watson Shoe & Clothing Co. v. Urquhart*, 32 Tex. Civ. App. 527, 75 S. W. 45.

See also *Ward v. California Celery & Produce Co.*, 15 Cal. App. 84, 113 Pac. 888; *Grand Valley Irrigation Co. v. Fruita Improvement Co.*, 37 Colo. 483, 86 Pac. 324; *Marseilles Land & Water-Power Co. v. Aldrich*, 86 Ill. 504; *Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33.

⁷⁹ *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939.

⁸⁰ *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 Pac. 296; *Mantle v. Jack Waite Min. Co.*, 24 Idaho 613, 136 Pac. 1130, 135 Pac. 854; *Weber v. Della Mountain Min. Co.*, 11 Idaho 264, 81 Pac. 931; *Schuetz v. German-American Real Estate Co.*, 21 N. Y. App. Div. 163, 47 N. Y. Supp. 500; *Moore v. New Jersey Lighterage Co.*, 25 Jones & S. (N. Y.) 1, 5 N. Y. Supp. 192. See also *Sullivan v. Triunfo Gold & Silver Min. Co.*, 39 Cal. 459; *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194. But see *Ibester v. Murphy Mfg. Co.*, 95 Ill. App. 105.

It is sometimes specifically provided by statute that he may recover back the stock sold from the purchaser,⁸¹ provided he first pays or tenders to him the sum for which it was sold, together with all subsequent assessments paid by him and interest,⁸² and brings his action within a specified time.⁸³

In some jurisdictions, if the stock has never been issued to him, he may treat the sale as a nullity and maintain a mandamus proceed-

⁸¹ *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10; *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194.

In such an action, an allegation that the assessment, for nonpayment of which the stock was sold, was not levied in compliance with law and was void, is a mere conclusion which is not admitted by a demurrer. The facts showing that it was invalid should be alleged. *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458.

⁸² *California*. Civ. Code, § 347. Such payment or tender is a condition precedent to the recovery of the stock. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10. Whether such tender has been made is a question of fact, and the court's finding of fact on the subject, based on substantially conflicting evidence, will not be disturbed on appeal. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10. The tender is insufficient where it does not include a tender of the interest. *Campbell v. Santa Maria Oil & Gas Co.*, 153 Cal. 282, 95 Pac. 39. The tender must be made to the purchaser rather than to the corporation. A tender to the latter is ineffectual. *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 Pac. 707. The code provision is equally applicable where it is sought to recover damages for the conversion of the stock instead of the stock itself. *Ward v. California Celery & Produce Co.*, 15 Cal. App. 84, 113 Pac. 888.

Idaho. Rev. Codes, § 2766; *Mantle*

v. Jack Waite Min. Co., 24 Idaho 613, 136 Pac. 1130, 135 Pac. 854.

This provision applies only to cases where the sale is irregular, and not where the corporation has by its contract or act divested itself of the power and authority to levy an assessment, as where there is a valid agreement that the stock shall be non-assessable, or that the other stock shall be nonassessable until the stock of the promoters has been paid up to a certain amount per share. *Mantle v. Jack Waite Min. Co.*, 24 Idaho 613, 136 Pac. 1130, 135 Pac. 854. And see *Wall v. Basin Min. Co.*, 16 Idaho 313; 22 L. R. A. (N. S.) 1013, 101 Pac. 733.

Utah. An action to recover stock irregularly sold for nonpayment of assessments thereon cannot be maintained without compliance with a statute requiring payment or tender of the sum for which the stock was sold, with interest thereon. *Raht v. Sevier Mining & Milling Co.*, 18 Utah 290, 54 Pac. 889.

⁸³ Cal. Civ. Code, § 347, and Code Civ. Proc. § 341, requiring the action to be commenced within six months after the sale, apply only where there has been some irregularity or defect in the assessment, or in the notice of sale or the sale itself, and not where the sale is absolutely void. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 Pac. 707.

ing to compel the company to issue the stock to him on payment of the amount due.⁸⁴

A stockholder whose stock has been illegally forfeited cannot sue the corporation for a specific interest in the corporate property.⁸⁵

The purchaser at an invalid sale may recover back the purchase money with interest.⁸⁶

§ 667. — Waiver of irregularities and estoppel to set them up. The subscriber may be estopped by his conduct from asserting irregularities in the proceedings,⁸⁷ or may acquiesce in or ratify the attempted forfeiture.⁸⁸ So he may be estopped by laches from insisting upon a reinstatement entitling him to share in the subsequent profits of the company, if, with full knowledge of the forfeiture, he has stood by and allowed the others to contribute the funds necessary for the business of the company,⁸⁹ or to purchase the shares and

⁸⁴ Where he tenders the amount due after the sale has been advertised but before it is held, he may have mandamus directing the company to issue the stock to him on payment of the balance due on the stock, with interest to the date of tender and cost of advertisement to that day. He need not pay the cost of sale under such circumstances. *Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62.

⁸⁵ *Smith v. Maine Boys Tunnel Co.*, 18 Cal. 111.

⁸⁶ *Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62.

⁸⁷ *Ward v. California Celery & Produce Co.*, 15 Cal. App. 84, 113 Pac. 888.

See *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 72 Atl. 1119, where it was held that the subscriber was not estopped as against one to whom the stock had been issued after an attempted forfeiture.

⁸⁸ *Sayre v. Citizens' Gas Light & Heat Co.*, 69 Cal. 207, 10 Pac. 408, 7 Pac. 437. See also *Elsberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

Irregularities or defects in the pro-

ceedings, such as a failure to give notice in the manner prescribed, or a failure to pass a formal resolution of forfeiture, do not invalidate the proceedings, but, at most, merely render the forfeiture voidable, and a subsequent acquiescence therein with knowledge of the facts will estop both the corporation and the stockholder, and render the forfeiture effective even as against the corporate creditors. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

A stockholder may waive the right to have a sale for nonpayment of assessments set aside for irregularities, and he does so by unreasonable delay in exercising the right. *Raht v. Sevier Mining & Milling Co.*, 18 Utah 290, 54 Pac. 889.

In *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 72 Atl. 1119, it was held that there was no evidence showing acquiescence or ratification, it not appearing that the subscriber ever had any knowledge of the attempted forfeiture.

⁸⁹ *Raht v. Sevier Mining & Milling Co.*, 18 Utah 290, 54 Pac. 889; *Rule v. Jewell*, 18 Ch. Div. 660; *Clarke v.*

incur expense in connection therewith believing sound the title they were acquiring;⁹⁰ or where he has acquiesced in the forfeiture until a change of circumstances or conditions has arisen.⁹¹

There is no estoppel, however, where the forfeiture is void, the stockholder not having been in default, and where the company is not engaged in a business requiring contributions from its members to sustain its existence or business, and there has been no intentional abandonment, or "lying by for chances."⁹²

If the forfeiture is invalid by reason of defects which the parties are incompetent to waive, the attempted forfeiture will be ineffective as to corporate creditors and the stockholder will remain liable to them in case of insolvency.⁹³

Hart, 6 H. L. Cas. 649; Prendergast v. Turton, 1 Younge & C. 109.

It has been said that the cases which so hold are based on the case of Prendergast v. Turton, *supra*, in which the relation of the parties was practically that of partners in a mining venture; that the decision in that case was placed upon the peculiar nature of a mining concern, and proceeded upon the principle that persons who do not respond to a call when they should, have no right to stand by and wait until it appears clearly that it is worth while before coming forward and asserting their rights; that while some of the later cases have applied the same doctrine to ordinary corporations, the thing in question in all the earlier ones was a mine; and hence that it is necessary to receive these authorities with extreme caution. New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co., 74 N. J. Eq. 221, 69 Atl. 528, *aff'd* 75 N. J. Eq. 297, 72 Atl. 1119.

And see *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240, a case involving a forfeiture of stock of an unincorporated joint stock company, where the cases on the subject of laches and acquiescence are also reviewed and distinguished.

⁹⁰ The law is well established that

where property is of an uncertain and fluctuating value and is undergoing constant change of ownership, one deeming himself injured in relation to his title thereto by the fraud of others must act promptly or he will be deemed to have lost his rights. It is inequitable that he should be permitted to remain idle when his idleness will result in loss to others, and thereafter secure reinstatement. Where, therefore, a member's shares have been sold for failure to pay assessments, even though the assessments were in fact void, he will become estopped to set up the invalidity thereof where he has stood by and permitted others to purchase the shares and incur expense in connection therewith, believing sound the title they were acquiring. *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

⁹¹ *Sayre v. Citizens' Gas Light & Heat Co.*, 69 Cal. 207, 10 Pac. 408, 7 Pac. 437. See also *Boll v. Camp*, 118 Iowa 516, 92 N. W. 703; *Joseph v. Davenport*, 116 Iowa 268, 89 N. W. 1081.

⁹² *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240. See also *Garden Gully United Quartz Min. Co. v. McLister*, 1 App. Cas. 39, 55.

⁹³ *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

VII. CALLS OR ASSESSMENTS ON UNPAID SUBSCRIPTIONS

§ 668. Definitions and distinctions. The term "call," with reference to subscriptions to the capital stock of a corporation, is used in several senses. Ordinarily it is used merely to designate the resolution or declaration of the board of directors or other authority by which the whole or a part of unpaid subscriptions are made payable.⁹⁴ It is also used to designate both this formal resolution or declaration, and the notice thereof or demand of payment, and other steps which may be required to render subscriptions payable, or to designate the time when the payment is due. "The word 'call,'" said Parke, B., in an English case, "is capable of three meanings. It may either mean the resolution, or its notification, or the time when it becomes payable. It must mean either one of these three."⁹⁵

An "assessment" has been defined to be "a levy made upon the

Nor will the subscriber be held to have abandoned his interest in the corporation by a mere failure to act, where he has no knowledge of the attempted forfeiture, and there is no estoppel, ratification or acquiescence, each of which presupposes and requires knowledge, and no extraordinary circumstances requiring action on his part. *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 72 Atl. 1119. See also *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240, where a similar rule was applied in the case of a forfeiture of stock in an unincorporated joint stock company.

⁹⁴ See *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Newry & E. Ry. Co. v. Edmunds*, 2 Exch. 118.

"A call is nothing more than an official declaration that the sums subscribed are to be paid." *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363, quoted in *American Alkali Co. v. Campbell*, 113 Fed. 398, aff'd 125 Fed. 207.

Strictly speaking the word call "means the action of the board of directors or corporation demanding the payment of all or a portion of unpaid subscriptions." *Wall v. Basin Min. Co.*, 16 Idaho 313, 22 L. R. A. (N. S.) 1013, 101 Pac. 733.

"A call is an official declaration by the directors that the sum subscribed, or any specified instalment thereof, is required to be paid * * *." *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

Mr. Cook defines a call as being "An official declaration by the proper corporate authorities that the whole or a specified part of the subscriptions to the capital stock is required to be paid." *Cook on Corporations*, § 104, quoted with approval in *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'd 113 Fed. 398, and in *Newmann v. Sexton*, 156 Ill. App. 517.

Calls are simply one step towards payment or the collection of subscriptions when the corporation is in full operation under its charter. *Stiles v. Samaniego*, 3 Ariz. 48, 20 Pac. 607.

⁹⁵ *Ambergate, N. & B. & E. J. Ry. Co. v. Mitchell*, 4 Exch. 540. See also *Germania Iron Min. Co. v. King*, 94

stock of the corporation and requires the stockholder to pay in proportion to the amount of stock owned by him."⁹⁶

It has been said that "the object of an assessment, where one is necessary, is to fix the amount that may be called for and the time when it may be called for."⁹⁷

The term "assessment," with reference to unpaid subscriptions, means the same thing as the term "call," the two terms being often used interchangeably.⁹⁸ This term, however, is also used to designate payments required to be made by stockholders over and above the par value of their shares, either to provide additional funds for the use of the corporation, or to pay creditors upon the insolvency of the corporation.⁹⁹ While the term "call," therefore, is properly applied to unpaid subscriptions, the term "assessment" applies both to unpaid and to full-paid stock.¹

Wis. 439, 36 L. R. A. 51, 69 N. W. 181; Queen v. Londonderry & C. Ry. Co., 13 Q. B. 998.

It "is the demand fixing the time of payment and the proportion of the subscription to be paid." Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

⁹⁶ Omaha Law Library Ass'n v. Connell, 55 Neb. 396, 75 N. W. 837.

⁹⁷ Waukon & M. R. Co. v. Dwyer, 49 Iowa 121.

⁹⁸ See in this connection:

California. Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661; Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994.

Idaho. Wall v. Basin Min. Co., 16 Idaho 313, 22 L. R. A. (N. S.) 1013, 101 Pac. 733.

Illinois. Spangler v. Indiana & I. C. R. Co., 21 Ill. 276.

Maine. Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654.

Michigan. Omo v. Bernart, 108 Mich. 43, 65 N. W. 379.

Oregon. Budd v. Multnomah St. Ry. Co., 15 Ore. 413, 3 Am. St. Rep. 169.

Wisconsin. Great Western Tel. Co. v. Burnham, 79 Wis. 47, 24 Am. St. Rep. 698, 43 N. W. 373.

"Assessments, as understood in such contracts, mean a rating or fixing of the proportion, by the board of directors, which every subscriber is to pay of his subscription, when notified of it, and when called on." Spangler v. Indiana & I. C. R. Co., 21 Ill. 276.

Assessment is the proper method to collect unpaid subscriptions. O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1.

⁹⁹ Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661; Omo v. Bernart, 108 Mich. 43, 65 N. W. 622. And see Lum v. American Wheel & Vehicle Co., 165 Cal. 657, Ann. Cas. 1915 A 816, 133 Pac. 303.

In Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, the court says that at most the legal effect of the word "nonassessable" stamped on a stock certificate "is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay" the full amount of his subscription.

For matters relating to assessments in this sense of the term, see § 672, *infra*.

¹ Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661; Omo v. Bernart, 108 Mich. 43, 65 N. W. 379.

It has been said that, strictly speaking, the word "assessment" applies only to full-paid subscriptions,² and that the term "call" is more properly used with reference to unpaid subscriptions.³

An instalment has been defined to be "one of the several part payments into which a single call may be divided."⁴

§ 669. When calls are necessary—In general. Whether or not a call is necessary to render a subscriber liable to an action on his subscription depends upon the terms of his contract of subscription, and the provisions of the charter of the corporation, general law, articles of association, and by-laws of the corporation, entering into and forming a part of his contract.⁵

² "Strictly speaking, the word 'assessment' means a demand upon stockholders for payments above the par value of their stock to meet the money demands of creditors of the corporation." *Wall v. Basin Min. Co.*, 16 Idaho 313, 22 L. R. A. (N. S.) 1013, 101 Pac. 733. And see, to the same effect, *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

³ *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661; *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

⁴ *Cook on Corporations*, § 104, quoted with approval in *Newmann v. Sexton*, 156 Ill. App. 517. See also *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

⁵ *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691; *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

The subscribers may agree among themselves to pay the amount of their subscriptions, either in a single instalment or in such sums and at such times as the same may be called for. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

Where the contract provides that payments are to be made "upon the terms and conditions set forth in the

subscription contract and prospectus of the company," the provisions on the subject in the contract are to be read in connection with those in the prospectus. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

A statute providing for calls by the directors has no application where the contract contemplates immediate payment upon the terms therein prescribed. *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395.

Although a statute may provide that no assessment shall exceed ten per cent. of the amount of the capital stock of a corporation, except that, if the whole has not been paid up, and the corporation is unable to meet its liabilities, the assessment may be for the full amount of the unpaid subscriptions, an agreement of subscription, by which the subscribers agree that the amounts subscribed by them shall be due and payable on the formation of the corporation and the issue of the stock, gives rise, on such formation, to a cause of action in favor of the corporation for the full amount, without any assessment or call, and although the money may not be then needed to satisfy liabilities of the corporation. *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

No call is necessary when a subscription is payable, not upon call or demand by the directors or stockholders, but immediately, or on a specified day, or on or before a specified day, or when it is payable in instalments at specified times. In such cases it is the duty of the subscriber to pay the subscription or instalment thereof as soon as it is due, without any call or demand, and, if he fails to do so, an action may be brought at any time.⁶ So no call is necessary where by the certifi-

The corporation may adopt by-laws regulating the matter of calls and the manner of enforcing the same. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

A by-law providing that the balance due on stock shall be subject to the call of the board of directors to be made at any time, and that the amount called if not paid, shall become a debt on which the corporation may sue, when signed by the subscribers becomes a contract between them and the corporation, and is a waiver of their right to insist that the corporation shall levy assessments for unpaid subscriptions as provided by the statute, and it may be enforced against them according to its terms. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

⁶ *Alabama*. *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611; *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384.

California. *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

Indiana. *Estell v. Knightstown & M. Turnpike Co.*, 41 Ind. 174; *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Breedlove v. Martinsville & F. R. Co.*, 12 Ind. 114; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *New Albany & S. R. Co. v. Pickens*, 5 Ind. 247.

Iowa. *Waukon & M. R. Co. v. Dwyer*, 49 Iowa 121.

Kansas. See *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Maryland. *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641.

New Hampshire. *Northwood Union Shoe Co. v. Pray*, 67 N. H. 435, 32 Atl. 770.

Oregon. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691; *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Tennessee. *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

Virginia. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

Wisconsin. *Columbus Institute of Milwaukee v. Conohan*, — Wis. —, 159 N. W. 720.

A subscriber may by agreement be required to make certain payments on application or allotment without any call. *Alexander v. Automatic Tel. Co.*, L. R. [1900] 2 Ch. Div. 56, rev'g L. R. [1899] 2 Ch. Div. 302.

Where the subscription contains no condition or stipulation as to the time of payment, the subscriber undertakes to pay according to the provisions of the charter, and if the charter requires the whole capital stock to be paid in within two years, it is not necessary to aver calls in an action brought after that time. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, aff'g 6 Hun (N. Y.) 293.

cate of incorporation the full amount of capital stock must be paid in before the corporation can commence business and it appears that it has commenced and has been carrying on business.⁷ Nor are calls necessary where the contract provides for payment in instalments at fixed intervals "until by a sale of the lots of the company such payments shall be declared unnecessary by the board of directors," and no such declaration has been made.⁸

A contract providing that the subscription shall be paid on demand by the secretary and on or before a certain date, requires payment either on demand, or, in the absence thereof, not later than the date so specified, and after that time no demand is necessary as a condition precedent to the right to sue on the subscription.⁹

A statute making subscriptions payable in fixed instalments at definite times instead of on call by the directors has been held not to be invalid as impairing the obligation of existing subscription contracts even though it is applicable to them.¹⁰

Generally, subscriptions are not made payable immediately or at specified times, but are subject to call. If subscriptions are expressly or impliedly made payable upon call or demand by the directors or stockholders, either by the terms of the subscription paper itself, or by the charter of the corporation, or the general law, or articles of association, or by an authorized by-law adopted by the corporation prior to the subscription, a valid call by the directors or a majority of the stockholders, as the case may be, is a condition precedent to

⁷ Under such circumstances a trustee in bankruptcy need not show a call by the corporation in order to recover unpaid subscriptions. *Rathbone v. Ayer*, 84 N. Y. App. Div. 186, 82 N. Y. Supp. 235.

⁸ *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641. In the above case this was held to be true as to instalments becoming due even after the board had issued a circular to the stockholders stating that it was confidently believed that the balance on the stock could be paid up by dividends from the earnings of the company.

⁹ *Mountain Timber Co. v. Case*, 65 Ore. 417, 133 Pac. 92.

¹⁰ *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252. In the

course of the opinion in this case the court says that in passing such a statute "the legislature merely asserted the power which under the contract had been left to the discretion of the board, and made absolute the liability which the board had the power to fix, to the same extent the board might have done. Nothing was affected except the board's power to delay. The liability of the stockholder to pay was not changed or impaired, or its boundaries of either time or amount disturbed. The board was the creature of the legislature, and subject to its direction and control. Any power the board might lawfully exercise the legislature could require to be exercised, or it could exercise the power itself."

any liability on the subscription, and to the right of the corporation to maintain an action thereon,¹¹ or to set up the subscription by way

11 United States. *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Covell v. Fowler*, 144 Fed. 535; *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398; *Carey v. Mayer*, 79 Fed. 926; *Priest v. Glenn*, 51 Fed. 405, 51 Fed. 401, aff'g 48 Fed. 19, 47 Fed. 472; *Dorsheimer v. Glenn*, 51 Fed. 404, aff'g 48 Fed. 19, 47 Fed. 472; *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472; *Glenn v. Soule*, 22 Fed. 417; *Wilbur v. Stockholders*, Fed. Cas. No. 17,636, 13 Phila. (Pa.) 479; *Chandler v. Siddle*, 3 Dill. 477, Fed. Cas. No. 2,594.

Alabama. *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431; *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384; *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Curry v. Woodward*, 53 Ala. 371; *Paschall v. Whitsett*, 11 Ala. 472; *Cooper v. Frederick*, 9 Ala. 738; *Bingham v. Rushing*, 5 Ala. 403.

California. *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Union Sav. Bank of San José v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Ventura & O. Val. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *Ventura & O. Val. Ry. Co. v. Collins (Cal.)*, 46 Pac. 287; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Harmon v. Page*, 62 Cal. 448; *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62.

Colorado. *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890.

District of Columbia. *Crook v. International Trust Co.*, 32 App. Cas. 490.

Florida. *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508.

Georgia. *Crawford v. Roney*, 126 Ga. 763, 55 S. E. 499; *North & South St. R. Co. v. Spullock*, 88 Ga. 283, 14 S. E. 478; *Cherry v. Lamar*, 58 Ga. 541; *Macon & A. R. Co. v. Vason*, 57 Ga. 314, 52 Ga. 326; *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230.

Illinois. *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214, rev'g 23 Ill. App. 72; *Lamar Ins. Co. v. Moore*, 84 Ill. 575; *Spangler v. Indiana & I. Cent. Ry. Co.*, 21 Ill. 276; *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Great Western Tel. Co. v. Barker*, 56 Ill. App. 402, aff'd 166 Ill. 150, 46 N. E. 1153; *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276.

Indiana. *Banty v. Buckles*, 68 Ind. 49; *McClasky v. Grand Rapids & I. R. Co.*, 16 Ind. 96; *Gebhart v. Junction R. Co.*, 12 Ind. 484; *Ross v. Lafayette & I. R. Co.*, 6 Ind. 297.

Iowa. *Chandler v. Keith*, 42 Iowa 99.

Kansas. *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252; *Swan v. Pittsburgh Driving Park & Fair Ass'n*, 6 Kan. App. 572, 51 Pac. 583. See also *Beal v. Dillon*, 5 Kan. App. 27, 47 Pac. 317.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Louisiana. *Purton v. New Orleans & C. R. Co.*, 3 La. Ann. 199.

Maryland. *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895; *Glenn v. Williams*, 60 Md. 93; *Granite Roofing Co. v. Michael*, 54 Md. 65. See also *Stillman v. Dougherty*, 44 Md. 380.

Michigan. *Halsey Fire-Engine Co. v. Donovan*, 57 Mich. 318.

of set-off or counterclaim in an action by the subscriber.¹² A call is necessary, for example, in the case of subscriptions payable "in such instalments and at such times as may be decided by a majority of the stockholders, or board of directors,"¹³ or where the agree-

Mississippi. *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373.

Missouri. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Eppright v. Nickerson*, 78 Mo. 482; *Hannah v. Moberly Bank*, 67 Mo. 678; *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

Nebraska. *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994.

New Jersey. *McCarter v. Ketcham*, 72 N. J. L. 247, 62 Atl. 693; *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363; *Grosse Isle Hotel Co. v. I'Anson's Ex'rs*, 43 N. J. L. 442, aff'g 42 N. J. L. 10. See also *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322.

New York. *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g 41 Hun 545; *Seymour v. Sturgess*, 26 N. Y. 134; *Bouton v. Dry Dock, G. S. & S. F. Stage Co.*, 4 E. D. Smith 420.

North Carolina. *Western R. Co. v. Avery*, 64 N. C. 491.

Oregon. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691.

Pennsylvania. *Sinkler v. Turnpike Co.*, 3 Penr. & W. 149. See also *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

Vermont. *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

Virginia. See *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

Washington. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472; *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 51 Pac. 1048. See also *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

Wisconsin. *Columbus Institute of Milwaukee v. Conohan*, — Wis. —, 159 N. W. 720; *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

England. *Grissell's Case*, 1 Ch. App. 528; *Alexander v. Automatic Tel. Co.*, L. R. [1900] 2 Ch. Div. 56, rev'g L. R. [1899] 2 Ch. Div. 302; *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 265.

A call is not rendered unnecessary by reason of the fact that the stock, the subscription for which it is sought to enforce, was issued for property, and the transaction is attacked on the ground of fraud. *Granite Roofing Co. v. Michael*, 54 Md. 65.

¹² *Holt v. Holt Elec. Storage Co.*, 79 Fed. 597; *Bouton v. Dry Dock, G. S. & S. F. Stage Co.*, 4 E. D. Smith (N. Y.) 420.

¹³ *North & South St. R. Co. v. Spullock*, 88 Ga. 283, 14 S. E. 478; *Grissell's Case*, 1 Ch. App. 528, and other cases in the notes preceding.

Under a statute providing that all subscriptions shall be paid in such instalments and at such times as the directors may require, and, if default be made in any payment, the person in default shall pay a certain additional amount, the penalty cannot be collected for nonpayment of a subscription unless there has been a valid call. *Blair v. Wilson*, 15 Pa. Super. Ct. 131.

A call is necessary where the subscription is "subject to the call of the directors as they may be instructed by a majority of the stockholders represented at any regular meeting." *Chandler v. Siddle*, 3 Dill. (U. S. C. C.) 477. Or where it is

ment is to pay a specified sum monthly until the full amount is paid, "in case it is required."¹⁴

There seems to be a conflict of authority as to the necessity for a call when no time for payment is specifically stated. Some courts hold that such a subscription is equivalent to an agreement to pay for the stock at such times and in such amounts as the directors may decide, and that the liability of the subscriber is conditional, and does not become absolute until call by the directors.¹⁵ Others take the view that such a subscription is due immediately, and hence that no call is necessary.¹⁶ And this rule has been applied where the subscription is "to be thereafter paid as required by the board of directors," on the theory that such a subscription is payable on demand, and that the bringing of the suit is in itself a sufficient demand.¹⁷ And it has also been held that where the contract is to pay "when required," and it does not provide for any call nor prescribe any particular mode of demand, no call other than a general demand is necessary.¹⁸

A call may be necessary to put a subscriber in default on a note given in payment of his subscription. It is necessary where the note is in terms "payable in such instalments and at such time or times as the directors may require,"¹⁹ and it has also been held to be neces-

payable "In such manner and proportion, and at such times as the directors of said company may order and direct." *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276. Or in such instalments as the board of trustees may call for the same for the purposes of the business. *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g 41 Hun (N. Y.) 545. Or where the statute requires payment of a certain sum at the time of the subscription "and the residue thereof as required by the president and directors." *Glenn v. Williams*, 60 Md. 93.

¹⁴ *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396.

¹⁵ *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691.

¹⁶ *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611. But see *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384. See also *Phoenix Warehousing Co. v.*

Badger, 67 N. Y. 294, aff'g 6 Hun (N. Y.) 293.

In *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451, it is said that where the agreement is to pay generally, it is payable presently, or as soon, at least, as the company is duly organized, and that no previous call or demand is necessary in order to maintain an action for its recovery. A call was made in this case, however, and the question really involved was as to the necessity for giving notice of it.

¹⁷ *McNelus v. Stillman*, — N. Y. App. Div. —, 158 N. Y. Supp. 428. In this case, however, the corporation was insolvent and there was an order of court directing the receiver to sue.

¹⁸ *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63.

¹⁹ *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep.

sary where the note is payable on demand,²⁰ though there is authority to the contrary.²¹ But when a note given for a subscription is payable absolutely on a day certain, no call is necessary before an action thereon by the corporation, or by an assignee in bankruptcy.²²

A subscriber may waive a call, either expressly or by his acts.²³

If a subscriber repudiates his subscription, no call is necessary to render him liable to an action.²⁴

Where the agreement is to pay all calls regularly made, the fact that a subscriber pays the full price for a part of the stock subscribed for without any call, does not obligate him to pay in like manner for the rest, and is not evidence of an agreement on his part to pay without call.²⁵

The necessity for calls when the corporation is insolvent and subscriptions are enforced for the benefit of creditors is considered in a subsequent chapter.²⁶

§ 670. — Purpose and effect of calls. Where a subscription to the stock of a corporation is payable only on call, the liability of the subscriber is a contingent one until a call is made.²⁷ Until that time it is a present debt payable at a future day.²⁸ The purpose of a call

771, 45 Atl. 221. And see *Lamar Ins. Co. v. Moore*, 84 Ill. 575.

Where the promise is to pay, "subject to a call by the board of directors." *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431.

But see *Howland v. Edmonds*, 24 N. Y. 307, where the contrary was held in respect to a premium note given to help make up the capital of a mutual insurance company.

²⁰ *Kilbreath v. Gaylord*, 34 Ohio St. 305.

²¹ *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384.

See also *Howland v. Edmonds*, 24 N. Y. 307, where this rule was applied in an action on a premium note given as one of the notes required by statute to make up the capital of a mutual insurance company.

²² *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240.

²³ *Graebner v. Post*, 119 Wis. 392,

100 Am. St. Rep. 890, 96 N. W. 783.

²⁴ *Cass v. Pittsburg, V. & C. Ry. Co.*, 80 Pa. St. 31.

²⁵ *Grosse Isle Hotel Co. v. I'Anson's Ex'rs*, 43 N. J. L. 442, aff'g 42 N. J. L. 10.

²⁶ See chapter on Stock and Stockholders, *infra*.

²⁷ *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62; *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

The balance due may or may not be called for, depending on the necessities of the company. *Handley Inv. Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472.

²⁸ *Ventura & O. Val. Ry. Co. v. Collins (Cal.)*, 46 Pac. 287; *Eppright v. Nickerson*, 78 Mo. 482; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

is to fix the time of payment when no time is fixed by the contract, and to make that certain which was before uncertain.²⁹ When duly made, it gives rise to a fixed liability on the contract of subscription, both as to the time and amount,³⁰ and converts the contingent liability into an absolute one;³¹ and a cause of action then accrues against the subscriber for the amount of the call.³²

"Its effect is to make whatever the stockholders are liable for, within the call, become due and payable, so that suit may be brought to enforce such liability."³³

It has been said that the duty to pay pertains to the ownership of the stock and exists before the call is made and is not created by it; that before call this duty is inchoate and indefinite, but that upon call, made and notified, the owner, by reason of such pre-existing duty, becomes charged with a definitive debt, a sum fixed and certain, which he is absolutely bound to liquidate.³⁴

"The call does not fix the liability in the sense of creating the obligation to pay for the stock. That is created by the subscription contract; but the contract is not to pay for the stock at all events; it is to pay upon a contingency, upon condition of a call being made according to the contract. The call makes what was before contingent absolute."³⁵

"The obligation to pay it is assumed when the stock is subscribed for, and, that it is only payable on call, does not make it an obligation in posse merely."³⁶

"It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscrip-

²⁹ *Columbus Institute of Milwaukee v. Conohan*, — Wis. —, 159 N. W. 720.

³⁰ *Ventura & O. Val. Ry. Co. v. Collins* (Cal.), 46 Pac. 287; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438; *Crawford v. Roney*, 126 Ga. 763, 55 S. E. 499.

³¹ *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

³² *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420. See also *Burke v. Maze*, 10 Cal. App. 206, 61 Pac. 438.

That the statute of limitations does

not commence to run until a valid call or assessment has been made, see § 669, *supra*.

³³ *In re Minnehaha Driving-Park Ass'n*, 53 Minn. 423, 55 N. W. 598.

³⁴ *American Alkali Co. v. Campbell*, 113 Fed. 398, *aff'd* 125 Fed. 207. See also *Carey v. Mayer*, 79 Fed. 926; *Glenn v. Abell*, 39 Fed. 10; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

³⁵ *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

³⁶ *Eppright v. Nickerson*, 78 Mo. 482.

tion * * *,³⁷ except where the whole amount is called for.³⁸

The liability to pay calls that have been made arises by virtue of the stockholders' contract of membership in the corporation,³⁹ and is contractual and not a penalty. It has been said that it "has but slight analogy to a debt, but is a statutory liability, the form and extent of which is dependent upon the particular phraseology of the statute creating the liability."⁴⁰

§ 671. — Right to pay without call. A subscriber is not obliged to wait to pay his subscription until a call is made upon him, but may make payment at any time without a call,⁴¹ though there seems to be authority to the effect that the corporation is not obliged to accept such payments.⁴² If, however, it accepts and retains money tendered in payment of a subscription, but refuses to so apply it, and converts it to its own use, its liability therefor is the same as though it had converted the property of a stranger.⁴³

§ 672. Validity and sufficiency of calls—In general. The validity of calls upon unpaid subscriptions is determined by the laws of the state or country in which the corporation is located.⁴⁴ But the method of establishing the illegality of a call is governed by the *lex fori*.⁴⁵

³⁷ Glenn v. Williams, 60 Md. 93, quoted in Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420.

No claim accrues for anything beyond the amount of the call. Fitzgerald's Estate v. Union Sav. Bank, 65 Neb. 97, 90 N. W. 994.

³⁸ Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Glenn v. Williams, 60 Md. 93.

As to the right to call for the whole amount of the subscription at one time, see § 676, *infra*.

³⁹ Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438.

⁴⁰ Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

⁴¹ Marsh v. Burroughs, 1 Woods (U. S. C. C.) 463, Fed. Cas. No. 9,112; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Poole's Case, L. R. 9 Ch. Div. 322; Adamson's Case, L. R. 18 Eq.

670; Sykes' Case, L. R. 13 Eq. 255; Barge's Case, L. R. 5 Eq. 420.

⁴² Where the statute authorizing it to accept such payments is permissive only. Miller v. Hawkeye Gold Dredging Co., 156 Iowa 557, 137 N. W. 507.

As to the right of a stockholder to make payment to a creditor after the corporation becomes insolvent, see chapter on Stock and Stockholders, *infra*.

⁴³ Miller v. Hawkeye Gold Dredging Co., 156 Iowa 557, 137 N. W. 507.

⁴⁴ American Pastoral Co. v. Gurney, 61 Fed. 41; Bank of China, Japan & The Straits v. Morse, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

⁴⁵ Bank of China, Japan & The Straits v. Morse, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

A call or assessment in violation of the terms of the subscription contract is void and creates no liability.⁴⁶

A subscriber is not liable for calls or assessments made before he subscribed, and which therefore were not made on the stock subscribed for by him.⁴⁷

Generally the fact that a call was illegal and not warranted by the charter or articles may be set up as a defense to an action to recover the amount of the call.⁴⁸ In England, under such circumstances, the stockholder may bring an action to have the call declared invalid and to set it aside.⁴⁹

In the federal courts the stockholder's remedy in case of a fraudulent call is in equity rather than in an action at law.⁵⁰

§ 673. — By whom made. Calls are not valid, and cannot be enforced, unless they are made by the proper authority.⁵¹ In the absence of express provisions on the subject, they may and must be made by the board of directors as the managing agents of the corporation,⁵² and the power to make them is often expressly conferred on the directors by the charter, articles or statute.⁵³

⁴⁶ Great Western Tel. Co. v. Barker, 56 Ill. App. 402, aff'd 166 Ill. 150, 46 N. E. 1153.

⁴⁷ Pike v. Bangor & C. S. L. R. Co., 68 Me. 445. See also French v. Busch, 189 Fed. 480.

⁴⁸ Bank of China, Japan & The Straits v. Morse, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

⁴⁹ Bank of China, Japan & The Straits v. Morse, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

⁵⁰ Car Trust Inv. Co. v. Metropolitan Trust Co. of New York, 184 Fed. 443.

⁵¹ People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440. See also New Jersey Midland Ry. Co. v. Strait, 35 N. J. L. 322; Provident Life Assur. & Inv. Co. v. Wilson, 25 U. C. Q. B. 53, and other cases in the notes following.

⁵² Budd v. Multnomah St. Ry. Co., 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659; Ambergate, N. & B. & E. J. Ry. Co. v. Mitchell, 4 Exch. 540.

⁵³ Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764. See also Oglesby v. Attrill, 105 U. S. 605, 26 L. Ed. 1186; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441; Banet v. Alton & S. R. Co., 13 Ill. 504; Peninsular Leasing Co. v. Cody, 161 Mich. 604, 126 N. W. 1053.

A statute providing that the powers vested in the corporation are to be exercised by the board of directors except as otherwise provided, gives them power to make calls, in the absence of any specific provision on the subject. Budd v. Multnomah St. Ry. Co., 15 Ore. 413, 3 Am. St. Rep. 169.

If not otherwise provided in the by-laws. Rem. & Bal. Code, § 3694; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485; South-

Calls are sometimes required to be made by the stockholders.⁵⁴

If the statute merely authorizes stockholders to make calls, it does not exclude the power of the directors to make them.⁵⁵

A provision of the by-laws that a certain per cent. of the stock shall be paid up and that no further call for payments shall be made except by a two-thirds vote of all the stock issued and outstanding, can have no force as against creditors, and especially against creditors without notice. And it must also be construed in connection with the statutory provisions on the subject of calls and assessments; and of course cannot abrogate a statutory provision authorizing the directors to levy and collect an assessment for such percentage of the full amount unpaid as may be necessary to satisfy the claims of creditors, or in any way affect their right to levy and collect such an assessment thereunder.⁵⁶ But similar provisions in the charter have been held valid both as against the corporation and its creditors.⁵⁷

If the charter or articles of association prescribe who shall exercise the power to make calls, the provision is mandatory, and the power cannot be validly exercised by any other person or persons.⁵⁸ So where the charter provides for calls by directors, a call by the president without the sanction of the board would be invalid.⁵⁹ Nor have

ampton Dock Co. v. Richards, 1 M. & G. 448, 133 Eng. Reprint 408.

Calls made by the directors under authority of the by-laws are binding on the subscribers without their consent. *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479.

The directors of a bank which has been adjudged insolvent in a proceeding instituted for that purpose, and who are engaged in winding up its affairs, pursuant to statute, may collect unpaid subscriptions by the assessment proceedings provided for by Civ. Code, § 331 et seq. *Union Sav. Bank of San José v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Union Sav. Bank of San José v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

Where calls are required to be made by directors, there must be directors before subscriptions can be collected. *Covington, C., C. & J. Plank-Road Co. v. Moore*, 3 Ind. 510.

⁵⁴ *In re British Sugar Refining Co.*, 3 K. & J. 408, 26 L. J. Ch. 369, 5 Wkly. Rep. 379, 69 Eng. Reprint 1168.

⁵⁵ *Ambergate, N. & B. & E. J. Ry. Co. v. Mitchell*, 4 Exch. 540.

⁵⁶ *Union Sav. Bank of San José v. Leiter*, 145 Cal. 696, 79 Pac. 441.

⁵⁷ *Louisiana Paper Co. v. Waples*, 3 Woods (U. S. C. C.) 34, Fed. Cas. No. 8,540.

⁵⁸ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. 434.

Where the statute requires the call to fix the place of payment, it must be fixed by the directors, and the call is invalid if it is fixed by the managing director only after the adoption of a resolution by the board which fails to fix it. *Provident Life Assur. & Inv. Co. v. Wilson*, 25 U. C. Q. B. 53.

⁵⁹ *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

the directors power to make calls when the charter provides that they shall be made by the stockholders.⁶⁰ But if the power is exercised by others than the prescribed authority, their action may be adopted or ratified, for in such case it becomes the action of the proper authority.⁶¹

As a general rule, the power cannot be delegated by the authority in which it is vested, as by the board of directors to the president, treasurer, or other corporate officer, for example,⁶² or to a committee.⁶³ But where a call is authorized by the board of directors, the fact that they authorize the president to determine the amount of some of the instalments and to designate the times of payment will not render the call invalid.⁶⁴

It has been held that when the power to make calls is vested in the stockholders, they may delegate the power to the directors,⁶⁵ though there is authority to the contrary.⁶⁶

The legislature may take away from the directors their power to make calls and provide for payment of subscriptions in fixed instalments at definite times,⁶⁷ and it has been held that an act which

⁶⁰ *Louisiana Paper Co. v. Waples*, 3 Woods (U. S. C. C.) 34, Fed. Cas. No. 8,540.

Where by the contract the subscriber binds himself to pay in such instalments as the president and directors shall require, and by a statute to which the corporation is made subject the right to impose assessments is given exclusively to the corporation at a legal meeting of its proprietors, he is liable for an assessment voted first by the stockholders and then by the president and directors. *City Hotel in Worcester v. Dickinson*, 6 Gray (Mass.) 586.

⁶¹ *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536. See also *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445; *Silver Hook Road v. Greene*, 12 R. I. 164.

⁶² *Illinois. Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Maine. *Monmouth Mut. Fire Ins. Co. v. Lowell*, 59 Me. 504.

Missouri. *Commerce Trust Co. v.*

Hettinger, 181 Mo. App. 338, 168 S. W. 911.

New Hampshire. *Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341.

Rhode Island. *Silver Hook Road v. Greene*, 12 R. I. 164.

Canada. *In re Bolt & Iron Co. (Hovenden's Case)*, 10 Ont. Pr. 434.

⁶³ *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁶⁴ *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

⁶⁵ *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92.

Where the contract provided that payment was to be made "as shall hereafter be required by a vote of the company," assessments made by the president and directors pursuant to authority conferred by the by-laws were held to be valid, in *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

⁶⁶ *Ex parte Winsor*, 3 Story (U. S.) 411, Fed. Cas. No. 17,884.

⁶⁷ *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

does so is valid even when applied to existing subscription contracts.⁶⁸

If the directors refuse for an unreasonable length of time to make and enforce a call though the corporation is in need of funds to carry on its business, the stockholders may make and enforce it in the name of and for the benefit of the corporation.⁶⁹ And under such circumstances a court of equity may make the call in a suit brought by a stockholder to collect unpaid subscriptions for the benefit of the corporation.⁷⁰

The call must be made by a duly constituted board of directors,⁷¹ and the directors joining in making it must be qualified to act.⁷²

If a call is made by persons assuming to act as directors, but who are not directors, either de jure or de facto, it is necessarily void. In some of the cases it has been held that a valid call cannot be made by directors de facto merely, but that the board must be a legal board.⁷³ By the weight of authority, however, in this country at

⁶⁸ See § 669, supra.

⁶⁹ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

⁷⁰ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

⁷¹ It is invalid if made by a board of directors illegally claiming to be such. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376.

Where the charter provides that there shall be not less than seven nor more than fifteen directors, a call is not invalidated by a failure to elect fifteen directors, if at no time there were less than seven directors, and when the calls were made there were more than seven and more than a majority of fifteen participated in the vote of the board making the calls. *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 45 Atl. 221, 76 Am. St. Rep. 771.

Where it appears that a major portion of the directors was legally chosen, and the call purports to have been made by the directors, the presumption is that it was made by a legal board, in the absence of any showing to the contrary. *Fairfield*

County Turnpike Co. v. Thorpe, 13 Conn. 173.

⁷² An assessment by directors who have not taken the statutory oath of office is invalid, and will not support a forfeiture. *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

But an assessment is not invalidated by the fact that certain of the directors have not filed their oath of office where they have taken it. *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

Hold-over directors are qualified to act until their successors are elected and have qualified. *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

⁷³ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440.

An assessment by a board of directors de facto will not support a forfeiture. *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

In *Macon & A. R. Co. v. Vason*, 57 Ga. 314, the opinion is expressed that the fact that more persons were directors than the charter authorized,

least, a call which is made by a de facto board of directors is valid.⁷⁴

The board of directors can only make a call at a valid meeting,⁷⁵ of which the required notice was given.⁷⁶ And a failure to notify

and that some of them were not stockholders, would have been fatal to the right of recovery if the defendant had not acquiesced therein.

This is the rule in England. *Garden Gully United Quartz Min. Co. v. McLister*, 1 App. Cas. 39; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Swansea Dock Co. v. Levien*, 20 L. J. Exch. 447.

But a call is not invalidated by defects in the appointment of directors, as, for example, because notice of the meeting at which they were appointed was not given for the prescribed length of time. Such defects are cured by 25 & 26 Vict. c. 89, § 67. And this is especially true where their appointment is confirmed at subsequent meetings properly called. *Briton Medical, G. & L. Ass'n v. Jones*, 61 L. T. R. 384.

⁷⁴*O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Atherton v. Sugar Creek & P. Turnpike Co.*, 67 Ind. 334; *Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 457; *EaKright v. Logansport & Northern I. R. Co.*, 13 Ind. 404; *Covington, C. & J. Plank-Road Co. v. Moore*, 3 Ind. 510; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Chandler v. Sheep Rock Mining & Milling Co.*, 15 Utah 434, 49 Pac. 535. See also *Fairfield County Turnpike Co. v. Thorpe*, 13 Conn. 173.

"Illegality in the election of directors cannot be pleaded as a defense to an action upon a subscription of stock." *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280. See also *Covington, C. & J. Plank-Road Co. v. Moore*, 3 Ind. 510.

Their right to levy the assessment cannot be collaterally attacked.

O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1.

⁷⁵*Ross v. Lafayette & I. R. Co.*, 6 Ind. 297; *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828. See also *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657; *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053.

An assessment can be legally levied only at a regular meeting of the board or at a special meeting regularly called. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17; *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383; *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; *Harding v. Vanderwater*, 40 Cal. 77; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662. See also *Bank of National City v. Johnston (Cal.)*, 60 Pac. 776.

If made at a meeting held outside of the state it must appear that the statutory requirements as to meetings outside the state were complied with. *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431.

⁷⁶*Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17; *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383; *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662. See also *Bank of National City v. Johnston (Cal.)*, 60 Pac. 776; *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

The fact that the meeting was not called upon notice as provided in the by-laws is immaterial, where all the

all of the directors of the meeting at which a call is made will invalidate it, where those not notified do not attend.⁷⁷ But it will be presumed that a valid notice of the meeting was duly given, and that the meeting itself was regularly and lawfully held, and the burden of proof is upon him who alleges the contrary.⁷⁸

When a call is made by the board of directors, a quorum must be present, or the call will be void.⁷⁹ But a call made, when there is no quorum present may be validated if it is confirmed at a subsequent meeting at which a quorum is present.⁸⁰

Whether a particular call was made by authority of the board of directors may be a question for the jury.⁸¹

A subscriber may waive statutory provisions as to the authority by which calls must be made, or may by his conduct estop himself from relying thereon.⁸² So a subscriber who assists in making a by-law providing for the making of calls by the stockholders cannot resist a call so made on the ground that such by-law conflicts with a statute requiring calls to be made by the directors, and is therefore invalid.⁸³ Nor can a subscriber defend against a call on the ground of a violation of the provisions of the charter as to the number and qualifications of the directors where he has acquiesced in such violation by the payment of previous calls,⁸⁴ nor on the ground that a call was made by a board of directors who were not legally appointed, where

directors were personally present and participated in the meeting. *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

As to the necessity for and the sufficiency of such notice generally, see Chap. 40.

⁷⁷ *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; *Harding v. Vanderwater*, 40 Cal. 77.

An assessment is voidable when it is made at a meeting of which certain directors, who were absent, were not notified. *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

⁷⁸ *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

Where the record of the meeting shows that a quorum was present, it will be presumed that legal notice was given in the absence of a showing to the contrary. *Lane v. Brainerd*,

30 Conn. 565; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

⁷⁹ *Humphry v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 Pac. 296; *Hamilton v. Grand Rapids & I. R. Co.*, 13 Ind. 347; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *Bottomley's Case*, 16 Ch. Div. 681; *Southampton Dock Co. v. Richards*, 1 M. & G. 448, 133 Eng. Reprint 408.

⁸⁰ *In re Phosphate of Lime Co.* (Austin's Case), 24 L. T. R. 932.

⁸¹ *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

⁸² *State Bank Bldg. Co. v. Pierce*, 92 Iowa 668, 61 N. W. 426; *Willamette Freighting Co. v. Stannus*, 4 Ore. 261.

⁸³ *Willamette Freighting Co. v. Stannus*, 4 Ore. 261.

⁸⁴ *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

he has accepted dividends declared by said board, and has acted as an officer of the company,⁸⁵ nor on the ground that calls were made by the president instead of the board of directors, where he told the president to make them, acquiesced in their being made by him, promised to pay them, and knew that debts were being contracted on the faith of them.⁸⁶

§ 674. — Time of making calls—Conditions precedent. Of course, a call for payment of a subscription, or a part thereof, cannot be made if payment is not yet due according to the express and implied terms of the contract. It follows that no call can be made upon a subscription until performance or fulfillment of all express or implied conditions precedent to liability thereon, as explained in a former section.⁸⁷

As we have seen, it is an implied condition precedent to liability on a subscription, unless there is something to show a contrary intention, and except so far as may be necessary for payment of contemplated preliminary expenses, that the corporation shall have complied with all conditions precedent to the right to commence business, and until it has done so, no call can be made except for payment of preliminary expenses.⁸⁸ When, as will be explained in a subsequent section, it is a condition precedent, express or implied, that the full amount of the capital stock, or a certain percentage thereof, shall be subscribed before the subscribers shall be liable on their subscriptions, an assessment or call other than for necessary preliminary expenses is invalid, if made before performance of the condition,⁸⁹ unless the

⁸⁵ Briton Medical, G. & L. Ass'n v. Jones, 61 L. T. R. 384.

⁸⁶ State Bank Bldg. Co. v. Pierce, 92 Iowa 668, 61 N. W. 426.

⁸⁷ Wood v. Universal Adding Mach. Co., 166 Ill. App. 346.

A demand for payment of the full amount of unpaid balance cannot be made the basis of a forfeiture where the contract provides for payment in monthly instalments. Wood v. Universal Adding Mach. Co., 166 Ill. App. 346.

See § 579, supra.

⁸⁸ Salem Mill Dam Corporation v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363, 6 Pick. (Mass.) 23; Anvil

Min. Co. v. Sherman, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

See § 579, supra.

⁸⁹ Ventura & O. Val. Ry. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65; Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277; Salem Mill Dam Corporation v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363, 6 Pick. (Mass.) 23; Anvil Min. Co. v. Sherman, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226. And see § 693, infra.

An error in making a call upon subscriptions before performance of a condition precedent prescribed in the same may be corrected by making another call after performance of the

condition has been waived by the subscriber objecting, or he is estopped to set up its nonperformance.⁹⁰ And it is none the less so because of the fact that the condition was performed on the same day on which the assessment was made, if it was not performed until after the dissolution of the meeting of the directors at which it was made.⁹¹

An agreement to pay in such instalments and at such times as may be determined by the board of directors does not mean that the directors can make an illegal call, or that the time of payment is left wholly to their discretion, and hence does not authorize them to make a call before the full amount of stock has been subscribed, if subscription to the full amount is essential to the liability of individual subscribers.⁹²

Provisions in the contract of subscription as to the times when calls may be made are controlling, and general power to make calls conferred on the directors by the charter will not authorize calls in contravention of such provisions.⁹³

A resolution of the board of directors requiring payment in monthly instalments has been held not to be a sufficient demand where the subscription was payable in materials, on the ground that payment in instalments was not contemplated by the contract.⁹⁴

A resolution to make a call prospectively is good; that is, a resolution providing that a call be made on a specified day in the future.⁹⁵ Under such circumstances the date so specified is the date of the call, although the resolution also provides for payment in instalments at a still later date.⁹⁶

§ 675. — Object of call and necessity therefor. Undoubtedly, calls or assessments upon unpaid subscriptions cannot be made except

condition. *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. St. 318.

⁹⁰ See § 704, *infra*.

⁹¹ *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277.

⁹² *Littleton Mfg. Co. v. Parker*, 14 N. H. 543; *Orynski v. Loustaunan* (Tex.), 15 S. W. 674.

A promise to pay assessments "must of course be considered as a promise to pay only legal assessments." *Littleton Mfg. Co. v. Parker*, 14 N. H. 543.

⁹³ *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373.

⁹⁴ *Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490.

⁹⁵ *Sheffield, A. & M. Ry. Co. v. Woodcock*, 7 M. & W. 574. See also *Campbell v. American Alkali Co.*, 125 Fed. 207, *aff'g* 113 Fed. 398.

⁹⁶ For the purpose of determining the liability of a stockholder, not an original subscriber, who has transferred his shares. *Campbell v. American Alkali Co.*, 125 Fed. 207, *aff'g* 113 Fed. 398.

for the legitimate purpose of the corporation. They cannot be made to raise money to be used or invested for an unauthorized purpose.⁹⁷ It will be presumed, however, that they were made for a legitimate purpose,⁹⁸ and in good faith,⁹⁹ and in accordance with the terms of the contract,¹ unless the contrary appears.

Power to levy assessments for the purpose of paying "the proper and legal expenses" of the corporation includes power to levy them for the purpose of paying corporate debts.²

It has been held that a provision of the charter of an insurance company that "in all cases of losses exceeding the means of the corporation each stockholder shall be liable to the amount of the unpaid stock held by him," does not limit the right to make a call or assessment to cases where it is necessary in order to pay losses, but that when the funds have been exhausted by losses, and a call becomes necessary, it may be made for all purposes, including the

⁹⁷ See *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Bank of China, Japan & The Straits v. Morse*, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268; *Habershon's Case*, L. R. 5 Eq. 286. See also *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189; *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285, 21 Pac. 753; *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892; *Grand Valley Irrigation Co. v. Fruita Improvement Co.*, 37 Colo. 483, 86 Pac. 324.

An assessment to raise money to construct a reservoir for storing water is void where the corporation is not authorized to construct reservoirs for that purpose. See *Seeley v. Huntington Canal & Agricultural Ass'n*, 27 Utah 179, 75 Pac. 367.

The fact that the trustees have no authority to incur an indebtedness in excess of a certain sum, does not preclude them from levying and collecting an assessment for the purpose of paying the legal and proper expenses of the company, though the amount thereby raised will exceed the specified sum. *Sullivan v. Triunfo Gold & Silver Min. Co.*, 29 Cal. 585.

A provision in the charter limiting the amount of personal property which the corporation is authorized to hold, does not preclude it from making assessments in excess of that amount where it is also authorized to hold real estate. The purpose of the provision is not to prevent the assessment and collection of an amount in excess of the limit to be expended, but to prevent the corporation from retaining more than that amount as capital. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

⁹⁸ *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

⁹⁹ *Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764, where the court stated that the presumption would be deemed to exist with reference to foreign the same as with reference to domestic corporations.

¹ *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g 41 Hun (N. Y.) 545.

² *Sullivan v. Triunfo Gold & Silver Min. Co.*, 39 Cal. 459.

payment of debts or the creation of a new fund for the purpose of carrying on the business.³

Provisions in the contract of subscription as to the purposes for which calls may be made are controlling, and general power to make calls conferred on the directors by the charter will not authorize calls in contravention of such provisions.⁴

The necessity or advisability for a call is to be determined by the directors or other authority vested with the power to make calls, and is not open to question by the stockholders, if it is made in good faith and for the purposes of the corporation.⁵

The courts will not inquire into the wisdom of a call, nor its necessity at the time, nor the motives which prompt it, if it is within the legitimate authority of the directors to make it and the objects for which the company was incorporated would justify the expenditure of the money to be raised.⁶

³ *In re Republic Ins. Co.*, 3 Biss. (U. S.) 452, Fed. Cas. No. 11,704.

⁴ Where a contract of subscription to a railroad company provides for payment "when requisite for the payment of the contractors for the construction of said road, in such instalments as may be called and required by the president and directors," and that the amount realized is to be expended upon the construction of the road in a certain county, the declaration in an action to recover the amount of a call must allege that the money was required for the payment of contractors for the construction of the road in such county. *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373.

⁵ *United States. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g 83 Iowa 430, 50 N. W. 45; *Car Trust Inv. Co. v. Metropolitan Trust Co. of New York*, 184 Fed. 443.

California. See *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

Idaho. *Weber v. Della Mountain Min. Co.*, 14 Idaho 404, 94 Pac. 441.

Indiana. *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

Massachusetts. *Hastings Lumber Co. v. Edwards*, 188 Mass. 587, 75 N. E. 57.

Missouri. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

Nebraska. *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994.

Oregon. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Washington. See *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

England. *Bailey v. Birkenhead, L. & C. J. Ry. Co.*, 12 Beav. 433; *Anglo-Universal Bank v. Baragnon*, 45 L. T. R. 362.

⁶ *Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, aff'g 103 Fed. 764; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. Ed. 1186; *Car Trust Inv. Co. v. Metropolitan Trust Co. of New York*, 184 Fed. 443; *American Alkali*

If calls are made for a corporate purpose, they are not rendered invalid because the corporation owes no debts, or has sufficient property to pay its debts, or because contracts which it has made are illegal, and not enforceable against it.⁷ So it is no defense to an action to recover the amount of a call that the corporation does not intend to use the money for the purpose of paying its debts or engaging in business, but for the purpose of winding up its affairs and making distribution among its stockholders.⁸ Nor can the stockholder urge as a defense to such an action that the corporation has no right to collect the full amount of his subscription because a part of it, when collected, must be returned to him.⁹

The resolution of the directors need not recite or expressly show that the call is made for a corporate purpose, or that any demand of the business of the corporation requires that subscriptions shall be paid.¹⁰

While a stockholder has a right to defend and resist a fraudulent call,¹¹ if he desires to attack a call on this or any other ground he must do so directly, and not collaterally.¹²

Co. v. Campbell, 113 Fed. 398, *aff'd* on other grounds 125 Fed. 207; Anglo-American Land, Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416.

⁷ Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

"The right to make assessments cannot be made to depend upon any actual indebtedness existing at the time, nor defeated by any apparent indebtedness incurred under a contract which was void." Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

A subscriber may be compelled to pay calls though the corporation owes no debts. Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

It is no defense that the directors and other officers of the company have, for their private gain, settled and compromised all of the corporate debts. Chouteau Ins. Co. v. Floyd, 74 Mo. 286.

⁸ Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828.

⁹ Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828.

¹⁰ Budd v. Multnomah St. Ry. Co., 15 Ore. 413, 3 Am. St. Rep. 169.

¹¹ Oglesby v. Attrill, 105 U. S. 605, 26 L. Ed. 1186; Campbell v. American Alkali Co., 125 Fed. 207, *aff'g* 113 Fed. 398. See also Weber v. Della Mountain Min. Co., 11 Idaho 264, 81 Pac. 931.

Where actions involving the validity of calls claimed to be fraudulent, are compromised by the dismissal of the actions, the release of the subscribers from further liability, and the transfer of their shares, such compromise cannot be collaterally attacked for fraud. Oglesby v. Attrill, 105 U. S. 605, 26 L. Ed. 1186.

¹² In an action against a stockholder to recover an assessment, the stockholder will not be permitted a collateral attack upon the validity of

The power conferred upon the directors or trustees to make calls is not an autocratic one, but must be reasonably exercised for the benefit of the corporation and its stockholders.¹³ While it is a discretionary power, the discretion is merely modal, relating to the time and manner of making payments.¹⁴

If the corporation is in need of funds to carry on its business,¹⁵ or to pay its debts,¹⁶ it is their duty to make a call for that purpose, and to enforce it, and, if they fail to do so for an unreasonable length of time, the stockholders may make and enforce a call for the benefit of the corporation.¹⁷

The directors may also be compelled to make calls by the court when the corporation becomes insolvent, or the court may itself make them under such circumstances.¹⁸

The directors have no right to exercise their power in respect to making calls for their own personal benefit, to the detriment of the stockholders generally.¹⁹ And it has been held that a call made for the purpose of preventing certain stockholders from voting at a meeting, called at the instance of the stockholders, would be an improper exercise of the powers of the directors, and illegal.²⁰

the order for the assessment made by directors. *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

"Otherwise it might happen that one stockholder might be released and another held, while the same legal liability attached to each." *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

¹³ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

¹⁴ *Louisiana Paper Co. v. Waples*, 3 Woods (U. S. C. C.) 34, Fed. Cas. No. 8,540; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Germantown Passenger R. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546. See also *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

¹⁵ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

¹⁶ *Louisiana Paper Co. v. Waples*, 3 Woods (U. S. C. C.) 34, Fed. Cas. No.

8,540; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Germantown Passenger R. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546. See also *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

"It is not discretionary with the directors to say whether the company debts shall be paid or not, when they have the means at command."

Ward v. Griswoldville Mfg. Co., 16 Conn. 593, quoted with approval in *Louisiana Paper Co. v. Waples*, 3 Woods (U. S. C. C.) 34, Fed. Cas. No. 8,540; *Germantown Passenger R. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546.

¹⁷ See § 673, *supra*.

¹⁸ See chapter on Insolvency, *infra*.

¹⁹ So where the directors agree to make a call but postpone the declaration of it so as to enable one of their number to transfer shares owned by him in order to escape liability for the call, such transfer is void. *Gilbert's Case*, L. R. 5 Ch. 559.

²⁰ Where stockholders who had not

§ 676. — **Amount that may be called for.** The amount that may be called for at any one time depends upon the terms of the contract of subscription and the provisions of the charter and general laws on the subject.²¹

When subscriptions are payable simply upon call of the directors, it is for them to determine how they shall be paid, and they may call for payment either in full at one time, or in instalments.²² And the same is true where the statute authorizes the directors to require payment at such times, and in such proportions, and on such conditions as they shall see fit.²³ But where the contract contemplates payment in certain periodical instalments, a call for the whole amount due at once is not justified.²⁴ And where the subscription is payable in such instalments as the trustees may call for the same "for the purposes of the business," they have no right to call for the whole amount at once unless the purposes of the business require it.²⁵

Provisions in the articles, statutes, or subscription contract that not more than a certain per cent. shall be called for at any one time are controlling.²⁶ But though subscriptions stipulate that assessments

paid would be ineligible to vote, and those complaining would be unable to pay. *Anglo-Universal Bank v. Baragon*, 45 L. T. R. 362.

²¹ *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276; *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g 41 Hun (N. Y.) 545.

²² *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276; *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31; *Haun v. Mulberry & J. Gravel Road Co.*, 33 Ind. 103; *Ross v. Lafayette & I. R. Co.*, 6 Ind. 297; *Hays v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81; *Northwestern Ry. Co. v. McMichael*, 6 Exch. 273.

²³ *Haun v. Mulberry & J. Gravel Road Co.*, 33 Ind. 103. See also *Stone v. Great Western Oil Co.*, 41 Ill. 85.

²⁴ As where the subscribers agree to pay "in such manner and proportion, and at such times as the directors of said company may order and direct." *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276.

²⁵ *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g 41 Hun (N. Y.) 545.

²⁶ *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

"Under the laws of California a stockholder may be lawfully called upon and required to pay assessments upon his stock to the extent of ten per cent. of the par value thereof, except where the whole capital is not paid up, in which case he may be required, if the liabilities of the company demand it, to pay by way of assessment the full amount unpaid upon the capital stock." *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

Under an agreement to pay twenty per cent. of the subscription to an agent to be expended for the benefit of the corporation, payment to be made within five days after incorporation, the subscriber's liability to make such payment is not dependent upon the making of an assessment by the corporation, and the fact that the corporation could not make an assessment

shall not exceed a certain sum on each share at one time, several assessments may be voted at the same time, provided no greater sum than the amount limited is made payable on each share at one time.²⁷

One who as a director co-operates with the other directors in ordering a call for the full amount of the subscriptions and who participated in a previous meeting of the stockholders at which the directors were instructed to make it, is estopped from objecting that the directors had no authority to call for the full amount.²⁸

§ 677. — Uniformity and equality. It is a well-settled principle that calls or assessments must be uniform in their operation and that in making them there must be equality in the burden imposed upon the stockholders.²⁹ Unless some of the stockholders have already paid more on their subscriptions than others, a call must be made on all alike, or it will be void. So a call is void if made upon a part only of the stockholders,³⁰ as, for example, where it is made only upon municipal corporations which have subscribed for stock, and not upon the individual subscribers,³¹ or only upon those subscribers who have sold their stock.³² And, similarly, any call or

in excess of ten per cent. does not invalidate the agreement. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.

²⁷ *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

²⁸ *Stone v. Great Western Oil Co.*, 41 Ill. 85.

²⁹ *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472; *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1; *Bank of China, Japan & The Straits v. Morse*, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268; *North Milwaukee Townsite Co. No. 2 v. Bishop*, 103 Wis. 492, 45 L. R. A. 174, 79 N. W. 785; *Bowen v. Kuehn*, 79 Wis. 53, 47 N. W. 374; *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 24 Am. St. Rep. 698, 47 N. W. 373. See also *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

An allegation that the per cent. named was assessed upon each and

every share of stock sufficiently shows that the assessment was equal and uniform upon all the subscribers. *La Crosse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

³⁰ *Alabama*. *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431.

California. *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

Maine. *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445.

Wisconsin. *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

England. *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, 59 Eng. Reprint 900.

³¹ *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445.

³² *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431.

assessment which requires some of the stockholders to pay a higher rate than the others, or which is otherwise unequal or partial, will not be enforced.³³

This principle does not prevent a call which is itself unequal, where the inequality is because of the fact that the favored stockholders have already paid more than the others, and the purpose is merely to render the contributions, as a whole, equal.³⁴ So a call for the payment of all subscriptions except that of a person who has already paid in full is valid.³⁵

In the case of railroad companies, calls may be confined to the stock of subscribers residing in a particular county where the money so obtained is to be used in the construction of that portion of the road which lies within such county.³⁶ It has also been held that stockholders are not prejudiced by the fact that stock purchased by the corporation at a sale for nonpayment of previous assessments

³³ *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 24 Am. St. Rep. 698, 47 N. W. 373. In this case, the complaint in an action to recover an assessment on a subscription showed that some of the stockholders, including the defendant, had paid forty per cent. of their subscriptions, while others had paid but two per cent., and that a further assessment of thirty-five per cent. was levied upon all stockholders. A demurrer was sustained on the ground that the complaint showed that the assessment was unequal, partial, and invalid. This holding was followed in *Bowen v. Kuehn*, 79 Wis. 53, 47 N. W. 374.

An assessment of a certain per cent. against all stockholders who have not paid in full regardless of what they have paid and though some have paid more than others, is void whether made by the directors or the court. *Great Western Tel. Co. v. Barker*, 56 Ill. App. 402, aff'd 166 Ill. 150, 46 N. E. 1153; *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276.

³⁴ *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431;

Fey v. Peoria Watch Co., 32 Ill. App. 618.

"If upon a portion of the stock all or half should have been paid, and nothing or but a small amount has been paid on the other portion, an assessment could be properly levied on the stock which had made the smaller payments, in order to equalize the contributions of all the stockholders." *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

"This is the only mode of assessment as to different classes of stock which would not be violative of the rule that all assessments on stocks must be uniform." *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

³⁵ *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

³⁶ *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280; *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

A provision of the charter permitting a call to be made upon subscribers residing in one county only is valid under such circumstances. *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

and held by it is not included in the assessment, since to include it would increase the amount to be paid by them to that extent.³⁷

§ 678. — Mode of making calls. In order that assessments or calls may be valid, they must be made in the manner, if any, prescribed by the charter, articles of association, or by-laws of the corporation,³⁸ unless a different mode is authorized by the terms of the contract of subscription, in which case its provisions will control.³⁹

³⁷ Any assessment on such stock would have to be paid by the outstanding shares. *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

³⁸ *United States. Covell v. Fowler*, 144 Fed. 535.

California. Shively v. Eureka Telurium Gold-Min. Co., 129 Cal. 293, 61 Pac. 939; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662.

Maryland. See Stillman v. Dougherty, 44 Md. 380.

Massachusetts. People's Mut. Ins. Co. v. Westcott, 14 Gray 440.

Utah. Raht v. Sevier Mining & Milling Co., 18 Utah 290, 54 Pac. 889.

Wisconsin. North Milwaukee Town-site Co. No. 2 v. Bishop, 103 Wis. 492, 45 L. R. A. 174, 79 N. W. 785; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

The power given must be strictly pursued, and if any restrictions or limitations provided in the charter have been disregarded, the attempted forfeiture is invalid. *Germantown Passenger R. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546.

A statutory provision that the directors shall require subscribers to pay their subscriptions in such manner and instalments as the by-laws may provide, does not make the adoption of a by-law regulating the manner of payment an essential step to the declaration of a forfeiture for nonpayment of a call. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

In California "the procedure for

levying and collecting an assessment and for the sale of delinquent stock, is the same whether it be a 'call' for subscription or an 'assessment' on paid-up stock to pay debts and expenses * * *." Civ. Code, §§ 331-349, govern in either case. *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

Where the subscription contract is silent upon the subject, calls can be made only upon the terms and in the manner and form prescribed by the code. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298.

The provisions of the statute or charter on the subject must be strictly complied with. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194.

With reference to sufficiency of allegation of the making of call for instalment of subscription price, see *La Crosse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

³⁹ *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

It is permissible for the subscriber, by terms expressed in his contract of subscription, to modify or waive the code provisions on the subject, which are clearly designed for his benefit. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298.

The subscribers "may agree among themselves to pay the amount of their

No particular formalities are necessary unless expressly prescribed. Subject to special provisions, all that is necessary on the part of the board of directors to make a valid call is "that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part or all the unpaid subscription."⁴⁰ If

subscription either in a single instalment, or in such sums and at such times as the same may be called for. Such a contract will be a waiver of their right to insist that the corporation shall levy assessments therefor as provided in the Civil Code, and may be enforced against them by the corporation according to its terms." *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

So where a subscriber by his contract agrees to pay upon the call of the directors "at such times and in such manner as may be determined by" them, it is not necessary that the directors shall make calls or assessments on his stock in the mode prescribed by the code. *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859. See also *Auburn Opera House & Pavilion Ass'n v. Hill*, 113 Cal. 382, 45 Pac. 695; (Cal.), 32 Pac. 587.

Nor do the code provisions as to assessments apply where the contract provides for the payment of a certain percentage when the corporation is formed and the balance when called upon, and that calls are to be made by the board of directors with such notice as the by-laws shall prescribe; *Beedy v. San Mateo Hotel Co.*, 27 Cal. App. 653, 150 Pac. 810; nor where the contract provides: "Amounts to be due and payable upon the formation of the company and the issuance of the stock." *Marysville Electric Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

Where all the subscribers agree in writing to a by-law giving the corporation a lien on the stock for un-

paid calls and providing that if may commence suit at once to collect the same, they thereby waive the right to insist that the corporation shall levy assessments in the manner provided by the code. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

Where a subscription provides for payment of calls thereon "in conformity with the general incorporating law of the state, and the by-laws of the company made under the same," the amount for which a call may be made will not necessarily be controlled by the general law, if the by-laws prescribe a different rule. *Stone v. Great Western Oil Co.*, 41 Ill. 85. See also *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360, where it was held that assessments were made in accordance with the provisions of the contract.

⁴⁰ *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169.

A resolution directing the president to take such proceedings towards the collection of subscriptions as will "most speedily accomplish the object," is sufficient though it does not specifically state that the directors call in the sums due. It is in substance a call for the entire amount of the sums subscribed. *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363. See also *Van Riper v. American Cent. Ins. Co.*, 60 Ind. 123, where it was held that certain proceedings of the trustees constituted a sufficient assessment. But "where an amount of stock in a banking corporation exists subscribed and unpaid, and books are opened for the subscription

there is such an act or resolution, and statutory requirements are substantially complied with, the call will not be rendered void by mere irregularities or informalities.⁴¹

Of course there must be some definite act or resolution to constitute a call, and not a mere conversation among the directors, or a mere declaration of an intention to make a call in the future.⁴² But unless it is expressly required, an assessment or call by the directors need not be signed by them.⁴³ The resolution or declaration must be sufficiently definite and certain to be capable of enforcement, and either the resolution or declaration, or the notice thereof, must fix the time and mode of payment in express terms, or by clear implication.⁴⁴ The place of payment must also be specified in the order or resolution where the statute so provides.⁴⁵ It has been held, how-

of other stock, for which a stock note is executed, the court cannot by construction declare the stock purporting to be subscribed a mere call on the old unpaid stock." *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

⁴¹ *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Fox v. Allensville*, C. S. & V. Turnpike Co., 46 Ind. 31; *Hays v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81; *In re British Sugar Refining Co.*, 3 Kay & J. 408.

As to recording the call, see *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137.

⁴² Calls for payments of subscriptions to the capital stock of a corporation, payable "as the directors may direct," cannot be made by mere street conversations between the president and directors, in which they agree that the former may call in subscriptions as needed. *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128.

⁴³ *North River Meadow Co. v. Shrewsbury Christ Church*, 22 N. J. L. 424, 53 Am. Dec. 258.

⁴⁴ *Heaston v. Cincinnati & Ft. Wayne R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

A resolution by the directors of a corporation, requiring subscribers to

its stock to pay a stated sum on their shares within a certain time, either in cash or by a promise to pay in the form of a land contract or contracts, whereupon stock is to become full-paid, is too indefinite to support an action against a subscriber for non-payment of the sum called for. *North Milwaukee Town Site Co. v. Bishop*, 103 Wis. 492, 45 L. R. A. 174, 79 N. W. 785.

A resolution of the board of directors that the stockholders "are hereby required to pay an instalment of ten per cent. every thirty days, on all cash subscriptions, until the whole subscriptions are paid, and that due notice thereof be given," etc., is not open to the objection that it is too vague, indefinite, and uncertain, or that it does not fix a definite time for payment. It shows a call for payment of an instalment in thirty days from date, and every thirty days afterwards. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

⁴⁵ *Ruck v. Caledonia Silver Min. Co.*, 16 Cal. App. 356, 92 Pac. 194; *Provident Life Assur. & Inv. Co. v. Wilson*, 25 U. C. Q. B. 53.

Where the by-laws authorize, but do not require the directors to designate a place of payment, the contract

ever, that if the notice of a call definitely fixes the time and place of payment, and the person to whom payments are to be made, it is no objection that the declaration or resolution does not do so.⁴⁶ It has also been held that if no time is fixed for payment, the call is payable on demand;⁴⁷ that if no place is fixed, payment must be made at the place of business of the corporation,⁴⁸ and that if no person is named to whom payment is to be made, it must be made to the treasurer or other officer whose duty it is to receive money due the corporation,⁴⁹ and hence that a failure to name the time, place, or person will not invalidate the call.

The objects and purpose of the call are sometimes required to be stated.⁵⁰

The call is not invalidated because the resolution provides that on default in payment the attorney for the corporation is authorized to take such action as he may deem necessary to collect the amount

requires payment to such person as shall be designated by the company, and the by-laws designate the treasurer to receive payment, the place of payment is to be determined by a provision of the by-laws that the treasurer shall have his office at such place as the directors may determine, and a designation by the treasurer of certain banks where payment may be made is valid and sufficient. *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

⁴⁶ *United States. American Pastoral Co. v. Gurney*, 61 Fed. 41.

Indiana. See *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31.

New York. *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

Pennsylvania. See *Hays & Black v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

Wisconsin. *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

England. *Sheffield, A. & M. Ry. Co. v. Woodcock*, 7 M. & W. 574; *Great North of England Ry. Co. v. Biddulph*, 7 M. & W. 243.

In *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169, a call was held to be suffi-

ciently explicit though it did not fix the place or per cent. of payment, where the amount and place were specified in the notice, and the charter limited the amount that could be called per annum, a part of which had already been called.

⁴⁷ *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

⁴⁸ *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

⁴⁹ *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

A requirement in the vote that instalments be paid at specified times "imports that payments should be made to the treasurer, who is the proper and only officer to receive and keep the moneys of the corporation." *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

⁵⁰ In *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657, the resolution was held to sufficiently designate the objects of the assessment when taken in connection with the articles.

due, where the action for that purpose is in fact brought by duly licensed attorneys, and it does not appear that they were not duly authorized to bring it.⁵¹

It is not necessary, in order to bind a stockholder by a call made by the stockholders, that he be present at the meeting at which it is made, provided it is within the power of the meeting to make it and a quorum is present.⁵² Nor, if present in person or by proxy, need he have voted in favor of it.⁵³ Nor is a resolution for a call adopted at a meeting of the stockholders invalidated by the fact that resolutions for calls for smaller amounts have been previously defeated at the same meeting.⁵⁴

Irregularities in making calls may be cured, and the objection obviated by making a new call,⁵⁵ and the subscriber may waive them or be estopped to set them up.

§ 679. — Waiver of irregularities; estoppel. Even where irregularities are material, and would ordinarily invalidate a call, they may be waived by the stockholders,⁵⁶ and if the steps taken, though informal, are treated as sufficient by the corporation and the subscriber, they will be deemed to be binding.⁵⁷ So one who makes payment in answer to a call thereby admits its validity.⁵⁸ Nor can one who denies any liability whatever object to the form of the call.⁵⁹ But waiver as to one call or assessment is not a waiver as to subse-

⁵¹ *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

⁵² *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

⁵³ It is immaterial whether he voted in favor of or against it, or did not vote at all. *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

⁵⁴ *In re British Sugar Refining Co.*, 3 Kay & J. 408, 26 L. J. Ch. 369, 5 Wkly. Rep. 379, 69 Eng. Reprint 1168.

⁵⁵ *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. St. 318. And see *Hays v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

⁵⁶ *Georgia. Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Iowa. State Bank Building Co. v. Pierce, 92 Iowa 668, 61 N. W. 426.

Kansas. Crissey v. Cook, 67 Kan. 20, 72 Pac. 541.

Utah. Hatch v. Lucky Bill Min. Co., 25 Utah 405, 71 Pac. 865; *Ogden Clay Co. v. Harvey*, 9 Utah 497, 35 Pac. 510.

Wisconsin. Graebner v. Post, 119 Wis. 392, 100 Am. St. Rep. 890, 96 N. W. 783.

England. In re British Sugar Refining Co., 3 Kay & J. 408, 26 L. J. Ch. 369, 5 Wkly. Rep. 379, 69 Eng. Reprint 1168.

⁵⁷ *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

⁵⁸ *Hays & Black v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81; *Graebner v. Post*, 119 Wis. 392, 100 Am. St. Rep. 890, 96 N. W. 783.

⁵⁹ *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816.

quent ones.⁶⁰ And the board of directors in making an assessment cannot represent the stockholder so as to waive or in any manner affect his right to a lawful assessment.⁶¹

A stockholder may be estopped to set up irregularities by having participated as a stockholder or director in making the call,⁶² or other calls in which there were similar irregularities,⁶³ or by otherwise recognizing its validity.⁶⁴

A stockholder who has recognized the validity of a by-law providing for the payment of subscriptions in specified instalments and at specified times by making such payments and sharing in the profits of the company, cannot thereafter deny its validity in order to escape liability for the balance due.⁶⁵ And a stockholder who, as a member of the board of directors, introduces a resolution reducing the amount of an assessment previously made, is estopped to set up that such reduction is illegal and hence that a sale of his stock for nonpayment of the reduced assessment is void.⁶⁶

A subscriber may waive statutory or charter provisions as to the

⁶⁰ *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

⁶¹ *Great Western Tel. Co. v. Barker*, 56 Ill. App. 402, aff'd 166 Ill. 150, 46 N. E. 1153. See also *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276.

⁶² *Connecticut. Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

Missouri. Kansas City Hotel Co. v. Harris, 51 Mo. 464.

Oregon. Willamette Freighting Co. v. Stannus, 4 Ore. 261.

Pennsylvania. Hays v. Pittsburgh & S. R. Co., 38 Pa. St. 81.

Wisconsin. Wisconsin River Lumber Co. v. Walker, 48 Wis. 614, 4 N. W. 803.

England. York Tramways Co. v. Willows, 8 Q. B. Div. 685.

A subscriber is estopped to object to a call on the ground that it was improperly made for the full amount of the subscriptions, where he participated as a director in making the call, and as a stockholder in instructing the directors to make the call.

Stone v. Great Western Oil Co., 41 Ill. 85.

A director who votes in favor of a resolution levying an assessment is estopped from denying its validity as a basis for the forfeiture of his stock for its nonpayment. *Campbell v. Santa Maria Oil & Gas Co.*, 153 Cal. 282, 95 Pac. 39.

⁶³ A stockholder cannot object to the validity of an assessment on the ground that the directors present at the meeting at which it was levied did not represent a majority of the stock, or that certain previous assessments had not been collected in full, where he acted as president, director and manager, and hence must have known that it was customary to levy assessments in this irregular manner. *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

⁶⁴ See *Boll v. Camp*, 118 Iowa 516, 92 N. W. 703; *Joseph v. Davenport*, 116 Iowa 268, 89 N. W. 1081.

⁶⁵ *Morrison v. Dorsey*, 48 Md. 461.

⁶⁶ *Ward v. California Celery & Produce Co.*, 15 Cal. App. 84, 113 Pac. 888.

authority by which calls must be made or may by his conduct estop himself from relying thereon.⁶⁷

Where the proper officers of the corporation procure a loan upon the unpaid subscriptions as collateral security by falsely representing that a call has been made, both the corporation and the subscribers are estopped to deny the truth of the representation.⁶⁸ But a municipality is not estopped to deny the validity of an assessment upon stock subscribed by it by reason of the fact that the city council, after the commencement of an action to recover the amount thereof, votes to pay it, where no action is taken by the plaintiff company by reason thereof.⁶⁹

§ 680. — Partial invalidity. The fact that one of several assessments is invalid does not render all of them invalid, but those which are invalid may be abandoned, and those which are valid enforced.⁷⁰

§ 681. — Time of payment—Payment in instalments. The time when a given call or assessment becomes payable may depend upon the provisions of the charter or by-laws of the particular corporation, or upon the terms of the call, or possibly on the practice adopted in collecting calls or assessments by the persons charged with that duty.⁷¹ So the charter or by-laws or the general law may provide that all calls or assessments shall be payable in a certain number of days after they are ordered,⁷² or after notice given by publication or otherwise,⁷³ or, if the charter and by-laws are silent on the subject, the calls as ordered from time to time may fix the date of payment.⁷⁴

A call becomes a debt due from the time when it is made, though by its terms it is not payable until a future date.⁷⁵

If a subscription is payable in labor and materials, on receipt of a call, it is the duty of the subscriber to attempt to ascertain when, where and how such payment will be received.⁷⁶

⁶⁷ See § 667, *supra*.

⁶⁸ *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

⁶⁹ *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445.

⁷⁰ *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545.

⁷¹ *Liggett v. Glenn*, 51 Fed. 381, *rev'g* on other grounds 47 Fed. 472.

⁷² *Liggett v. Glenn*, 51 Fed. 381, *rev'g* on other grounds 47 Fed. 472.

⁷³ *Liggett v. Glenn*, 51 Fed. 381,

rev'g on other grounds 47 Fed. 472. See also *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890.

As to the necessity for notice, see § 683, *infra*.

⁷⁴ *Liggett v. Glenn*, 51 Fed. 381, *rev'g* on other grounds 47 Fed. 472.

⁷⁵ *In re China Steamship & L. C. Co* 38 L. J. Ch. 512.

⁷⁶ Proof of an agreement that defendant might pay his subscription in labor and materials is inadmissible in

A call may be made payable in instalments,⁷⁷ although an action will not lie to collect one of such instalments until all have become due and payable.⁷⁸

In the absence of any provision fixing a length of time that must intervene between the times for the payment of each instalment, the matter rests in the judgment and discretion of the directors.⁷⁹

Provisions of the contract of subscription limiting the intervals within which instalments may be made payable are valid, and calls not in conformity therewith are void.⁸⁰

§ 682. — Proof of calls. The books and records of the corporation are admissible as against members of the corporation to prove that calls were made, and the amount thereof.⁸¹ And an authorized call for a subsequent instalment is evidence that a former one was made by authority.⁸²

The certificate of the corporate secretary that a call was made by order of the board of directors is not evidence of that fact, but he must give a copy of the order of the board of directors making the call, so that the court may judge as to its sufficiency.⁸³

an action to recover the amount of the subscription, where there is no offer to show that he attempted to ascertain when and where he could do so. *McClure v. People's Freight Ry. Co.*, 90 Pa. St. 269.

⁷⁷ *Ambergate, N., B. & E. J. R. Co. v. Norcliffe*, 6 Exch. 629; *Birkenhead, L. & C. J. R. Co. v. Webster*, 6 Exch. 277; *Northwestern Ry. Co. v. McMichael*, 6 Exch. 273. See also *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁷⁸ *Birkenhead, L. & C. J. R. Co. v. Webster*, 6 Exch. 277; *Northwestern Ry. Co. v. McMichael*, 6 Exch. 273.

⁷⁹ *Hall v. United States Ins. Co. of Baltimore*, 5 Gill. (Md.) 484.

⁸⁰ That there was a shorter interval between calls than permitted by the statute or charter is a matter of defense. *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20. See *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322, where this rule was applied in the case of a subscription to cor-

porate bonds. See also *Gill's Adm'r v. Kentucky & C. Gold & Silver Min. Co.*, 7 Bush (Ky.) 635.

⁸¹ *District of Columbia. National Exp. & Transp. Co. v. Morris*, 15 App. Cas. 262.

Indiana. Fox v. Allensville, C. S. & V. Turnpike Co., 46 Ind. 31; *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169.

Missouri. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

New York. Hamilton & D. Plank Road Co. v. Rice, 7 Barb. 157.

Pennsylvania. Hays & Black v. Pittsburgh & S. R. Co., 38 Pa. St. 81; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

England. Southampton Dock Co. v. Richards, 1 M. & G. 448, 133 Eng. Reprint 408; *Sheffield, A. & M. Ry. Co. v. Woodcock*, 7 M. & W. 574.

⁸² *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

⁸³ *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429.

§ 683. Notice of calls and demand of payment—Necessity for notice. By the weight of authority, in the absence of provision to the contrary in the charter, articles of association, by-laws, or contract of subscription, subscribers of stock are bound to take notice of all calls upon the subscriptions, and the directors are not required to give any notice, or to make any further demand of payment, before maintaining an action.⁸⁴

There are, however, holdings that notice is necessary even under such circumstances,⁸⁵ pursuant to the general rule that notice must

84 Alabama. *Grubbs v. Vicksburg & B. R. Co.*, 50 Ala. 398; *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33. But see *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70, holding that notice must be given.

Georgia. *Wilson v. Wills Valley R. Co.*, 33 Ga. 466.

Indiana. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Smith v. Indiana & I. Ry. Co.*, 12 Ind. 61. But see *Hill v. Nisbet*, 100 Ind. 341; *Beckner v. Riverside & B. G. Turnpike Co.*, 65 Ind. 468; *Van Riper v. American Cent. Ins. Co.*, 60 Ind. 123; *Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *Breedlove v. Martinsville & F. R. Co.*, 12 Ind. 114; *Johnson v. Crawfordsville, F. K. & Ft. W. R. Co.*, 11 Ind. 280; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Ross v. Lafayette & I. R. Co.*, 6 Ind. 297. See also *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407.

Kansas. *Swan v. Pittsburg Driving Park & Fair Ass'n*, 6 Kan. App. 572, 51 Pac. 583.

Kentucky. See *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. 43; *Louisville & E. Turnpike Road Co. v. Meriwether*, 5 B. Mon. 13.

New York. *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *United Growers Co. v. Eisner*, 22 App. Div. 1, 47 N. Y. Supp. 906.

Pennsylvania. See *Grubb v. Ma-*

honing Nav. Co., 14 Pa. St. 302; *Gray v. Monongahela Nav. Co.*, 2 Watts & S. 156, 37 Am. Dec. 500.

This rule rests upon the ground that the contract to pay by installments is, in effect, a promise to pay on demand, and that the demand involved in the suit itself is alone sufficient. *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *Smith v. Indiana & I. Ry. Co.*, 12 Ind. 61.

A claim by way of set-off for the amount of the subscription in an action brought by the subscriber against the corporation is a sufficient demand for payment even if a demand is required. *Robson v. C. E. Fenniman Co.*, 83 N. J. L. 453, 85 Atl. 356.

85 Alabama & F. R. Co. v. Rowley, 9 Fla. 508; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393. See also *Scarlett v. Academy of Music*, 43 Md. 203; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181; *Miles v. Bough*, L. R. 3 Q. B. 845.

It was so held in *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70. But see later Alabama cases cited in the preceding note which hold to the contrary.

In *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593, notice was held to be necessary. But *Peake v. Wabash R. Co.*, 18 Ill. 88, holds to the contrary.

be given where the fact or circumstance upon which the performance of a contract depends lies more particularly in the knowledge of the promisee than the promisor,⁸⁶ or where, by the terms of the contract, the payee or obligee has the right to determine the time of payment or performance by the payor or obligor.⁸⁷

If the charter, articles of association, by-laws, or subscription requires that a particular notice be given, or demand made, such notice or demand is necessary before an action can be maintained,⁸⁸

⁸⁶ *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508; *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593.

⁸⁷ *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70; *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593.

⁸⁸ *United States. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U. S. 221, 47 L. Ed. 782, aff'g 108 Fed. 764.

Arkansas. *Mississippi, O. & R. River R. Co. v. Chesnutt*, 20 Ark. 461; *Mississippi, O. & R. River R. Co. v. Gaster*, 20 Ark. 455. See also *Mississippi, O. & R. River R. Co. v. Turrentine*, 21 Ark. 445.

California. *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 Pac. 707; *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

District of Columbia. *Crook v. International Trust Co.*, 32 App. Cas. 490.

Georgia. *Cherry v. Lamar*, 58 Ga. 541; *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Illinois. *Cole v. Joliet Opera-House Co.*, 79 Ill. 96; *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429; *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276; *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Indiana. *Fox v. Allensville, C. & W. Turnpike Co.*, 46 Ind. 31; *Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Smith v. Indiana & I. Ry. Co.*, 12 Ind. 61; *Corydon Steam Mill Co. v. Pell*, 4 Blackf. 472.

Maryland. *Granite Roofing Co. v.*

Michael, 54 Md. 65; *Scarlett v. Academy of Music*, 46 Md. 132, 43 Md. 203; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Michigan. *Dexter & M. Plank-Road Co. v. Millerd*, 3 Mich. 91.

Minnesota. *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317.

Pennsylvania. *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240; *McCarty v. Selinsgrove & N. V. R. Co.*, 87 Pa. St. 332; *Sinkler v. Turnpike Co.*, 3 Penr. & W. 149.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

Washington. *Rem. & Bal. Code*, § 3694; *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

Wisconsin. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583; *North Milwaukee Town Site Co. No. 2 v. Bishop*, 103 Wis. 492, 45 L. R. A. 174, 79 N. W. 785.

England. *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407; *Edinburgh, L. & N. Ry. Co. v. Hebblewhite*, 6 M. & W. 707.

In Colorado the statute provides that payment is not required to be made until a specified time after demand. *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890.

In *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435, it was held that a provision that the directors may require assessments to be paid "in such manner and with such notice as may be

unless it is affirmatively shown that the subscriber had actual notice,⁸⁹ or it appears that he has waived notice or is estopped to rely on the failure to give it.⁹⁰

Provisions requiring notice have sometimes been held to apply only to subscriptions payable in money, as distinguished from those payable in property or labor,⁹¹ or only where it is sought to enforce a forfeiture,⁹² or to recover a statutory penalty for nonpayment,⁹³ leaving to the corporation its remedy by action although no notice is given.

Of course they have no application where payment is required to be made in certain fixed instalments at specified times.⁹⁴

It has been held that a suit in equity by an injured stockholder, who has paid for his stock in full, against delinquent stockholders who are at the same time controlling directors of the corporation, for their refusal to call for unpaid subscriptions which they themselves owe, is in itself equivalent to a notice of call, and that no other notice need be shown.⁹⁵

A provision for giving notice to "successors in interest" of a stockholder applies to the giving of notice to the heirs of a deceased stock-

prescribed by the by-laws" was not intended to make that mode of notice exclusive of all others, and that an assessment was not invalidated because no by-law prescribing the form of the notice had been adopted.

Under a statute providing that, unless otherwise expressly provided by law or the articles of incorporation, the directors of any corporation may call in the subscriptions to the capital stock by instalments by giving such notice thereof as the by-laws shall prescribe, to render a call enforceable, in the absence of any express provision of law, or of the articles of incorporation, fixing the time for its payment, a notice to be given must be prescribed by a by-law, or by a resolution or regulation having the effect of a by-law. *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181.

In *Beckner v. Riverside & B. G. Turnpike Co.*, 65 Ind. 468, it was held that a statutory provision requiring published notice applied only when the

subscription was not payable at a fixed time or upon a given contingency, and did not apply where it was payable on call by the directors.

⁸⁹ See § 684, *infra*.

⁹⁰ See § 687, *infra*.

⁹¹ *Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490.

⁹² *Hill v. Nisbet*, 100 Ind. 341; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Smith v. Indiana & I. R. Co.*, 12 Ind. 61; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451. See also *Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490.

⁹³ *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43; *Louisville & E. Turnpike Road Co. v. Meriwether*, 5 B. Mon. (Ky.) 13; *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 302; *Gray v. Monongahela Nav. Co.*, 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

⁹⁴ *Morrison v. Dorsey*, 48 Md. 461.

⁹⁵ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

holder to whom the entire beneficial interest in the stock passes by descent.⁹⁶

It seems that want of notice to other subscribers will not constitute a defense to a subscriber who has himself been properly notified.⁹⁷

Whether or not notice was given is a question of fact for the jury, where the evidence on the subject is conflicting.⁹⁸ So it is for them to determine whether a notice mailed to a subscriber was received by him, whether he testifies that he did not receive it or that he does not remember receiving it.⁹⁹

§ 684. — Mode of giving notice; service. The mode of giving notice is sometimes prescribed by the statute or charter, or the articles of association, or the subscription contract, in which case a compliance with the requirement is generally necessary.¹ But the notice need not be given in any particular mode, unless there is some express requirement,² and any reasonable notice will generally be held

⁹⁶ *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

⁹⁷ *Fairfield County Turnpike Co. v. Thorpe*, 13 Conn. 173; *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

⁹⁸ *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053; *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

⁹⁹ *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363.

¹ *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 Pac. 707; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316. See also *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890; *Smith v. Indiana & I. Ry. Co.*, 12 Ind. 61; *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240.

Cal. Civ. Code, § 335, prescribes the form of the notice, and a notice in the statutory form is sufficient. *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

² Under a statute authorizing the di-

rectors of a corporation to call in the subscriptions to its stock by giving such notice as may be prescribed by its by-laws, notice of a call by mailing a copy to subscribers is insufficient, in the absence of a by-law authorizing notice in such manner, although the directors have made a resolution directing such notice. *North Milwaukee Town Site Co. No. 2 v. Bishop*, 103 Wis. 492, 45 L. R. A. 174, 79 N. W. 785.

An allegation, in an action to recover the amount of certain assessments, to the effect that the defendant had due and personal service and notice of the said calls or assessments, was held to be sufficient in *La Crosse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127, and *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

² *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650; *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

In such case it is within the general powers of the directors to adopt any reasonable mode. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

sufficient,³ such as a personal demand for payment.⁴ Written notice is not necessary unless expressly required.⁵

Some courts hold that when notice is required, but publication of notice in a newspaper is not expressly authorized, such notice is not sufficient, unless actual notice is shown,⁶ while others hold that under such circumstances notice by publication is sufficient without personal notice.⁷ But notice by publication is often expressly authorized or required.⁸

If notice is given by publication, publication must be proved by competent legal evidence.⁹

The fact that a subscription is conditioned on the amount subscribed being expended on a particular portion of the work does not make it necessary to state in the notice that the money is wanted for that purpose. *Nichols v. Burlington & L. County Plank Road Co.*, 4 Greene (Iowa) 42.

³ *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43; *Louisville & E. Turnpike Road Co. v. Meriwether*, 5 B. Mon. (Ky.) 13.

⁴ *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43.

⁵ Verbal notice by the secretary under direction of the president is sufficient where the charter does not require written notice. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

⁶ *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508; *People's Building & Loan Ass'n v. Furey*, 47 N. J. Eq. 410, 20 Atl. 890; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451.

The notice must be actual or personal in the absence of any provision on the subject. *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

Notice must be given personally or in some way pointed out by the vote or by-laws of the company. *Essex Bridge Co. v. Tuttle*, 2 Vt. 393.

⁷ See *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Fisher v. Evans-*

ville & C. R. Co., 7 Ind. 407; *Ross v. Lafayette & I. R. Co.*, 6 Ind. 297; *Louisville & E. Turnpike Road Co. v. Meriwether*, 5 B. Mon. (Ky.) 13; *Hall v. United States Ins. Co. of Baltimore*, 5 Gill (Md.) 484.

⁸ *Illinois*. *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429.

Indiana. *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169; *Unthank v. Henry County Turnpike Co.*, 6 Ind. 125.

Kentucky. *Logan, T. & C. Turnpike Road Co. v. Glass*, 3 B. Mon. 493.

Maryland. *Scarlett v. Academy of Music*, 46 Md. 132, 43 Md. 203; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Pennsylvania. *Sinkler v. Turnpike Co.*, 3 Penr. & W. 149.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

Washington. *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523.

In California the statute provides that the notice of assessment must be served personally, or, in lieu thereof, must be served by mailing and by publication. Civ. Code, § 336; *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 Pac. 707; *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

When required by the charter it is a condition precedent to the validity of the calls. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

⁹ It cannot be proved by the certifi-

Where personal or published notice is required, notice by mail is insufficient,¹⁰ at least unless it is received.¹¹

Proof that a notice properly addressed was duly mailed raises a presumption that it was received, and such presumption is not overcome by the testimony of the addressee that he does not remember receiving it.¹²

When a particular notice is required by the statute, articles of incorporation, or contract, no other or further notice is necessary.¹³ And where the charter requires notice to be given as prescribed by the by-laws, and such notice is given, no other notice or demand of payment is necessary.¹⁴

Proof of actual notice generally renders failure to give the notice required by the charter of the corporation harmless and immaterial.¹⁵

cate of the secretary of the corporation. *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429.

The newspaper which contains the notice is the best evidence of its contents and publication, and must be produced in the first instance. Its contents cannot be proved by secondary evidence without proof of the loss of the original. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

In order to prove the loss of the original, it is not necessary to prove the loss of the whole edition of the paper in which the notice appeared, but it is sufficient to show a fair, sincere and diligent search for the paper in places where it would be likely to be, within the vicinity of the party, and reasonably accessible. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

Publication may be proved by the affidavit of a bookkeeper in the office of the paper in which the publication was made. *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169.

If the notice is required to be published more than once, publication may be proved by producing one copy of the paper containing it, and the deposition of the publisher that the same was published the requisite

number of times. See *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

So where the charter requires publication for three weeks, the three successive papers in which the notice was published need not be produced, but the production of one copy with the oath of the publisher that it was published three weeks is prima facie sufficient to shift the burden of proof upon the defendant to show that it was not so published. *Unthank v. Henry County Turnpike Co.*, 6 Ind. 125.

¹⁰ *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

¹¹ *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

¹² *Braddock v. Philadelphia, M. & M. R. Co.*, 45 N. J. L. 363.

¹³ *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546.

A notice in the statutory form is sufficient. *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

¹⁴ *Penhobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

¹⁵ *Arkansas. Mississippi, O. & R. R. Co. v. Gaster*, 20 Ark. 455.

So where a stockholder is present, either in person or by proxy, at a stockholders' meeting at which a call is voted, no further notice to him is necessary.¹⁶

§ 685. — Length of notice. Statutory or charter provisions as to the length of the notice must be complied with.¹⁷ And the notice must be complete at least the specified length of time before the day of payment.¹⁸

Where the contract provides for payment within a specified time after call, it seems that notice for the length of time so specified is essential to the liability of the subscriber.¹⁹

Colorado. See *Grand Valley Irrigation Co. v. Fruita Improvement Co.*, 37 Colo. 483, 86 Pac. 324.

Connecticut. See *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

District of Columbia. *Crook v. International Trust Co.*, 32 App. Cas. 490.

Massachusetts. *Jones v. Sisson*, 6 Gray 288.

New York. *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

Pennsylvania. *Livingston v. Pittsburgh & S. R. Co.*, 2 Grant 219.

England. See *In re Phosphate of Lime Co. (Austin's Case)*, 24 L. T. R. 932.

Want of notice of calls, as required by statute, cannot be set up by a subscriber who, as a director of the company, voted for the resolution making the call, and delivered notices to other subscribers. *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

And where the subscriber is the president of the company and is present at a meeting at which a by-law is adopted requiring suit to be instituted for the full amount of their subscriptions against all delinquent stockholders, no demand is necessary before instituting such a suit against him. *Winter v. Muscogee R. Co.*, 11 Ga. 438.

But see *Tomlin v. Tonica & P. R.*

Co., 23 Ill. 429, where it is said that the court is inclined to think that actual notice is not sufficient where the charter expressly requires notice by publication.

¹⁶ *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

¹⁷ *Mississippi, O. & R. R. Co. v. Gaster*, 22 Ark. 361, 20 Ark. 455; *Mississippi, O. & R. R. Co. v. Chesnutt*, 20 Ark. 461; *Dexter & M. Plank-Road Co. v. Millerd*, 3 Mich. 91. See also *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890; *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43; *Louisville & E. Turnpike Road Co. v. Meriwether*, 5 B. Mon. (Ky.) 13.

Where the charter requires sixty days' notice, fifty-nine days' notice is insufficient. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Where the statute fixes no particular time prior to the date of delinquency or the date of assessment when the notice must be published, an allegation that it was published at the places and for the duration of time required by the statute, is sufficient. *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

¹⁸ *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191.

¹⁹ *Cole v. Joliet Opera-House Co.*, 79 Ill. 96.

Generally where a certain number of days' notice is required and provision is made for publication, a single publication made the required number of days before the time fixed for payment is sufficient.²⁰ In computing the number of days, both the day of publication and the day of payment should not be counted, but the rule is to exclude one of such days and to include the other.²¹

If the resolution of the board of directors making the call provides for notice by publication and by mail, but does not provide when notice by mail shall be given, and the notice is duly published, it is sufficient if notice is served by mail long before an action to recover the amount due is in fact brought, though not until the day on which the resolution provides that proceedings may be brought to enforce payment.²² If no term of notice is prescribed, reasonable notice is sufficient.²³

If the subscription contract does not in terms provide for any particular notice, but the subscribers merely agree to pay their subscriptions when called for according to law, there is an implied reservation of the right to change the law, and the length of the notice

²⁰ Where the charter provides for sixty days' notice in some newspaper, a single publication sixty days before the time fixed for payment is sufficient. *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169.

Where thirty days' notice is required, and the notice is given by publication, but one publication is required, and this must be made thirty days before the specified time of payment. *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31.

A statute requiring that "at least sixty days' notice shall be given in some paper" of the time and place of paying any instalment on subscriptions is complied with where a notice is published once only, if it is published sixty full days before the day of payment. Publication continuously for sixty days is not necessary. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191.

Where the statute does not prescribe for what length of time notice shall be published before the day of

payment, but merely gives the subscriber ninety days after the publication in which to pay, it is immaterial whether the notice is published for only one, or for any number of days before the time of payment mentioned in it, and one publication before the day fixed for payment is sufficient. *Scarlett v. Academy of Music*, 46 Md. 132.

²¹ Publication on March 2nd for payment on April 1st is a publication thirty days before the specified time of payment. *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31.

²² *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

²³ *Fairfield County Turnpike Co. v. Thorpe*, 13 Conn. 173; *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43.

The fact that the subscriber promised to pay two instalments more than thirty days after the last was paid is sufficient evidence that he had reasonable notice. *Fairfield County Turnpike Co. v. Thorpe*, 13 Conn. 173.

required by the charter may be reduced by amendment, even as to existing subscribers.²⁴

§ 686. — Form and contents of notice. Provision of the charter or statute as to the contents of the notice, as that, it must specify the time and place of payment, must be complied with.²⁵

It has been held that notice directing payment to be made to a receiver requires payment at his office, and therefore is sufficient though no place of payment is specifically named.²⁶ And the same has been held to be true of a notice requiring payment to be made to the treasurer of the company,²⁷ though there is authority to the contrary.²⁸ It has also been held that the notice need not specify any place of payment where the contract does not provide for payment at any particular place.²⁹

In the absence of any provisions in the charter, statute, or contract on the subject, the notice need not be in any particular form,³⁰ but it must come from the proper corporate authority³¹ and must give the stockholder to understand that a call has been made, and that he is required to pay the amount.³²

A mistake in the name of the corporation is immaterial where the subscribers receiving the notice know what company is intended.³³

²⁴ *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

²⁵ *French v. Busch*, 189 Fed. 480; *Dexter & M. Plank-Road Co. v. Millerd*, 3 Mich. 91; *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

See also § 684, *supra*.

²⁶ This has been held to be true of a notice to pay an assessment made by the court, for the reason that the subscribers will have no difficulty in finding or knowing his place of business. *French v. Busch*, 189 Fed. 480.

²⁷ *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191.

²⁸ Notice requiring payment to be made to the treasurer or at the office of the treasurer of the company, without further designating the place of payment, is insufficient. *Dexter & M. Plank-Road Co. v. Millerd*, 3 Mich. 91.

²⁹ *Vawter v. Franklin College*, 53 Ind. 88, followed in *Whitesides v. Franklin College*, 53 Ind. 93.

³⁰ *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053; *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546; *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

Secondary evidence of the contents of the notice is admissible where the defendant fails to produce the original in response to a notice to do so. *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

³¹ *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

³² *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546.

³³ *Gray v. Monongahela Nav. Co.*, 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

That the notice is given in the new name of a corporation before proceedings to change its name have been

§ 687. — Waiver and estoppel. The giving of notice,³⁴ or the fact that the notice given was defective,³⁵ or was not served in the manner prescribed,³⁶ may be waived, or the subscriber may be estopped from objecting that it was not given or was defective. So a general agreement by the stockholders to consider a call as made is a waiver of formal notice by the proper officer.³⁷ And one who as a director participates in a meeting of the directors at which a certain notice is directed to be given waives the objection that such notice is not in compliance with the statute.³⁸

If upon receipt of notice of a call the subscriber denies all liability on his subscription and notifies the corporation that he will not pay it, notice to him of subsequent calls is unnecessary.³⁹

Where the corporation forfeits the stock on the assumption that there has been a valid call, it cannot subsequently contend that the notice of the call was insufficient for the purpose of holding the subscriber liable for subsequent calls.⁴⁰

VIII. TRANSFER OF UNPAID SUBSCRIPTIONS

§ 688. Sale, pledge, mortgage or assignment. When a corporation has a claim against a stockholder for an unpaid subscription to its capital stock, and no call is necessary to entitle it to payment and

completed is immaterial, where the persons to whom it is sent know of the contemplated change. *Shackelford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

³⁴ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

³⁵ *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Graebner v. Post*, 119 Wis. 392, 100 Am. St. Rep. 890, 96 N. W. 783.

Rutland & B. R. Co. v. Thrall, 35 Vt. 536. In this case it was held that no such acts on the part of the subscriber were shown as would estop him from setting up that the notice did not specify the place of payment.

³⁶ See *Grand Valley Irrigation Co. v. Fruita Improvement Co.*, 37 Colo. 483, 86 Pac. 324, holding that a stockholder who had acquiesced in the custom of giving personal notice, and who had received personal notice, could not

complain of a failure to publish notice as required by the by-laws.

³⁷ *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

³⁸ *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Graebner v. Post*, 119 Wis. 392, 100 Am. St. Rep. 890, 96 N. W. 783. See also *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

³⁹ *Louisiana Purchase Expos. Co. v. Schnurmacher*, 160 Mo. App. 611, 140 S. W. 1198, 151 Mo. App. 601, 132 S. W. 326.

See *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053, holding that where the defendant refused to pay any further calls, it was sufficient to show that he was requested to pay them and was given a reasonable opportunity to do so.

⁴⁰ In *re Phosphate of Lime Co.* (Austin's Case), 24 L. T. R. 932.

to maintain an action thereon, or a call, if necessary, has been made, the claim is like any other chose in action constituting a part of its assets, and it may, for a legitimate corporate purpose, sell, pledge, mortgage or assign the same in payment of a debt, or in trust for the benefit of creditors generally.⁴¹

⁴¹ **United States.** See *Coler v. Grainger County*, 74 Fed. 16.

Alabama. *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384.

Georgia. *Lynah v. Citizens & Southern Bank*, 136 Ga. 344, 71 S. E. 469; *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988. See also *Wikle v. Avary*, 12 Ga. App. 148, 76 S. E. 1039.

Illinois. *Morgan County v. Thomas*, 76 Ill. 120; *Morris v. Cheney*, 51 Ill. 451; *Croft v. Beecher*, 185 Ill. App. 622.

Indiana. *Hardy v. Merriweather*, 14 Ind. 203.

Iowa. *Rand v. Wiley*, 70 Iowa 110, 29 N. W. 814.

Kentucky. *Miller v. Malony*, 3 B. Mon. 105.

Michigan. *Wells v. Rodgers*, 50 Mich. 294, 15 N. W. 462.

Missouri. *Shockley v. Fisher*, 75 Mo. 498; *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911; *Boeppler v. Menown*, 17 Mo. App. 447; *Franklin v. Menown*, 11 Mo. App. 592; *Shultz v. Sutter*, 3 Mo. App. 137.

New York. See *Knickerbocker Trust Co. v. Hard*, 67 App. Div. 463, 73 N. Y. Supp. 979; *Dean v. Biggs*, 25 Hun 122, aff'd 93 N. Y. 662; *Hill v. Reed*, 16 Barb. 280.

Pennsylvania. *Germantown Passenger Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546.

Virginia. *Lewis Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866.

Wisconsin. *Kimball v. Spicer*, 12 Wis. 668; *Racine County Bank v. Ayres*, 12 Wis. 512; *Downie v. Hoover*, 12 Wis. 174, 78 Am. Dec. 730.

England. In re *Sankey Brook Coal*

Co., L. R. 10 Eq. 381, L. R. 9 Eq. 721; In re *International Life Assurance Society*, L. R. 10 Eq. 312; Re *Humber Iron Works Co.*, 16 Wkly. Rep. 474.

In *Clark v. Sigua Iron Co.*, 81 Fed. 310, a contract whereby a corporation agreed to collect unpaid subscriptions for the benefit of a secured creditor was held to be an equitable assignment of its claims against the subscribers to said creditor, and was a good defense to an action by it to recover money paid to such creditor by a stockholder on a judgment for the amount of his unpaid subscription.

See *Hargadine-McKittrick Dry Goods Co. v. Breedlove*, 36 Okla. 768, 130 Pac. 267, where a recovery was had by one to whom a subscription had been assigned as security. The validity of the assignment was not questioned, and it does not appear from the opinion whether a call was necessary or whether it had been made.

Under the laws of Minnesota, where the corporation becomes insolvent, this liability may be sold, after it has been made payable by a call by the court, as a means of satisfying the corporate creditors. Nor is such liability discharged because the price paid for it renders the corporation solvent. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

A complaint alleging a transfer to the plaintiff of the defendant's agreement to pay for stock without a transfer of the company's obligation to deliver the stock is insufficient. *Minneapolis Harvester Works v. Libby*, 24 Minn. 327. See *Nichols v. Atwood*, 127

"A stock subscription is nothing but a contract, by which the subscriber is bound to pay the company certain amounts. It would clearly be assignable as between individuals, and we can see no reason why it should not in the case of a corporation, acting in execution of the powers conferred by its charter."⁴²

Whether or not unpaid subscriptions pass under a sale or other transfer of assets of a corporation depends, of course, upon the terms of the contract and the intention of the parties.⁴³

Minn. 425, 149 N. W. 672, where the evidence was held to sustain a finding that the plaintiff's assignor was not the owner of the contract of subscription but acted merely as the agent of the corporation in procuring it, so that the alleged assignment gave the plaintiff no right to sue thereon.

The subscriber cannot set up an assignment as a defense to a garnishment proceeding instituted against him by a creditor of the corporation, where the assignee files a formal disclaimer of any interest in the subscription. *Chott v. Tivoli Amusement Co.*, 114 Ill. App. 178.

A statute prohibiting a corporation which has refused to pay its obligation from transferring any of its property to its officers other than for full value in cash does not invalidate an assignment of a claim for an unpaid subscription to an officer simply for the purpose of more effectively enforcing it for the benefit of the corporation. *Sanders v. Barnaby*, — N. Y. App. Div. —, 159 N. Y. Supp. 579.

⁴² *Downie v. Hoover*, 12 Wis. 174, 78 Am. Dec. 730.

Where a stockholder merely agrees to accept such drafts as the corporation shall draw on him for sales of stock, and the corporation makes a draft on him, and delivers it to another for value, this is not an assignment of the sum due from the stockholder to the corporation. *Bank of Commerce v. Bogy*, 9 Mo. App. 335.

⁴³ A mortgage of the property of the

corporation with all the receipts and revenues arising therefrom does not include the capital of the company. *In re Marine Mansions Co.*, L. R. 4 Eq. 601.

A right of action for breach of an agreement to subscribe in the future will not pass under a mortgage of all the corporate property, including "things in action, contracts, claims, and demands," belonging to the corporation. *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420.

Neither existing calls nor future calls are included in a mortgage of all the lands, tenements and estate of the company and all their undertaking as a security. *King v. Marshall*, 33 Beav. 565. See also *Gardner v. London, C. & D. Ry. Co.*, L. R. 2 Ch. 201, 215.

An unpaid subscription to the stock of a railroad company is not covered by a mortgage of its road, rights of way, machinery, implements "and other property, chattels and things pertaining to said railroad, and all its chartered rights, privileges and franchises," etc. *Dean v. Biggs*, 21 Hun (N. Y.) 122, aff'd 93 N. Y. 662.

In *Smith v. Gower*, 2 Duv. (Ky.) 17, it was held that the sale of a railroad under a decree of mortgage foreclosure did not pass to the purchaser unpaid stock subscriptions.

In *Lishman's Claim*, 23 L. T. R. (N. S.) 759, it was held that under a mortgage of all the lands, property and effects of the company of whatever

Unpaid subscriptions, if due, will pass with the other assets under a general assignment for the benefit of creditors, and may be collected by the assignee.⁴⁴

What has been said above applies only to subscriptions which are due, and for which no future call is necessary. By the weight of authority, in the absence of charter or statutory authority, a corporation cannot pledge, mortgage or assign unpaid subscriptions when a call is necessary and has not been made, so as to entitle the pledgee, mortgagee or assignee to collect the same, for in such a case the making of the call is discretionary with the directors or stockholders, and they cannot delegate the exercise of such discretion to another unless expressly authorized to do so.⁴⁵ But there is authority

nature or kind, the debenture holders were entitled to be paid in priority to other creditors out of money raised by calls either made or to be made.

The purchase by one railroad company of the roadbed only of another, with intent to complete the road, gives it no right to purchase or enforce the latter's unpaid stock subscriptions. *West End Narrow Gauge R. Co. v. Dameron*, 4 Mo. App. 414.

In *Morgan County v. Thomas*, 76 Ill. 120, it was held that bonds issued by a county in payment of a subscription to railroad stock did not pass under a deed of trust of the franchise and railroad of the company and all its property connected therewith, but which did not either in terms, or by necessary implication, embrace such bonds.

⁴⁴ See chapter on Stock and Stockholders, *infra*.

⁴⁵ *Wells v. Rodgers*, 50 Mich. 294, 15 N. W. 462; *Shultz v. Sutter*, 3 Mo. App. 137; *New Jersey Midland Ry. Co. v. Strait*, 35 N. J. L. 322; *Howard v. Patent Ivory Mfg. Co.*, 38 Ch. Div. 156; *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340; *In re Joint Stock Companies*, 4 De G., J. & S. 407; *In re Sankey Brook Coal Co.*, L. R. 10 Eq. 381; *Stanley's Case*, 33 L. J. Ch. 535, 4 De G., J. & S. 407; *Bank of South*

Australia v. Abrahams, L. R. 6 P. C. 265. See also *Rodgers v. Wells*, 44 Mich. 411, 6 N. W. 860; *Hurlbut v. Carter*, 21 Barb. (N. Y.) 221; *Wallingford Mfg. Co. v. Fox*, 12 Vt. 304.

But see *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499; *Lishman's Claim*, 23 L. T. R. (N. S.) 759.

Since the trustee in bankruptcy of a corporation cannot enforce payment of unpaid stock subscriptions until an assessment has been made by the proper court ratably distributing the liability of the bankrupt estate among the subscribers to its stock, he cannot, in the absence of such an assessment, sell the balance due on a subscription so as to pass title to the purchaser and enable him to enforce the same. *Hunt v. Sharkey*, 20 Cal. App. 690, 130 Pac. 21.

A railroad company which purchases the property of another company at a foreclosure sale cannot enforce a subscription by a township to the stock of the latter company where it has no power to issue stock of said company. *Board Com'rs Hamilton Co. v. State*, 115 Ind. 64, 17 N. E. 855, 4 N. E. 589.

The English Companies Act of 1862, § 161, permitting a corporation in process of voluntary litigation to transfer the whole or portion of its business or property to another com-

permitting an assignment even under such circumstances.⁴⁶ And, of course, the charter of a corporation, articles of association, or general law may expressly authorize a corporation to pledge, mortgage or assign its unpaid stock subscriptions, whether a call is necessary or not.⁴⁷

Whether such power is conferred or not depends upon the intent, and is a question of construction. It has been held that it is conferred by a general statute permitting the assignment of all non-negotiable agreements for the payment of money or the delivery of personal property and all open accounts, debts and demands of a liquidated character.⁴⁸

But, on the other hand, it has been held that a general grant to a corporation of the power to mortgage or pledge its "funds or property" does not confer the power to mortgage or pledge future assessments or calls upon unpaid subscriptions.⁴⁹ And it has also been held that a grant of power to sell unpaid subscriptions does not include the power to mortgage or pledge the same,⁵⁰ though the better opinion is to the contrary.⁵¹

Where subscriptions are pledged to a third person as security for a loan made to the corporation upon request of the subscribers, who agree that in event of default on the part of the corporation they will pay their subscriptions to the pledgee, on default of the corporation the pledgee may enforce them though the corporation could not

pany does not authorize a transfer of unpaid subscriptions not yet called, or justify a scheme of reorganization whereby the liquidator is to call the balance due on the shares of dissenting stockholders for the benefit of the new company composed of stockholders of the old company, and such a call is invalid. *Bank of China, Japan & The Straits v. Morse*, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676, 61 N. E. 774, aff'g 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

⁴⁶ *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Glenn v. Soule*, 22 Fed. 417. See also *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806.

In *Epwright v. Nickerson*, 78 Mo. 482, it was held that the liability of

stockholders for unpaid subscriptions might be included in an assignment for the benefit of creditors though no call had been made.

⁴⁷ *In re Pyle Works*, 44 Ch. Div. 534. See also *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

⁴⁸ *Crook v. International Trust Co.*, 32 App. Cas. (D. C.) 490.

⁴⁹ *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 265.

Power to borrow on the security of the funds or property of the society does not authorize the mortgaging of future calls. *Stanley's Case*, 33 L. J. Ch. 535, 4 De G., J. & S. 407.

⁵⁰ *Morris v. Cheney*, 51 Ill. 451.

⁵¹ *In re Sankey Brook Coal Co.*, L. R. 10 Eq. 381; *In re International Life Assur. Society*, L. R. 10 Eq. 312.

do so because the subscribers had not paid the amount required by the statute to be paid at the time of subscribing.⁵²

Of course, to be enforceable in any case, the assignment must be free from fraud and otherwise valid.⁵³

The subscriber will not be estopped to deny the validity of an assignment by permitting the corporation to receive the benefits of the contract under which it is made, where he had no knowledge of the facts, and the first opportunity given him to resist it was when sued on the subscription by the assignee.⁵⁴

Whether the assignee may sue in his own name or is required to sue in the name of the corporation to his use relates to the remedy only, and hence is governed by the *lex fori*.⁵⁵ At common law he cannot do so, unless the subscriber expressly or impliedly promises to make payments to him.⁵⁶

IX. INTEREST, PENALTIES AND LIQUIDATED DAMAGES

§ 689. Interest. The liability of a subscriber for interest on his subscription, in the absence of an express provision or stipulation, is the same as in the case of any other contract to pay money.⁵⁷

⁵² *Knickerbocker Trust Co. v. Hard*, 67 N. Y. App. Div. 463, 73 N. Y. Supp. 979.

⁵³ In *Cusick v. Bartlett*, 91 Me. 153, 39 Atl. 497, it was held that an assignment of an unpaid subscription to a director, as part of a transaction, whereby all the corporate stock and assets were sold by the directors, was fraudulent as to the stockholder, and that the assignee could not collect the subscription.

⁵⁴ *Cusick v. Bartlett*, 91 Me. 153, 39 Atl. 497.

⁵⁵ *Glenn v. Busey*, 5 Mackey (D. C.) 233.

⁵⁶ *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806.

⁵⁷ *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Lackey v. Richmond & L. Turnpike Road Co.*, 17 B. Mon. (Ky.) 43; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157; *Southampton Dock Co. v. Richards*, 1 M. & G. 448, 133 Eng. Reprint 408.

The statutes of Virginia expressly

provide for interest. *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115.

Interest at the ordinary rate is recoverable by way of damages. *Pittsburg & S. R. Co. v. Woodrow*, 3 Phila. (Pa.) 271.

Interest is recoverable where the statute provides for its recovery on all moneys after they become due on any written instrument. *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605; *Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

The allowance of interest rests in the discretion of the jury. *Musgrave v. Morrison*, 54 Md. 161.

Though the articles permit a recovery of the amount of a call notwithstanding a forfeiture, interest thereon is not recoverable. *Stocken's Case*, L. R. 3 Ch. 412, aff'g L. R. 5 Eq. 6.

The state is not liable for interest on its subscription, where it has not promised to pay it, at least until there has been a specific demand. Attorney

Interest does not begin to run until he is in default, but, as soon as he is in default, it begins to run, and continues to run until payment.⁵⁸

If no call is necessary, as explained in another section,⁵⁹ interest runs from the time the subscription is due—from the date of the subscription, if it is payable immediately, or from the day fixed for payment, when it is payable on a certain day.⁶⁰

If a subscription is payable upon call, interest runs from the date of the call, or from the time of payment fixed by the call, when no notice or demand is required.⁶¹

General v. Cape Fear Nav. Co., 37 N. C. 444.

⁵⁸ **Jackson Fire & Marine Ins. Co. v. Walle**, 105 La. 89, 29 So. 503; **Bergman v. Evans**, 92 Wash. 158, 158 Pac. 961.

In a creditor's suit to subject unpaid subscriptions, interest runs from the date of the decree fixing the amount due. **Florsheim v. Illinois Trust & Savings Bank**, 192 Ill. 382, 61 N. E. 491, aff'g 93 Ill. App. 297.

⁵⁹ See § 669, *supra*.

⁶⁰ **United States. Upton v. Burnham**, 3 Biss. 520, Fed. Cas. No. 16,799.

Illinois. Fey v. Peoria Watch Co., 32 Ill. App. 618.

Indiana. Rikhoff v. Brown's Rotary Shuttle Sew. Mach. Co., 68 Ind. 388.

New York. Gould v. Town of Oneonta, 71 N. Y. 298.

Oregon. Mountain Timber Co. v. Case, 65 Ore. 417, 133 Pac. 92.

Washington. Bergman v. Evans, 92 Wash. 158, 158 Pac. 961.

But see **Frank v. Morrison**, 55 Md. 399.

When subscriptions are payable in monthly instalments, without demand, each instalment bears interest from the time it becomes due. **Hawkins v. Citizens' Inv. Co.**, 38 Ore. 544, 64 Pac. 320.

Instalments draw interest after refusal to pay them as they become due. **Hayworth v. Junction R. Co.**, 13 Ind. 348.

⁶¹ **United States. Liggett v. Glenn**, 51 Fed. 381, rev'g on other grounds 47 Fed. 472, followed in **Priest v. Glenn**, 51 Fed. 405, 51 Fed. 401, aff'g 48 Fed. 19, 47 Fed. 472. See also **Hawkins v. Glenn**, 131 U. S. 319, 33 L. Ed. 184.

Illinois. McCoy v. World's Columbian Exposition, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605; **Fey v. Peoria Watch Co.**, 32 Ill. App. 618.

Indiana. Rikhoff v. Brown's Rotary Shuttle Sew. Mach. Co., 68 Ind. 388.

Louisiana. Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 So. 503.

New York. Gould v. Town of Oneonta, 71 N. Y. 298.

Pennsylvania. Bair & Gazzam v. Wilson, 15 Pa. Super. Ct. 131.

Tennessee. Moses v. Ocoee Bank, 1 Lea 398.

Washington. Seattle Trust Co. v. Pitner, 18 Wash. 401, 51 Pac. 1048.

It has been held that interest is not payable on a note given for a subscription to stock, although payment is not made until after the date named in the note, if there is no agreement to pay interest, and no call for payment of subscriptions has been made by the corporation. **Seattle Trust Co. v. Pitner**, 18 Wash. 401, 51 Pac. 1048.

If notice is required, interest runs from the time of notice, and not before.⁶²

Where the state is a subscriber, it has been held that it cannot be charged with interest not promised, before a specific demand.⁶³

If the directors refuse to make a call for unpaid subscriptions which they themselves owe, and the balance due is recovered for the benefit of the corporation in a suit instituted for that purpose by a stockholder, interest runs from the date when a specific demand was made upon them for a call and refused.⁶⁴

Where a call is made by an order or decree of a court, or by an authorized order of a public officer, as by the comptroller of the currency in the case of an insolvent national bank, interest runs from the date of the order.⁶⁵

§ 690. Penalties. Sometimes a statute imposes a specific penalty upon subscribers for nonpayment of assessments upon their stock, to be recovered in an action by the corporation. Where a statute authorized a corporation to charge five per cent. interest per month on all stock subscribed, if not paid within thirty days, it was held that this was not interest, but a penalty.⁶⁶ Such statutes will be strictly construed,⁶⁷ and an exact compliance with their provisions is essential.⁶⁸

If the subscription is payable on call, the penalty does not accrue until a call is made,⁶⁹ and notice thereof given, if notice is required.⁷⁰

⁶² American Pastoral Co. v. Gurney, 61 Fed. 41; Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; Dexter & M. Plank Road Co. v. Millerd, 3 Mich. 91.

⁶³ Attorney General v. Cape Fear Nav. Co., 37 N. C. 444.

⁶⁴ Bergman v. Evans, 92 Wash. 158, 158 Pac. 961.

⁶⁵ Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168.

Thus it runs from judicial demand, in a suit by liquidating commissioners of an insolvent corporation, where it does not appear that any call was regularly made, and the charter is not before the court so as to enable it to determine the date when the subscriptions became due. Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 So. 503.

⁶⁶ Louisville & E. Turnpike Road Co. v. Meriwether, 5 B. Mon. (Ky.) 13; Custar v. Titusville Gas & Water Co., 63 Pa. St. 381. As to the construction of such statutes, see Bavington v. Pittsburgh & S. R. Co., 34 Pa. St. 358; Delaware & S. Canal Navigation v. Sansom, 1 Bin. (Pa.) 70.

⁶⁷ Louisville & E. Turnpike Road Co. v. Meriwether, 5 B. Mon. (Ky.) 13.

⁶⁸ Lackey v. Richmond & Lancaster Turnpike Road Co., 17 B. Mon. (Ky.) 43; Louisville & E. Turnpike Road Co. v. Meriwether, 5 B. Mon. (Ky.) 13; Pittsburgh & S. R. Co. v. Woodrow, 3 Phila. (Pa.) 271.

⁶⁹ Bair & Gazzam v. Wilson, 15 Pa. Super. Ct. 131.

⁷⁰ Livingston v. Pittsburgh & S. R. Co., 2 Grant (Pa.) 219.

§ 691. Liquidated damages. A provision in a contract of subscription for the forfeiture of the advance payment in case the subscriber failed to pay the balance has been held to be one for liquidated damages rather than for a penalty, in view of the uncertainty of the resulting damages.⁷¹

X. SUBSCRIPTION OF FULL AMOUNT OF CAPITAL STOCK, OR OF A SPECIFIED PERCENTAGE THEREOF

§ 692. As a condition precedent to legal incorporation or transaction of business. The charter or enabling act under which a corporation is organized sometimes requires that the full amount of its capital stock, or a certain percentage thereof, shall be subscribed as a condition precedent to incorporation, and in such a case legal existence as a corporation cannot be acquired until the condition is performed.⁷²

⁷¹ *Edwards v. Johnston*, 23 Wyo. 384, 152 Pac. 273.

⁷² *Alabama*. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

California. *People v. Chambers*, 42 Cal. 201.

Georgia. *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777.

Illinois. *Temple v. Lemon*, 112 Ill. 51; *Allman v. Havana, R. & E. R. Co.*, 88 Ill. 521. See also *People v. National Sav. Bank*, 129 Ill. 618, 22 N. E. 288.

Indiana. *Holman v. State*, 105 Ind. 569, 5 N. E. 702; *Anderson v. Newcastle & R. R. Co.*, 12 Ind. 376, 74 Am. Dec. 218.

Iowa. *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa 357, 6 N. W. 547.

Kansas. *Topeka Bridge Co. v. Cummings*, 3 Kan. 55.

Louisiana. *Globe Realty Co. v. Whitney*, 106 La. 257, 30 So. 745.

Maryland. *Munich Re-Insurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59; *Wellersburg & W. N. Plank Road Co. v. Hoffman*, 9 Md. 559.

Nebraska. *Livesey v. Omaha Hotel*, 5 Neb. 50.

New Jersey. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 246.

New York. *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451.

Ohio. *Parkside Cemetery Ass'n v. Cleveland, B. & G. L. Traction Co.*, 93 Ohio St. 161, 112 N. E. 596; *Queen City Tel. Co. v. Cincinnati*, 73 Ohio St. 64, 76 N. E. 392.

Pennsylvania. *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Leighty v. Susquehanna & W. Turnpike Co.*, 14 Serg. & R. 434.

South Carolina. *Meyer v. Brunson*, — S. C. —, 88 S. E. 359.

Wisconsin. *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425.

Canada. *Hamilton Road Co. v. Townsend*, 13 Ont. App. 534.

The amount that must be subscribed before the corporation can legally organize for the transaction of business depends on the terms of the statute. *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412.

“Public policy, as well as the rights of individual members of the

Subscription of the whole or any particular part of the capital stock is, however, not a condition precedent to acquiring a corporate existence, unless it is made so by the charter or statute.⁷³ And of

corporation, requires that the full amount of capital fixed in the law or articles of association should be subscribed when the corporation is formed, unless by special permission of the legislature it may be afterwards subscribed." *International Fair & Exposition Ass'n v. Walker*, 88 Mich. 62, 49 N. W. 1086.

In Virginia, subscription of the minimum amount of stock is a condition precedent where the company is chartered by the legislature, but it is not a condition precedent where the charter is granted by the circuit court unless the charter so provides. *Coalter v. Bargamin*, 99 Va. 65, 37 S. E. 779; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Failure to obtain the requisite amount of subscriptions to authorize an organization may be cured by an act of the legislature sanctioning and legalizing such organization. *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237.

See also § 591, *supra*.

⁷³ *United States*. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 445.

Indiana. *Newcastle & A. Turnpike Co. v. Bell*, 8 Blackf. 584; *Smock v. Henderson*, 1 Wilson 241.

Maryland. *Hammond v. Straus*, 53 Md. 1.

Massachusetts. *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 29 N. E. 510.

Mississippi. *Perkins v. Sanders*, 56 Miss. 733.

New York. *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

Oregon. *Willamette Freighting Co. v. Stannus*, 4 Ore. 261.

South Carolina. *Cheraw & C. R. Co. v. White*, 10 S. C. 155.

South Dakota. *Singer Mfg. Co. v. Peck*, 9 S. D. 29, 67 N. W. 947.

Texas. *National Bank of Jefferson v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101.

Washington. *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N. S.) 453, 105 Pac. 630; *Carroll v. Pacific Nat. Bank*, 19 Wash. 639, 641, 54 Pac. 32.

Wisconsin. *Peyton v. Minong Lumber & Lath Co.*, 149 Wis. 66, 135 N. W. 518.

It is not necessary where the charter provides that the capital stock "may" consist of a certain amount. *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 7 L. Ed. 445.

In New York the incorporators of an insurance company become a corporation before subscriptions to the capital stock are invited. *Van Schaick v. Mackin*, 129 N. Y. App. Div. 335, 113 N. Y. Supp. 408.

In Missouri, the fact that the required amount has not been subscribed is no defense to an action to recover the amount of an assessment or call after the articles of incorporation have been filed, and a proper certificate of corporate existence has been duly issued by the officer authorized by law to issue it. Under such circumstances the state alone can complain. *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911.

In *Sedalia, W. & S. Ry. Co. v. Abell*, 17 Mo. App. 645, this is held to be true where it does not appear that the required amount was not subscribed prior to the assessment.

In Virginia, where the charter is granted by the circuit court, subscription of the minimum amount of stock is not a condition precedent unless the

course subscription to the full amount is not necessary where the statute or charter provides that articles of incorporation may be filed or the corporation may commence business when a less amount has been subscribed.⁷⁴

Under some statutes, articles of incorporation are required to be filed and a certificate of incorporation obtained before any stock is subscribed, but directors cannot be elected or the organization completed until the required amount of stock has been subscribed for, and the subscription of the required amount is therefore a necessary prerequisite to the organization of a corporation de jure, though not to the creation of such a corporation.⁷⁵

Subscription for the full amount of stock, or a certain percentage thereof, may also be made a condition precedent to the right to

charter so provides, but it is a condition precedent where the company is chartered by the legislature. *Coalter v. Bargamin*, 99 Va. 65, 37 S. E. 779; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Subscription to the required amount is not a condition precedent to incorporation where the charter provides that the incorporators "are hereby created a body politic and corporate," and that the corporation shall have power to commence business as soon as a certain amount of stock is subscribed and paid for. *W. L. Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003, rev'g 128 Fed. 369, which rev'd 118 Fed. 190.

In *Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co.*, 101 Tenn. 545, 48 S. W. 228, it is said that the statute does not prescribe that any share shall be subscribed before organization.

⁷⁴ *Connecticut*. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Illinois. *Peoria & P. U. Ry. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 110. See also *People v. National Sav. Bank*, 129 Ill. 618, 22 N. E. 288.

Indiana. *Fox v. Allensville, C. S. & V. Turnpike Co.*, 46 Ind. 31.

Kansas. *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412.

⁷⁵ *Lord's Ore. Laws* 1910, §§ 6680, 6684, 6686, 6687; *Nickum v. Burckhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788; *Fairview R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688; *Holladay v. Elliott*, 8 Ore. 84; *Willamette Freighting Co. v. Stannus*, 4 Ore. 261.

"A corporation is created by making and filing articles of incorporation, and is organized by electing a board of directors, which can only be done when one-half of the capital stock has been subscribed." *Goodale Lumber Co. v. Shaw*, 41 Ore. 544, 69 Pac. 546.

The required amount of stock must have been subscribed and officers elected before the corporation can be deemed legally organized, and until this is done it has no power to contract even though the articles have been filed. *McVicker v. Cone*, 21 Ore. 353, 28 Pac. 76.

See also *State v. Insurance Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658; *Cincinnati v. Queen City Tel. Co.*, 2 Ohio N. P. (N. S.) 349.

commence business and contract debts,⁷⁶ and the stockholders or

⁷⁶ **Alabama.** Trammell v. Pennington, 45 Ala. 673.

Connecticut. Johnston v. Allis, 71 Conn. 207, 41 Atl. 816.

Georgia. Wells v. DuBose, 140 Ga. 187, 78 S. E. 715; John V. Farwell Co. v. Jackson Stores, 137 Ga. 174, 73 S. E. 13; Hill & Merry v. Jackson Stores, 137 Ga. 174, 73 S. E. 13; Burns v. Beck, 83 Ga. 471, 10 S. E. 121; Academy of Music v. Flanders, 75 Ga. 14; Rosenheim Shoe Co. v. Horne, 10 Ga. App. 582, 73 S. E. 953; Walters v. Porter, 3 Ga. App. 73, 59 S. E. 452.

Illinois. People v. National Sav. Bank, 129 Ill. 618, 22 N. E. 288.

Iowa. Tama Water-Power Co. v. Hopkins, 79 Iowa 653, 44 N. W. 797.

Michigan. International Fair & Exposition Ass'n v. Walker, 88 Mich. 62, 49 N. W. 1086.

Nebraska. Livesey v. Omaha Hotel, 5 Neb. 50.

New York. Myers v. Sturgis, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

Oklahoma. King v. Howeth & Co., 42 Okla. 178, 140 Pac. 1182.

South Carolina. Spartanburg & A. R. Co. v. Ezell, 14 S. C. 281.

Washington. American Radiator Co. v. Kinnear, 56 Wash. 210, 35 L. R. A. (N. S.) 453, 105 Pac. 630; Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141; Manhattan Trust Co. of New York v. Seattle Coal & Iron Co., 16 Wash. 499, 48 Pac. 333.

Wisconsin. Peyton v. Minong Lumber & Lath Co., 149 Wis. 66, 135 N. W. 518; La Crosse Brown Harvester Co. v. Goddard, 114 Wis. 610, 91 N. W. 225.

Under the statutes of Wisconsin (1 Sanb. & B. Ann. St. § 1771-1775), while the corporation exists in a limited and qualified sense from the time when its articles are filed, it has no

power to engage in any transactions except such as are necessary to perfect its organization until the required amount of capital is subscribed and paid. Wechselberg v. Flour City Nat. Bank, 64 Fed. 90, 26 L. R. A. 470.

The Washington statute provides that no railroad corporation shall commence business or institute proceedings to condemn land until the whole amount of its stock has been subscribed. Ball. Ann. Codes & Stat. § 4520; State v. Superior Court for Clarke County, 45 Wash. 316, 88 Pac. 332; State v. Superior Court of Clarke County, 44 Wash. 108, 87 Pac. 40; Carroll v. Pacific Nat. Bank, 19 Wash. 639, 641, 54 Pac. 32; Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068; Birge v. Browning, 11 Wash. 249, 39 Pac. 643; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002; Rem & Bal. Code, § 3677. In re Grand Rapids Furniture Agency, 209 Fed. 483.

Very slight evidence of subscription in full is sufficient in condemnation proceedings where there is no issue upon the question. State v. Superior Court of Clarke County, 45 Wash. 316, 88 Pac. 332.

As to the admissibility and sufficiency of particular evidence, see § 703, *infra*.

The corporation cannot proceed to transact business before any portion of its capital stock has been subscribed or paid though its charter has been filed with the secretary of state, and though the statute provides that its existence shall date from such filing. Nemaha Coal & Mining Co. v. Settle, 54 Kan. 424, 38 Pac. 483; Walton v. Oliver, 49 Kan. 107, 53 Am. St. Rep. 355, 30 Pac. 172; Aspen Water & Light Co. v. Aspen, 5 Colo. App. 12, 37 Pac. 728.

Or though a charter has been regu-

directors may be made liable individually for debts contracted in violation of the prohibition.⁷⁷ But such subscription is not a condition precedent to the right to commence business unless the charter or the general law under which the corporation is formed so provides.⁷⁸ And, in any event, the corporation has a right to perform such acts as are necessary to perfect its organization and to prepare it for entering upon its regular business before the whole capital has been subscribed.⁷⁹

Where charter or statutory requirements of subscriptions to a certain amount are not conditions precedent to incorporation, but conditions subsequent,⁸⁰ noncompliance therewith, while it may render the charter of the corporation subject to forfeiture in proceedings

larly issued to it. *Central Nat. Bank of Junction City v. Sheldon*, 86 Kan. 460, 121 Pac. 340.

Where the corporation has done business without complying with the statute, the objection that it has not so complied cannot be raised, either by the corporation or one dealing with it, to the injury or loss of other parties. *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141; *Carroll v. Pacific Nat. Bank*, 19 Wash. 639, 641, 54 Pac. 32.

⁷⁷ See in this connection:

United States. *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 90, 26 L. R. A. 470.

Georgia. Civ. Code, § 1856; *Wells v. Du Bose*, 140 Ga. 187, 78 S. E. 715; *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13; *Hill & Merry v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13; *Rosenheim Shoe Co. v. Horne*, 10 Ga. App. 582, 73 S. E. 593; *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452.

Illinois. *Kent v. George M. Clark & Co.*, 181 Ill. 237, 54 N. E. 967, aff'd 80 Ill. App. 128; *Newmann v. Sexton*, 156 Ill. App. 517.

Kansas. *Walton v. Oliver*, 49 Kan. 107, 33 Am. St. Rep. 355, 30 Pac. 172.

Massachusetts. *Chase's Patent Elevator Co. v. Boston Tow-Boat Co.*, 152

Mass. 428, 9 L. R. A. 339, 28 N. E. 300.

They are not so liable unless the statute so provides. *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N. S.) 453, 105 Pac. 630.

Those who actually subscribe are liable for debts incurred in the process of organization or in preparing to commence business even though the whole capital has not been subscribed for. *Myers v. Sturgis*, 123 N. Y. App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

⁷⁸ *Newcastle & A. Turnpike Co. v. Bell*, 8 Blackf. (Ind.) 584; *Thornton v. Balcom*, 85 Iowa 198, 52 N. W. 190; *Johnson v. Kessler*, 76 Iowa 411; *Massey v. Citizens' Bldg. & Sav. Ass'n*, 22 Kan. 624; *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412; *Bank v. Hall*, 35 Ohio St. 159. But see *Sweeney v. Talcott*, 85 Iowa 103, 52 N. W. 106, where it is said that all the stock must be taken before the corporation can commence business and incur indebtedness unless the articles provide to the contrary.

⁷⁹ *People v. National Sav. Bank*, 129 Ill. 618, 22 N. E. 288.

⁸⁰ As to the effect of noncompliance with conditions subsequent generally, see § 601, *supra*.

by the state,⁸¹ will not affect the existence of the corporation before such proceedings are instituted, and a forfeiture adjudged.⁸² The organization and legal existence of a railroad corporation are not affected by noncompliance with a requirement in its charter that a certain percentage of the cost shall be subscribed before it shall commence the construction of any section of its road.⁸³

§ 693. As a condition precedent to enforcement of subscriptions—
General rule. Subscriptions for stock in corporations are sometimes made in terms upon the express condition that the full amount of the capital stock of the corporation, or a specified percentage thereof, shall be subscribed, or shall be subscribed by certain persons, or persons of a certain class; and in such a case, they cannot be enforced by the corporation, in the absence of a waiver or an estoppel, until the condition has been substantially performed or fulfilled.⁸⁴

⁸¹ *People v. National Sav. Bank* (Ill.), 11 N. E. 170.

Where the charter of a corporation authorizes it to commence business only when one thousand shares of its stock have been subscribed, commencement of business when only a few hundred shares have been subscribed is ground for proceedings to forfeit its charter. *State v. Debenture Guarantee & Loan Co.*, 51 La. Ann. 1874, 26 So. 600.

⁸² *Young Reversible Lock-Nut Co. v. Young Lock-Nut Co.*, 72 Fed. 62; *Stokes v. Findlay*, 4 McCrary (U. S.) 205, Fed. Cas. No. 13,478; *Smith v. Tallassee Branch of Cent. Plank-Road Co.*, 30 Ala. 650; *Hammond v. Straus*, 53 Md. 1.

But where an act incorporating a banking company provided that there should be a certain amount of capital stock, that no increase should be made unless the amount thereof should be paid in, that, before commencement of business, the stockholders should pay their subscriptions in full, and that the act should become void unless the corporation should organize and proceed to business within two years, it was held that failure to sub-

scribe and pay in the capital stock within two years forfeited the charter. *People v. National Sav. Bank*, 129 Ill. 618, 22 N. E. 288.

⁸³ *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

⁸⁴ *United States. Hollander v. Heaslip*, 222 Fed. 808.

California. *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106.

Connecticut. *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375; *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86.

Georgia. *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932; *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506, 1 S. E. 255; *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233; *Allen & Co. v. Hastings Industrial Co.*, 2 Ga. App. 291, 58 S. E. 504. See also *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

Illinois. See *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762, rev'g 14 Ill. App. 327.

Indiana. *Cravens v. Eagle Cotton*

Such a condition may also be implied, when not expressed. As a

Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; **Shick v. Citizens' Enterprise Co.**, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

Iowa. **Guthrie Ice Co. v. Selby**, 166 Iowa 474, 147 N. W. 923; **Rutenbeck v. Hohn**, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698; **State Bank of Indiana v. Cook**, 125 Iowa 111, 100 N. W. 72.

Kentucky. **Sigler v. Winstead & Co. (Ky.)**, 125 S. W. 272; **Stone v. Monticello Const. Co.**, 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369; **Phillips v. Covington & C. Bridge Co.**, 2 Mete. (Ky.) 210.

Maine. **Belfast & M. L. R. Co. v. Cottrell**, 66 Me. 185; **Ticonic Water Power & Manufacturing Co. v. Lang**, 63 Me. 480.

Maryland. **Morgan v. Landstreet**, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; **Scarlett v. Academy of Music**, 46 Md. 132, 43 Md. 203.

Massachusetts. **Troy & G. R. Co. v. Newton**, 8 Gray 596; **People's Ferry Co. v. Balch**, 8 Gray 303.

Missouri. **Louisiana Purchase Expos. Co. v. Kuenzel**, 108 Mo. App. 105, 82 S. W. 1099.

New Hampshire. **Porter v. Raymond**, 53 N. H. 519; **Monadnock R. R. v. Felt**, 52 N. H. 379.

New York. **Union Hotel Co. v. Hersee**, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun 371; **New York Exch. Co. v. De Wolf**, 31 N. Y. 273, rev'g 5 Bosw. 593.

North Carolina. **Alexander v. North Carolina Sav. Bank & Trust Co.**, 155 N. C. 124, 71 S. E. 69.

Pennsylvania. **McCarty v. Selinsgrove & N. V. R. Co.**, 87 Pa. St. 332; **Hanover Junction & S. R. Co. v. Grubb**, 82 Pa. St. 36; **Philadelphia & W. C. R. Co. v. Hinchman**, 28 Pa. St.

318; **In re Hahn's Appeal**, 7 Atl. 482; **Chicago Bldg. & Mfg. Co. v. Browning**, 19 Pa. Super. Ct. 355.

South Dakota. **Johnson v. Schar**, 9 S. D. 536, 70 N. W. 838.

Tennessee. **Heiskell v. Morris**, 135 Tenn. 238, 186 S. W. 99.

Vermont. **Montpelier & W. River R. Co. v. Langdon**, 45 Vt. 137.

Virginia. **Wright v. Agelasto**, 104 Va. 159, 51 S. E. 191.

Wisconsin. **Luetzke v. Roberts**, 130 Wis. 97, 109 N. W. 949.

Wyoming. **Edwards v. Johnston**, 23 Wyo. 384, 152 Pac. 273.

A provision that subscriptions to a proposed increase in the capital shall not become binding on the subscribers unless the subscription contract is signed by all or practically all of the stockholders of the company, is valid. **Hawkins v. Citizens' Inv. Co.**, 38 Ore. 544, 64 Pac. 320.

An agreement by a creditor of a corporation to take a certain amount of an increase of its stock upon condition that it shall be increased in a specified amount, and that a named person shall take the balance, is valid. **Reid v. Detroit Ideal Paint Co.**, 132 Mich. 528, 94 N. W. 3.

A condition in a subscription that five hundred shares shall be taken "under the terms hereof" is not performed by the taking of subscriptions aggregating five hundred shares, some of which are under different terms. **Johnson v. Schar**, 9 S. D. 536, 70 N. W. 838.

If subscriptions are absolute and unconditional on their face, they cannot be qualified or limited by proof of a general understanding among the subscribers that they were not to be collected unless a given amount of stock should be subscribed. **Hickling v. Wilson**, 104 Ill. 54.

A contract of subscription upon con-

general rule, every person who becomes a subscriber for original stock in a corporation has a right to assume that the full amount of the capital stock fixed by the charter or enabling act, or by the articles of association or the contract of subscription, or by the directors or stockholders when they are authorized to settle the same, will be subscribed in good faith and unconditionally, before he is called upon to pay anything on his subscription; and therefore, in the absence of anything to show a contrary intention on the part of the legislature or the subscribers, every subscription is upon the condition, implied when not expressed, that there shall be no liability thereon until the full capital stock or the required percentage thereof has been in good faith subscribed for.⁸⁵

dition that a certain amount of stock shall be subscribed by others may be modified, by agreement between the subscriber and the corporation, by reducing the amount to be subscribed by others. *Emmitt v. Springfield, J. & P. R. Co.*, 31 Ohio St. 23.

A person who is engaged in business in a certain city, and spends nearly all of his time there, but who has his legal domicile in another city, is a citizen of the former city, within the meaning of a condition in a subscription for stock in a hotel company that a certain amount of stock shall be subscribed by the citizens of such city. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun (N. Y.) 371.

In the absence of an estoppel the subscriber may recover payments made on his subscription where the full amount is not subscribed and the contract provided for its return under such circumstances, even after the company has become insolvent, at least where it can be traced and identified. *Grier v. Union Nat. Life Ins. Co.*, 217 Fed. 287.

"When a promoter induces subscriptions on the promise that in consideration of stock to be retained by him as a part of the plan he will furnish subscriptions to stock for the

benefit of the subscribers, that promise is a part of the consideration entering into the contract of subscription, and a default on the part of the promoter avoids the contract." *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577.

⁸⁵ **United States.** *Converse v. Gardner Governor Co.*, 174 Fed. 30; *Winters v. Armstrong*, 37 Fed. 508.

Arkansas. *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776.

California. *Herbert Kraft Co. v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Ventura & O. Val. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892.

Colorado. *Stearns v. Sopris*, 4 Colo. App. 191, 35 Pac. 281.

Connecticut. *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75.

Georgia. *Brand v. Lawrenceville Branch R. R.*, 77 Ga. 506, 1 S. E. 255; *Academy of Music v. Flanders*, 75 Ga. 14; *Hendrix v. Academy of Music*, 73 Ga. 437; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240. See also *Dotson v. Savannah Pure Food Canning Co.*, 140 Ga. 161, 78 S. E. 801.

Illinois. *McCoy v. World's Colum-*

This rule applies whether the amount of the capital stock is fixed by the charter or enabling act, or by the articles of association in

bian Exposition, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605; Temple v. Lemon, 112 Ill. 51; Allman v. Havana, R. & E. R. Co., 88 Ill. 521.

Indiana. Burke v. Mead, 159 Ind. 252, 64 N. E. 880; Fox v. Allensville, C. S. & V. Turnpike Co., 46 Ind. 31; Hain v. North Western Gravel Road Co., 41 Ind. 196; Johnson v. Crawfordsville, F., K. & Ft. W. R. Co., 11 Ind. 280.

Iowa. Peoria & R. I. R. Co. v. Preston, 35 Iowa 115. See also Oskaloosa Agr. Works v. Parkhurst, 54 Iowa 357, 6 N. W. 547.

Kansas. Nemaha Coal & Mining Co. v. Settle, 54 Kan. 424, 38 Pac. 483; Hunt v. Kansas & M. Bridge Co., 11 Kan. 412; Topeka Bridge Co. v. Cummings, 3 Kan. 55; United States Wind-Engine & Pump Co. v. Davies, 2 Kan. App. 611, 42 Pac. 590.

Kentucky. Fry's Ex'r v. Lexington & B. S. R. Co., 2 Mete. 314.

Louisiana. State v. Atehalaya Railroad & Banking Co., 5 Rob. 63; Exposition Railway & Improvement Co. v. Canal St. Expos. Ry. Co., 42 La. Ann. 370, 7 So. 627.

Maine. Rockland, Mt. D. & S. Steamboat Co. v. Sewall, 80 Me. 400, 14 Atl. 939, 78 Me. 167, 3 Atl. 181; Skowhegan & A. R. Co. v. Kinsman, 77 Me. 370; Pike v. Bangor & C. Shore Line R. Co., 68 Me. 445; Somerset R. Co. v. Clarke, 61 Me. 379; Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; Somerset & K. R. Co. v. Cushing, 45 Me. 524; Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654; Penobscot & K. R. Co. v. Dunn, 39 Me. 587; Oldtown & L. R. Co. v. Veazie, 39 Me. 571.

Maryland. Morgan v. Landstreet, 109 Md. 558, 130 Am. St. Rep. 531, 16

Ann. Cas. 1247, 72 Atl. 399; Gettysburg Nat. Bank v. Brown, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; Musgrave v. Morrison, 54 Md. 161; Morrison v. Dorsey, 48 Md. 461; Baile v. Calvert College Educational Society, 47 Md. 117; Stillman v. Dougherty, 44 Md. 380; Garling v. Baechtel, 41 Md. 305; Hager v. Cleveland, 36 Md. 476; Hughes v. Antietam Mfg. Co., 34 Md. 316.

Massachusetts. Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Cabot & W. S. Bridge v. Chapin, 6 Cush. 50; Troy & G. R. Co. v. Newton, 8 Gray 596; People's Ferry Co. v. Balch, 8 Gray 303; Stoneham Branch R. Co. v. Gould, 2 Gray 277; Central Turnpike Corporation v. Valentine, 10 Pick. 142; Salem Mill Dam Corporation v. Ropes, 9 Pick. 187, 19 Am. Dec. 363, 6 Pick. 23; Newburyport Bridge v. Story, 6 Pick. 45. See also Nutter v. Lexington & W. C. R. Co., 6 Gray 85.

Michigan. International Fair & Exposition Ass'n v. Walker, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; Curry Hotel Co. v. Mullins, 93 Mich. 318, 53 N. W. 360; Halsey Fire-Engine Co. v. Donovan, 57 Mich. 318, 23 N. W. 828; Monroe v. Ft. Wayne, J. & S. R. Co., 28 Mich. 272; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; Shurtz v. Schoolcraft & Three Rivers R. Co., 9 Mich. 270.

Minnesota. Arthur v. Clarke, 46 Minn. 491, 49 N. W. 252; Masonic Temple Ass'n of Minneapolis v. Chanell, 43 Minn. 353, 45 N. W. 716.

Mississippi. Perkins v. Sanders, 56 Miss. 733; Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829.

Missouri. Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481; Commerce Trust Co. v. Hettinger, 181 Mo. App.

pursuance thereof, or by a resolution of the stockholders or directors, when they are authorized to settle the same, or by the contract of

338, 168 S. W. 911; Sedalia, W. & S. Ry. Co. v. Abell, 17 Mo. App. 645.

Nebraska. McFarland v. West Side Improvement Ass'n, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480; Hards v. Platte Valley Improvement Co., 35 Neb. 263, 53 N. W. 73; Hale v. Sanborn, 16 Neb. 1; Estabrook v. Omaha Hotel, 5 Neb. 76; Livesey v. Omaha Hotel, 5 Neb. 50.

New Hampshire. Anderson v. Scott, 70 N. H. 534, 49 Atl. 568; Contoocook Valley R. Co. v. Barker, 32 N. H. 363; New Hampshire Cent. R. R. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Littleton Mfg. Co. v. Parker, 14 N. H. 543.

New Jersey. Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577.

New York. Bray v. Farwell, 81 N. Y. 600; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun 371; Myers v. Sturgis, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162. See also Hamilton & D. Plank Road Co. v. Rice, 7 Barb. 157.

Ohio. See Emmitt v. Springfield, J. & P. R. Co., 31 Ohio St. 23.

Oregon. Portland & F. R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688; Astoria & S. C. R. Co. v. Hill, 20 Ore. 177, 25 Pac. 379.

Pennsylvania. Spellier Elec. Time Co. v. Leedom, 149 Pa. St. 185, 24 Atl. 197; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318. See also Hamilton v. Clarion, M. & P. R. Co., 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

Rhode Island. Warwick R. Co. v. Cady, 11 R. I. 131.

Tennessee. Pope v. Merchants' Trust Co., 118 Tenn. 506, 103 S. W.

792; Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 S. W. 732; Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803; Read v. Memphis Gayoso Gas Co., 9 Heisk. 4.

Texas. Galveston Hotel Co. v. Bolton, 46 Tex. 633; Orynski v. Loustauan (Tex.), 15 S. W. 674.

Vermont. Connecticut & Passumpsic Rivers R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181.

Virginia. West End Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. 900; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877.

Washington. National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446; Cox v. Dickie, 48 Wash. 264, 93 Pac. 523; Birge v. Browning, 11 Wash. 249, 39 Pac. 643; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

In National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446, it is said that Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089, and Birge v. Browning, 11 Wash. 249, 39 Pac. 643, are in effect overruled by Cox v. Dickie, 48 Wash. 264, 93 Pac. 523, in so far as they permit this defense to be interposed as against creditors.

See also Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

Wisconsin. La Crosse Brown Harvester Co. v. Storey, 114 Wis. 614, 91 N. W. 1127; La Crosse Brown Harvester Co. v. Goddard, 114 Wis. 610, 91 N. W. 225; Milwaukee Brick & Cement Co. v. Schoknecht, 108 Wis. 457, 464, 84 N. W. 838; Anvil Min. Co. v. Sherman, 74 Wis. 226, 4 L. R. A., 232, 42 N. W. 226.

A requirement that one-fourth of the stock must be subscribed before an assessment can be levied is satisfied by the issuance of, and payment for, certificates for more than one-

subscription itself.⁸⁶ And generally it applies regardless of whether the subscription is made before or after the corporation is chartered,⁸⁷ though in at least one state it has been held to apply only where the subscription is made after the charter is granted.⁸⁸ And in another state it has been held not to apply after the articles of incorporation have been filed and a proper certificate of incorporation has been duly issued by the officer authorized by law to issue it.⁸⁹

If the number of shares is not fixed by the charter or general laws, but is to be determined by the directors or stockholders, there cannot be a valid call or assessment until the number is so fixed and the required amount subscribed.⁹⁰

When the liability on subscriptions is thus conditional upon the subscription of the full amount or a certain percentage of the capital stock, and there is no waiver of the condition, an assessment or call

fourth of the stock. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17.

⁸⁶ It applies where the capital stock and the number of shares are fixed in the recorded certificate; *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; or where the articles fix the capital at a certain number of shares of a specified par value. *Garling v. Baechtcl*, 41 Md. 305.

"It is well settled that there is an implied condition that the amount of stock specified in the charter, articles of association, or contract of subscription, or fixed by the incorporators when authorized to settle same, shall be actually taken before the subscribers shall become liable." *Anderson v. Railroad*, 91 Tenn. 44, 17 S. W. 803.

See also the cases in the notes preceding.

⁸⁷ *Hendrix v. Academy of Music*, 73 Ga. 437; *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; *Morrison v. Dorsey*, 48 Md. 461.

⁸⁸ *Orynski v. Loustaunan* (Tex.),

15 S. W. 674; *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134.

In *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134, it is said that, while the distinction is not made in the case of *Hotel Co. v. Bolton*, 46 Tex. 633, between subscriptions prior and subscriptions subsequent to incorporation, the subscription there was in fact made after incorporation.

⁸⁹ *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911; *Sedalia, W. & S. Ry. Co. v. Abell*, 17 Mo. App. 645.

⁹⁰ Where the charter gives the stockholders power to fix the amount of stock between certain limits, the corporation has no power to assess subscribers until the amount has been fixed and it has been fully taken. *Pike v. Bangor & C. Shore Line R. Co.*, 68 Me. 445.

This is true where the charter provides that the stock shall consist of not less than a certain number nor more than a certain number of shares. *Somerset R. Co. v. Clarke*, 61 Me. 379; *Somerset & K. R. Co. v. Cushing*, 45 Me. 524.

See also *Lexington & W. C. R. Co. v. Chandler*, 13 Metc. (Mass.) 311.

As to the necessity for fixing the

before the condition is performed is invalid.⁹¹ And it is none the less invalid because the condition is performed on the same day, but after dissolution of the meeting of the directors at which the assessment or call was made.⁹² The rule, however, does not prevent the levy of a sufficient assessment to defray necessary and contemplated preliminary expenses.⁹³ And as we shall see in a subsequent section, a subscriber may waive the condition or be estopped to set up its nonperformance.⁹⁴

§ 694. — Effect of provisions of statute, charter or contract. The general rule that subscriptions are upon the implied condition that the full amount of the capital stock shall be subscribed does not apply where a contrary intention appears from the provisions of the charter or enabling act, or, unless it is required by the charter or enabling act as a condition precedent to corporate existence, where a contrary intention appears from the provisions of the articles of association, or by the action of the stockholders or directors fixing the capital stock, or by the terms of the contracts of subscription.⁹⁵ If it appears

amount of the capital stock, see § 692, *supra*.

⁹¹ See the cases cited in the preceding notes.

⁹² *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277.

⁹³ *Somerset & K. R. Co. v. Cushing*, 45 Me. 524; *Central Turnpike Corporation v. Valentine*, 10 Pick. (Mass.) 142; *Salem Mill Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363, 6 Pick. (Mass.) 23; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 464, 84 N. W. 838; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226. See also *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

⁹⁴ See § 704, *infra*.

⁹⁵ *Arkansas. Arkadelphia Cotton-Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776.

Iowa. Peoria & R. I. R. Co. v. Preston, 35 Iowa 115; *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

Maryland. Gettysburg Nat. Bank v. Brown, 95 Md. 367, 93 Am. St. Rep.

339, 92 Atl. 975; *Hager v. Cleveland*, 36 Md. 476.

Tennessee. Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 S. W. 732; *Anderson v. Railroad*, 91 Tenn. 44, 17 S. W. 803.

Texas. Orynski v. Loustaunan (Tex.), 15 S. W. 674.

“The rule always yields to a different understanding of the parties.” *Emmitt v. Springfield, J. & P. R. Co.*, 31 Ohio St. 23.

Where there is nothing in the charter requiring that the whole capital stock shall be subscribed before calls are made, or before subscriptions made without specific limitations as to the time of payment shall become due, and the agreement is to pay when required. *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63.

The charter or general law under which the corporation was organized may vary the rule. *Lincoln Shee Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

“If the articles of incorporation provide that payment of subscriptions

therefrom, by express terms or clear implication, that it was intended that the corporation should or might engage in business before subscription of the full amount of its capital stock, or make contracts, create debts, or do any other act involving a necessity to call upon stockholders to pay their subscriptions, it cannot be implied that it was intended to make the subscription of the whole amount of the capital stock a condition precedent to liability on subscriptions, and it will not be so held.⁹⁶

may be called for before the whole stock is subscribed, that, as between the parties, is binding." *Masonic Temple Ass'n of Minneapolis v. Channel*, 43 Minn. 353, 45 N. W. 716.

And the general rule does not apply if there is anything in the charter which shows a right to make assessments before the full amount is subscribed. *Perkins v. Sanders*, 56 Miss. 733.

A statutory provision permitting the levying of assessments only when a certain per cent. of the stock has been subscribed may be varied or rendered inapplicable by the terms of the contract. *Ventura & O. V. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65.

But an agreement to "subscribe and take" the shares set opposite the subscriber's name does not bind him to pay otherwise than as assessments may be legally made under the statute. *Ventura & O. V. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65.

Subscription to the full amount of the stock is not essential to liability on an agreement to pay a certain per cent. of the subscription to a third person as trustee upon the incorporation of the company, where the statute permits incorporation before the full amount is subscribed. Under such circumstances it must be presumed that the subscribers contracted with knowledge of the provisions of the statute, and hence it cannot be presumed that their promise to pay was on condition that the whole of the stock should be taken,

where the contract of subscription does not expressly so provide. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.

The rule does not apply to an agreement whereby a corporation undertakes to build a factory in consideration of subscriptions for which stock in another corporation to be formed is to be issued, any money collected in excess of the contract price of the factory to be used as a working capital for the new corporation, and the first corporation, after having completed its contract may sue on the subscriptions without showing that all the stock of the new corporation had been subscribed and paid in, especially where it is evident that the parties contemplated that the new corporation might be organized before all its stock was subscribed. *Ada Dairy Ass'n v. Mears*, 123 Mich. 470, 82 N. W. 258.

In *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732, it was held that there was no such implied condition in a subscription by a municipality, made by virtue of a statute, and which was special in its nature and expressed the conditions of payment and the times when payment was to be made.

⁹⁶ **Alabama.** *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360.

Arkansas. *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776.

California. *Auburn Opera-House & Pavilion Ass'n v. Hill (Cal.)*, 32 Pac.

It has been held, for example, that there is no such implied con-

587; *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.

Connecticut. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Georgia. *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230. See also *Hendrix v. Academy of Music*, 73 Ga. 437.

Illinois. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204. See also *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237.

Indiana. *Hoagland v. Cincinnati & Ft. W. R. Co.*, 18 Ind. 452; *Newcastle & A. Turnpike Co. v. Bell*, 8 Blackf. 584.

Iowa. *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

Kansas. *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412.

Maine. *Skowhegan & A. R. Co. v. Kinsman*, 77 Me. 370; *Bucksport & B. R. Co. v. Buck*, 65 Me. 536; *York & C. R. Co. v. Pratt*, 40 Me. 447; *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

Maryland. *Musgrave v. Morrison*, 54 Md. 161.

Massachusetts. *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79; *Pennobscot & K. R. Co. v. Bartlett*, 12 Gray 244, 71 Am. Dec. 753; *Lexington & W. C. R. Co. v. Chandler*, 13 Mete. 311.

Mississippi. *Perkins v. Sanders*, 56 Miss. 733.

Missouri. *Sedalia, W. & S. Ry. Co. v. Abell*, 17 Mo. App. 645.

Nebraska. *Nebraska Chicory Co. v. Lednický*, 79 Neb. 587, 113 N. W. 245; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

New Jersey. *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577.

New York. *Schenectady & S. Plank*

Road Co. v. Thatcher, 11 N. Y. 102; *Rensselaer & W. Plank Road Co. v. Wetsel*, 21 Barb. 56.

Ohio. *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601.

Oregon. *Astoria & S. C. R. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379; *Willamette Freighting Co. v. Stannus*, 4 Ore. 261.

Pennsylvania. *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36.

Rhode Island. *Warwick R. Co. v. Cady*, 11 R. I. 131.

South Carolina. *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63.

Tennessee. *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

Texas. *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134.

Wisconsin. *Port Edwards, C. & N. Ry. Co. v. Arpin*, 80 Wis. 214, 49 N. W. 828; *Lynch v. Eastern, L. F. & M. Ry. Co.*, 57 Wis. 430, 15 N. W. 743.

Where a person subscribes for stock, knowing that the corporation is already engaged in business, and that the whole capital stock has not been subscribed, it may be inferred that the subscription was not upon condition that the whole capital stock should be subscribed. *Musgrave v. Morrison*, 54 Md. 161.

Where the charter of a railroad company provided that its capital stock should be not less than four thousand shares, nor more than ten thousand shares, and authorized it to organize when four thousand shares should be subscribed, but provided that no contract for building its road should be made until subscription of seven thousand shares, it was held that the liability of subscribers attached when four thousand shares were subscribed, and the corporation was organized and passed a vote to dispose of the

dition where the articles of association provide that the "capital stock of the said corporation shall be fifty thousand dollars, of which fourteen thousand five hundred have been subscribed, * * * and the residue may be issued and disposed of as the board of directors may from time to time order and direct;"⁹⁷ or where the enabling act provides that "the registered holders of shares in the company, for the time being, whatever the number issued or subscribed for," shall form the company, "and the business of the company may be commenced as soon as the directors think fit;"⁹⁸ or where the charter of a corporation provides merely that its capital stock shall not exceed a certain amount, and the contracts of subscription bind the subscribers severally to pay the amount of their subscriptions in such manner as the directors may, under the charter, direct;⁹⁹ or where the charter provides that the capital stock shall be not less than a specified number of shares of a specified par value, and by a subscription contract made after organization of the corporation and before the amount of stock is fixed, the subscribers expressly and unconditionally promise to pay the amount of their subscriptions;¹ or where the statute expressly confers upon the corporation power to make and enforce assessments as soon as the incorporation is completed;² or where the contract provides that it shall not be binding until a specified amount, which is less than the full amount of the authorized capital, is subscribed;³ or where the corporation is engaged in its

rest of the stock authorized, although no vote was passed fixing the amount of the stock, and the ten thousand shares had not been taken. *Penobscot & K. R. Co. v. Bartlett*, 12 Gray (Mass.) 244, 71 Am. Dec. 753.

In *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015, persons subscribing for stock after incorporation were held liable regardless of whether all of the stock was subscribed for or not, there being no provision making subscription for the full amount a condition precedent to liability.

⁹⁷ *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776.

In a Texas case, however, it was held that a statute conferring upon the directors the general management of a corporation, and empowering them to dispose of the unsubscribed

capital stock of the corporation "in such manner as the by-laws might prescribe," did not, in the absence of any by-laws on the subject, authorize them to enforce an unpaid subscription before all the capital stock was taken. *Orynski v. Loustaunan* (Tex.), 15 S. W. 674.

⁹⁸ *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

⁹⁹ *Warwick R. Co. v. Cady*, 11 R. I. 131.

¹ *Skowhegan & A. R. Co. v. Kinsman*, 77 Me. 370.

² *Port Edwards, C. & N. Ry. Co. v. Arpin*, 80 Wis. 214, 49 N. W. 828.

³ *Emmitt v. Springfield, J. & P. R. Co.*, 31 Ohio St. 23.

business at the time a subscription is made, and the subscriber knows that the full amount of its capital stock has not been subscribed.⁴

If the charter of a corporation or the enabling act authorizes it to incorporate and commence business when a certain percentage or amount of its capital is subscribed, it is not necessary that the full amount of its authorized capital stock shall be subscribed before calling for payment on subscriptions, but it is necessary that the required percentage shall be subscribed.⁵

⁴ *Musgrave v. Morrison*, 54 Md. 161.
As to waiver, see § 704, *infra*.

⁵ *United States*. See *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523.

Alabama. *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360.

California. *Ventura & O. Val. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

Indiana. *Hoagland v. Cincinnati & Ft. W. R. Co.*, 18 Ind. 452.

Iowa. *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281; *Nichols v. Burlington & L. County Plank-Road Co.*, 4 Greene 42.

Louisiana. *State v. Atchafalaya Railroad & Banking Co.*, 5 Rob. 63.

Maine. *Bucksport & B. R. Co. v. Buck*, 65 Me. 536.

Massachusetts. *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79.

Michigan. See *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Nebraska. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480.

New York. *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Rensselaer & W. Plank Road Co. v. Wetsel*, 21 Barb. 56; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157.

Ohio. *Jewett v. Valley Ry. Co.* 34 Ohio St. 601.

Oregon. *Astoria & S. C. R. Co. v.*

Hill, 20 Ore. 177, 25 Pac. 379; *Willamette Freighting Co. v. Stannus*, 4 Ore. 261.

Utah. *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

Wisconsin. *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

Where the articles provide for a specified number of shares of stock, the first issue to be one-half of the total authorized amount, it is not a defense to an assessment on stock that the entire number of shares have not been issued, where the actual issue is in excess of the prescribed one-half. *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 92 Am. St. Rep. 437, 64 N. E. 416.

The fact that a corporation is authorized to organize when less than the full amount of its capital stock is subscribed, does not authorize it to commence business before subscription of the full amount, so as to permit it to enforce subscriptions before the full amount has been subscribed. *Peoria & R. I. R. Co. v. Preston*, 35 Iowa 115; *Galveston Hotel Co. v. Bolton*, 46 Tex. 633.

Where the articles of association fix the capital stock at five hundred thousand dollars, the subscriber is not bound to pay until that amount is subscribed, although his contract provides that the capital of the proposed corporation shall be "at least \$250,000," and that "at least the sum of \$100,000 shall be subscribed within sixty days

But it has been held that the rule requiring subscription to the whole capital stock is not abrogated, as between the corporation and its subscribers, by a statutory provision that when the articles of incorporation are filed, recorded and published according to law, the persons named as corporators therein become a body corporate, and are authorized to carry into effect the objects set forth in the articles according to the provisions of the statute;⁶ nor by a provision permitting assessments from time to time "upon the shares subscribed for, until the whole amount of the said capital stock shall be paid in," where the amount of the stock is fixed by the charter;⁷ nor by a statute giving the directors authority to dispose of the unsubscribed stock in such manner as the by-laws may prescribe, where no by-laws on the subject have been adopted;⁸ nor because the subscriber agrees to pay the amount remaining due on each share at such times and in such instalments as the same shall be called for by the corporation or its directors.⁹

The construction of the charter in this regard is a question of law for the court.¹⁰

§ 695. — Increase of capital stock. According to the weight of authority, the rule that the whole amount of capital stock fixed by the charter of a corporation must be subscribed before a valid call or assessment can be made upon subscriptions, does not apply to the case of increased issues of stock made after the corporation is organized, unless full subscription is expressly required. An original stockholder who signs, without qualification, a subscription for new stock, to increase the original stock, is not entitled to cancellation of his subscription, and repayment of the amount paid in, on the ground that all the new shares have not been subscribed for. In the absence

from the date hereof, in order to render our agreement hereto binding," and although the one hundred thousand dollars is subscribed within the time specified and more than two hundred and fifty thousand dollars before the call is made. *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

⁶ *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

⁷ *Salem Mill Dam Corporation v. Ropes*, 6 Pick. (Mass.) 23.

⁸ *Orynski v. Loustaunan* (Tex.), 15 S. W. 674.

⁹ *Orynski v. Loustaunan* (Tex.), 15 S. W. 674; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 464, 84 N. W. 838; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

¹⁰ *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829.

of any stipulation or limitation to the contrary, his subscription is not dependent upon the taking of all the shares, but is absolute.¹¹

The contract of the subscriber "for such stock is that he will pay the price agreed upon for the stock, and, if it is not delivered in accordance with such contract, he is liable at any time to be called upon to pay whatever balance he may owe."¹²

The reason for the rule excluding liability in the case of original subscriptions does not apply under such circumstances, since the subscriber gets what he contracts and pays for, to wit, stock in a corporation already legally constituted.¹³

Of course, a subscription for increased stock may be made conditional upon subscription of the full amount, either by the express terms of the statute authorizing the increase, or by the vote making the increase, or by the contract of subscription itself; and when such is the case there is no liability on the part of the subscriber until the condition is performed.¹⁴

11 United States. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779.

Illinois. See *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605. But see *Housley v. Feilchenfeld Co.*, 152 Ill. App. 68.

Louisiana. *Avegno v. Citizens' Bank of Louisiana*, 40 La. Ann. 799, 5 So. 537.

Maryland. *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975.

Massachusetts. *Nutter v. Lexington & W. C. R. Co.*, 6 Gray 85.

Michigan. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

Ohio. *Clarke v. Thomas*, 34 Ohio St. 46.

Tennessee. *Pope v. Merchants' Trust Co.*, 118 Tenn. 506, 103 S. W. 792, distinguishing *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. 545.

West Virginia. *Greenbrier Industrial Exposition v. Ocheltree*, 44 W. Va. 626, 30 S. E. 78.

Where a railroad company voted to issue six hundred additional shares, and to allow each stockholder to take one new share for every two shares

already held by him, provided he should by a certain day subscribe therefor, and pay a part of the price, and give notes for the remainder, it was held that there was no implied condition that the whole number of six hundred new shares should be issued; and that the failure of the corporation to issue that number was no ground for an action by a stockholder to recover back money paid by him for the new stock, or for defeating an action on the notes given by him.

Nutter v. Lexington & W. C. R. Co., 6 Gray (Mass.) 85.

12 *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975.

13 *Pope v. Merchants' Trust Co.*, 118 Tenn. 506, 103 S. W. 792.

14 *Brown v. Tillinghast*, 84 Fed. 71; *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473; *In re Hahn's Appeal* (Pa.), 7 Atl. 482; *In re Mack's Appeal* (Pa.), 7 Atl. 481; *In re Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258.

Where defendant corporation entered into contract with plaintiff corporation to purchase a portion of its capital stock, the subscription to be

There are some cases which apparently hold that subscription of the full amount is necessary even in the absence of such a provision, but it is believed that in most instances the statements to that effect are either mere dicta, or have been overruled by later holdings.¹⁵ And

payable in merchandise handled by both corporations, and plaintiff agreed that its capital stock should be increased and that there should be a merger of the business of the two concerns, that further subscriptions should be taken to the increased stock to be paid for within a time specified, and that certain other action should be taken conducive to the enlargement of the business, the court held that the agreement of the plaintiff corporation was independent of and separable from the subscription agreement of defendant corporation and not a condition precedent to maintenance of action by plaintiff on the subscription agreement of defendant. *Pacific Mill Co. v. Inman*, 46 Ore. 352, 80 Pac. 424.

Under the federal statutes, payment of the full amount of the proposed increase is essential to the validity of an increase in the stock of national banks, and hence there is no liability on a subscription to the increased stock unless the full amount is subscribed. *Winters v. Armstrong*, 37 Fed. 508.

But the amount of the increase, within the amount voted by the directors, is subject to the discretionary power of the association itself, exerted in accordance with its articles, and to the approval and confirmation of the comptroller of the currency, and the fact that the amount of the increase is reduced by the directors with the approval and confirmation of the comptroller after a subscription has been made, will not release the subscriber. *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713; *Thayer v. Butler*, 141 U. S. 234, 35

L. Ed. 711; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779; *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260.

This is especially true where he acquiesces in the action of the corporation and the comptroller in making the reduction. *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260.

¹⁵ See *Winters v. Armstrong*, 37 Fed. 508, where it is said that the rule requiring the full amount to be subscribed "applies to increases of capital stock as well as to the original subscriptions in cases where the proposed increase is fixed and designated." But in this case the subscription was to an increase of the stock of a national bank, and the statute expressly required the full amount of the increase to be paid in before the increase would be valid.

In *Housley v. Feilchenfeld Co.*, 152 Ill. App. 68, it is said that there is an implied condition that the increase must be at least substantially subscribed for, and that if it is not so subscribed within a reasonable time, a subscriber thereto may rescind and recover back what he has paid. But the decision is placed on the ground that under the peculiar circumstances the case was one in which the stockholder should be protected because of the large and material deficiency in the contemplated capital. (See next note.)

In *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605, there is dictum to the effect that subscription for the full amount of the increase is not necessary.

it has also been said that there may be cases in which equity will interfere to protect the subscriber where a large and material deficiency in the amount of capital contemplated has occurred.¹⁶

Where before the company does any business its charter is amended so as to decrease the par value of its shares and increase the number of shares, thereby annulling the original stock, the new stock is original or formative stock and not merely increased stock, within the meaning of the foregoing rules.¹⁷

§ 696. What subscriptions or promises may be counted—In general.

In determining whether the entire capital stock of a corporation or a required percentage thereof has been subscribed, only bona fide, valid and absolute subscriptions can be taken into consideration.¹⁸

In *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545, it is said that the principle that the full amount of capital fixed by the charter must be subscribed before calls can be made applies to cases in which charters "authorize the companies, when organized under fixed capitals, to increase their capitals. When so increased, the amounts fixed become the capitals which must be subscribed before legal assessments can be made."

But in *Pope v. Merchants' Trust Co.*, 118 Tenn. 506, 103 S. W. 792, it is squarely held that subscription to the full amount of the increase is not necessary, and it is pointed out that in *Read v. Memphis Gayoso Gas Co.*, supra, the subscription was to the original stock, and the holding was that he was liable thereon though before his subscription was called for or paid the amount of stock was increased by the directors under power conferred on them by the charter, regardless of whether any amount in addition to the amount as originally fixed had been subscribed or not.

¹⁶ *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779.

In *Housley v. Feilchenfeld Co.*, 152 Ill. App. 68, where only two thousand dollars of an increase of ten thousand dollars was subscribed for in addition

to the plaintiff's subscription of three thousand dollars, the stock was never issued, the company for all practical purposes abandoned its business, the directors unanimously decided that the plaintiff was not a stockholder and that the money paid on his subscription should be returned to him, and the rights of creditors were not involved, it was held that the case was one within the exception stated in the text.

¹⁷ *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975.

¹⁸ *Alabama*. *Floyd v. State*, 177 Ala. 169, 59 So. 230; *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

Connecticut. *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816.

Georgia. *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

Illinois. *Kent v. George M. Clark & Co.*, 181 Ill. 237, 54 N. E. 967, aff'g 80 Ill. App. 128.

Indiana. *Holman v. State*, 105 Ind. 569, 5 N. E. 702.

Kansas. *Nemaha Coal & Mining Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *United States Wind-Engine & Pump Co. v. Davis*, 2 Kan. App. 611, 42 Pac. 590.

Kentucky. *Sigler v. Winstead &*

A bona fide subscription is one made by a person who subscribes in good faith with a reasonable expectation and apparent prospect of being able to pay the same when called for.¹⁹

A guaranty by a person that subscriptions shall be made to the amount required by an express or implied condition is not equivalent to the subscriptions, and cannot be considered in determining whether the condition has been fulfilled.²⁰

The full amount of an unconditional subscription by a municipality is to be counted though a part of it is subsequently paid in its bonds at par when their market value is less than par.²¹

A subscriber cannot be held though the required amount is subscribed, if the capital is afterwards reduced to an amount substantially below that required by the release of some of the subscribers.²²

The fact that some of the subscriptions are invalid is immaterial where there are more than enough valid subscriptions to make up the required amount.²³

In the absence of a provision to that effect in the contract, a sub-

Co. (Ky.), 125 S. W. 272; *Stone v. Monticello Const. Co.*, 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

Pennsylvania. *Chicago Bldg. & Mfg. Co. v. Browning*, 19 Pa. Super. Ct. 355.

Vermont. *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

Washington. *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333.

Wyoming. *Edwards v. Johnston*, 23 Wyo. 384, 152 Pac. 273.

Only those subscriptions may be counted which were made in good faith or under such circumstances that the subscribers are estopped to deny their validity. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

¹⁹ *Stone v. Monticello Const. Co.*, 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369; *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352.

"A 'bona fide subscriber' means a

bona fide subscription; that is, a real subscription, one that will in fact bring to the corporation the amount of capital which the subscription denotes, and upon which its creditors and all persons dealing with the corporation can rely." *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816.

"A bona fide subscription is a subscription in good faith; that is, with an honest purpose to comply with the requirements of the charter, and to execute its provisions." *Napier v. Poe*, 12 Ga. 170.

²⁰ *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128.

²¹ *Phillips v. Covington & C. Bridge Co.*, 2 Mete. (Ky.) 219.

²² By the release of certain subscribers on the ground that their subscriptions were merely nominal. *Hendrix v. Academy of Music*, 73 Ga. 437; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

²³ *Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 457; *Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs*, 21 Barb. (N. Y.) 541.

scriber has no right to insist that any particular persons or class of persons be secured as subscribers.²⁴

Subscriptions by the promoters themselves may be counted although the contract requires them to "procure" or "obtain" subscriptions to a certain amount, and although they subscribe with the purpose of selling the stock to others, since they are liable thereon regardless of such intention.²⁵

§ 697. — Fictitious subscriptions and subscriptions by persons under legal disability. Subscriptions in the names of fictitious persons,²⁶ or which are not genuine,²⁷ clearly cannot be counted, although the contrary is true of a subscription made by an individual in the name of a firm which has no existence, since in such case he is liable as upon his individual subscription.²⁸

Subscriptions which are merely colorable, or nominal,²⁹ or which are fraudulent,³⁰ cannot be counted. Nor can a subscription made by a person who does not intend to pay for the stock subscribed be included, since it is not made in good faith.³¹ Nor, unless they have been paid, is it permissible to count unpaid subscriptions by infants, which are voidable at their option;³² or by married women, where the

²⁴ *Heiskell v. Morris*, 135 Tenn. 238, 186 S. W. 99.

²⁵ *Heiskell v. Morris*, 135 Tenn. 238, 186 S. W. 99.

²⁶ See *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, and the cases hereafter cited.

²⁷ *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72.

²⁸ *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun (N. Y.) 371.

²⁹ A merely nominal subscription is no substantial compliance with the charter, and if released because it is nominal, it becomes equivalent to no subscription ab initio. *Hendrix v. Academy of Music*, 73 Ga. 437; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

Bogus subscriptions cannot be counted. *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

Evidence that there was a private

agreement whereby a subscriber was to be held liable for only half the amount of his subscription was held to require the submission to the jury of the question of failure of consideration for notes given for the amount of another subscription made on condition that a specified amount should be subscribed. *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72.

Sham subscriptions cannot be considered in determining whether there has been an overissue. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489. See also *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949.

³⁰ *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

³¹ *Kent v. George M. Clark & Co.*, 181 Ill. 237, 54 N. E. 967, aff'g 80 Ill. App. 128.

³² *Phillips v. Covington & C. Bridge Co.*, 2 Mete. (Ky.) 219; *In re Hahn's Appeal* (Pa.), 7 Atl. 482; *Hamilton*

disability arising from coverture has not been removed by statute, for at common law such a contract by a married woman is void.³³

§ 698. — Subscriptions by the corporation itself or by other corporations. A subscription by another corporation, where its charter does not expressly or impliedly authorize it to subscribe, cannot be counted in those jurisdictions in which such a contract, because *ultra vires*, is regarded as absolutely void and unenforceable;³⁴ but it is otherwise in those jurisdictions in which it is held that the subscribing corporation cannot set up its want of power to defeat an action on the subscription,³⁵ or may interpose the defense of *ultra vires* or not as it pleases,³⁶ or that the defense of *ultra vires* cannot be set up after the subscription has been paid, and such payment has in fact been made.³⁷

Road Co. v. Townsend, 13 Ont. App. 534.

As to the right of infants to subscribe and their liability on their subscriptions, see § 546, *supra*.

³³ Phillips v. Covington & C. Bridge Co., 2 Metc. (Ky.) 219; In re Hahn's Appeal (Pa.), 7 Atl. 482. See also In re Mack's Appeal (Pa.), 7 Atl. 481; In re Cornell's Appeal, 114 Pa. St. 153, 6 Atl. 258; Hamilton Roal Co. v. Townsend, 13 Ont. App. 534.

Shares of stock issued to and in the name of a married woman, who receipted therefor at the instance of her husband, the husband paying assessments thereon, so as to render him personally liable for corporate debts, were held not to be stock issued to a married woman in such a sense as to be equivalent to its not having been subscribed for, so as to exclude it from the reckoning in determining the amount of stock subscribed. Kampmann v. Tarver (Tex. Civ. App.), 29 S. W. 1144.

As to the right of married women to subscribe and their liability on their subscriptions, see § 547, *supra*.

³⁴ Belfast & M. L. R. Co. v. Cottrell, 66 Me. 185; Berry v. Yates, 24 Barb. (N. Y.) 199; Cole v. Satsop R. Co., 9 Wash. 487, 43 Am. St. Rep. 858, 37

Pac. 700; Denny Hotel Co. of Seattle v. Gilmore, 6 Wash. 152, 32 Pac. 1004; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

As to the right of corporations to subscribe, see § 548, *supra*.

³⁵ United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403.

³⁶ McCoy v. World's Columbian Exposition, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605. See also Pacific Mill Co. v. Inman, 46 Ore. 352, 80 Pac. 424.

³⁷ Another subscriber cannot question the validity of the subscription where the corporation has paid it and hence could not itself sue to cancel the subscription on the ground that it was *ultra vires*. Cox v. Hardee, 135 Ga. 80, 68 S. E. 932.

And it has been held that, where the corporation has waived this defense and paid its subscription, it cannot be said that the same was not made in good faith. Stone v. Monticello Const. Co., 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

The fact that some subscriptions were by corporations not authorized to subscribe is no defense in an action

The defense of *ultra vires*, and the conflicting doctrines in the different states, are considered at length in a subsequent chapter.³⁸

Of course a subscription by a corporation is to be counted where the corporation has authority under its charter or the general law to make it.³⁹

Subscriptions by municipal or quasi municipal corporations are to be counted where made under statutory authority, but not otherwise.⁴⁰

A corporation cannot subscribe for shares of its own stock, either directly or through a trustee, and, if it does so, its subscription cannot be counted in determining the amount of stock subscribed. But one who subscribes as trustee for the corporation may be personally liable, and in such a case the subscription may be counted.⁴¹

§ 699. — Subscriptions by agents, trustees or partners. A subscription made by a person as agent for another without authority, and not ratified, may be counted in those states in which it is held

against persons who afterwards subscribed, where all but two of such corporations had paid their subscriptions and the balance remaining after deducting the amount of their subscriptions was more than the amount required. *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149.

A subscription made by authority of the directors, with the consent of all the stockholders, and which has been paid, will be counted. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun (N. Y.) 371.

³⁸ See chapter on *Ultra Vires*, *infra*.

³⁹ The fact that it appears from the petition in an action to recover an unpaid subscription that another corporation subscribed for stock and that without its subscription the amount necessary to make subscriptions binding was not subscribed, does not make the petition demurrable, where the law does not prohibit such subscriptions, and it does not appear from the face of the petition that the corporation in question

had no power to make it. *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932.

A judgment recovered against a corporation for the amount of its subscription establishes its liability and the validity of its contract. *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605.

As to the right of corporations to subscribe, see § 548, *supra*.

⁴⁰ *Phillips v. Covington & C. Bridge Co.*, 2 Mete. (Ky.) 219.

Invalid subscriptions by towns cannot be counted. *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

As to the right of municipal and quasi municipal corporations to subscribe, see § 549, *supra*.

⁴¹ *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816; *Holladay v. Elliott*, 8 Ore. 84.

As to the right of the corporation to subscribe and the effect of an attempt on its part to do so, see § 548, *supra*.

As to the personal liability of a person subscribing in behalf of the corporation, see § 554, *supra*.

that the person thus assuming to act as agent without authority becomes liable himself, not merely in damages, but as a subscriber;⁴² but such a subscription cannot be counted in those states in which this doctrine is not recognized. For this purpose, a mere liability to the corporation in damages is not equivalent to a subscription.⁴³

Of course, a subscription may be counted, notwithstanding it was made by a person as agent for another without authority, if it has been ratified by the latter, so as to be binding on him.⁴⁴

A subscription by an agent or trustee for an undisclosed principal may be counted where such agent or trustee is personally liable thereon.⁴⁵

A subscription made by a partner in the firm name may be counted, especially where it is subsequently ratified and confirmed by the other partners.⁴⁶ And such a subscription may be counted even though it was made without authority and there was no ratification, since under such circumstances the person making it is liable as upon his individual subscription.⁴⁷ And for the same reason it has been held that a subscription made in the name of a firm may be counted even though there is no such firm in existence.⁴⁸

⁴² *State v. Smith*, 48 Vt. 266. And see *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149; *Allibone v. Hager*, 46 Pa. St. 48.

As to the personal liability of the pretended agent under such circumstances, see ante, § 554.

⁴³ *Salem Mill Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363. And see *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105.

⁴⁴ *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

But see *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105, holding that under Civ. Code, § 2313, a subsequent ratification cannot affect the right of another subscriber to claim that the conditions of his subscription have not been complied with.

As to the effect of such a ratification, see § 553, supra.

⁴⁵ *State v. Superior Court for Pacific County*, 56 Wash. 214, 105 Pac. 637; *State v. Superior Court for Skamania County*, 45 Wash. 321, 88 Pac.

334; *State v. Superior Court for Clarke County*, 45 Wash. 316, 88 Pac. 332; *State v. Superior Court for Clarke County*, 44 Wash. 108, 87 Pac. 40. See also *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

Especially is this true where the capital stock has been fully paid in. *State v. Superior Court for Pacific County*, 56 Wash. 214, 105 Pac. 637.

As to the effect of such a subscription, see § 555, supra.

⁴⁶ *Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs*, 21 Barb. (N. Y.) 541.

As to the validity and effect of subscriptions by partners, see § 555, supra.

⁴⁷ A subscription made by a partner in the name of the firm may be counted, whether he had authority to bind the firm or not, since, if the firm is not bound, he is bound individually. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun (N. Y.) 371.

⁴⁸ *Union Hotel Co. v. Hersee*, 79

§ 700. — Subscriptions by insolvent or irresponsible persons.

Whether subscriptions by insolvent or irresponsible persons can be taken into consideration depends upon the circumstances. If they were not made and accepted in good faith, but with knowledge that the subscribers were insolvent and irresponsible, they cannot be counted.⁴⁹

A subscription made by a person who is not apparently able to pay it is not a bona fide subscription, and cannot be counted,⁵⁰ even though it was not made for the purpose of committing a fraud.⁵¹ But the rule is otherwise as to subscriptions made by persons apparently solvent and able to pay, and accepted in good faith, although it may appear that the subscribers were and still are totally insolvent.⁵²

N. Y. 454, 35 Am. Rep. 536, rev'g 15 Hun (N. Y.) 371.

⁴⁹ **Kentucky.** Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. 219.

Maine. Belfast & M. Lake R. Co. v. Inhabitants of Brooks, 60 Me. 568; Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236.

Pennsylvania. Chicago Bldg. & Mfg. Co. v. Browning, 19 Pa. Super. Ct. 355.

Tennessee. Heiskell v. Morris, 135 Tenn. 238, 186 S. W. 99.

Washington. Denny Hotel Co. v. Schram, 6 Wash. 134, 138, 36 Am. St. Rep. 130, 32 Pac. 1002.

⁵⁰ A subscription is not made in good faith if made by a person whose apparent ability was not such as a person of ordinary prudence would have deemed reasonably sufficient to meet such assessments as might reasonably be expected to be made. Stone v. Monticello Const. Co., 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

"Merely simulated subscriptions, made by persons who are neither actually nor apparently able to pay the amount subscribed, cannot answer the purpose of the statute" requiring a certain amount to be subscribed as a condition precedent to incorporation. Holman v. State, 105 Ind. 569, 5 N.

E. 702, quoted with approval in Floyd v. State, 177 Ala. 169, 59 So. 280; State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

⁵¹ Stone v. Monticello Const. Co., 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

⁵² **Connecticut.** Litchfield Bank v. Church, 29 Conn. 137.

Kentucky. Stone v. Monticello Const. Co., 135 Ky. 659, 40 L. R. A. (N. S.) 978, 21 Ann. Cas. 640, 117 S. W. 369.

Maine. Belfast & M. Lake R. Co. v. Inhabitants of Brooks, 60 Me. 568; Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257; Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654.

Massachusetts. Salem Mill Dam Corporation v. Ropes, 9 Pick. 187, 19 Am. Dec. 363.

Tennessee. Heiskell v. Morris, 135 Tenn. 238, 186 S. W. 99.

It is not essential that there must be a present payment in cash or a solvent subscriber. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

In determining whether the company is a legal corporation the solvency or insolvency of the subscribers is immaterial where the statute does not require them to be solvent. Miller v. Wild Cat Gravel Road Co., 52 Ind. 51.

The insolvency of other subscribers is a matter of defense and the burden of showing that they were apparently insolvent when their subscriptions were made is on a subscriber who seeks to escape liability on that ground.⁵³

§ 701. — Conditional subscriptions. Subscriptions upon conditions precedent cannot be counted in determining the amount of stock subscribed, even when they are valid,⁵⁴ for such a subscription, as we have seen, imposes no liability upon the subscriber unless the conditions are performed or waived.⁵⁵

Subscriptions upon conditions precedent may be counted, however, if it affirmatively appears that the conditions have been performed, for they are then absolute and unconditional.⁵⁶ And where a sub-

If the required amount has been subscribed in good faith, the subsequent inability of the company to collect part of it is no defense. *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

The fact that some of the subscribers became insolvent after their subscriptions were made will not of itself support an information in the nature of quo warranto based on the ground that the minimum amount required by the statute was not subscribed. *Holman v. State*, 105 Ind. 569, 5 N. E. 702; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

⁵³ *Heiskell v. Morris*, 135 Tenn. 238, 186 S. W. 99.

⁵⁴ *California*. *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105.

Connecticut. *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75.

Georgia. *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506, 1 S. E. 255.

Iowa. *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa 357, 6 N. W. 547.

Maryland. *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399.

Massachusetts. *Proprietors of Cabot & W. S. Bridge v. Chapin*, 6 Cush. 50; *Troy & G. R. Co. v. Newton*, 8

Gray 596; *People's Ferry Co. v. Balch*, 8 Gray 303; *Central Turnpike Corporation v. Valentine*, 10 Pick. 142.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

Oregon. *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688.

Pennsylvania. *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36; *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. St. 318.

Where the statute under which a corporation was formed required articles of incorporation to be filed and a charter obtained before any subscriptions for stock, and one-half of the authorized capital stock to be subscribed before organization, it was held that a person might subscribe conditionally, and that the conditions would not be held void, and the subscription held unconditional, in determining whether the required amount of stock had been subscribed. *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688.

The burden is on the company to show performance or waiver. *Brand v. Lawrenceville Branch R. R.*, 77 Ga. 506, 1 S. E. 255.

⁵⁵ See § 579, *supra*.

⁵⁶ See the cases above cited.

scription is made upon condition that a certain amount of stock shall be subscribed, the amount of such subscription is to be counted in determining whether the condition has been performed, unless there is something to show a contrary intent.⁵⁷

If the contract requires that a certain amount be subscribed before a specified date, conditional subscriptions cannot be counted though the performance of the condition is waived where the waiver takes place after the date so specified.⁵⁸

As we have seen, conditional subscriptions cannot be received prior to incorporation. In New York it is held that such subscriptions are absolutely void, and therefore they cannot be counted in determining the amount of stock subscribed.⁵⁹ In Pennsylvania, on the other hand, it is held that such subscriptions are not void, but that the condition is void, and they may therefore be counted as absolute subscriptions.⁶⁰

§ 702. — Subscriptions upon special terms. Whether or not it is permissible to take into consideration subscriptions upon special terms, as distinguished from conditional subscriptions,⁶¹ in determining the amount of stock subscribed, depends upon the nature and effect of the special terms. If they are valid, and reduce the amount payable on the subscription below the par value of the stock, it seems clear that they cannot be counted.⁶² It is otherwise, however, if the full par value of the stock is payable without deduction, the special term being such as not to affect the amount to be paid.⁶³ A stipulation on the part of a railroad corporation to pay interest on the sums paid in by subscribers until the construction of its road is no ground for not counting the subscriptions.⁶⁴

⁵⁷ *Scarlett v. Academy of Music*, 46 Md. 132, 43 Md. 203; *Montpelier & W. River R. Co. v. Langdon*, 45 Vt. 137.

It cannot be successfully contended that such a condition means that the required amount must be made up by subscriptions other than those on the particular subscription paper signed by the defendant. *Scarlett v. Academy of Music*, 46 Md. 132, 43 Md. 203.

⁵⁸ *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480.

⁵⁹ See § 578, *supra*.

⁶⁰ See § 578, *supra*.

⁶¹ As to the nature, validity and effect of subscriptions upon special terms, see § 601, *supra*.

⁶² *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Proprietors of Cabot & W. S. Bridge v. Chapin*, 6 Cush. (Mass.) 50.

⁶³ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁶⁴ The contention that the interest to be paid must be deducted in determining whether the required amount has been subscribed is untenable.

According to the weight of authority, subscriptions payable in property, labor, or services, or construction work, although at a fair valuation, cannot be counted,⁶⁵ though there is authority to the contrary, where such subscriptions are permissible under the charter or general law.⁶⁶ But even where they may be counted, it has been held that the burden is on the company to show that the specific articles of property and things subscribed will be available to it the same as cash, and in like instalments as the cash payments, and at the same times.⁶⁷

Of course, subscriptions upon special terms may be counted if the special terms are void or unenforceable and the subscription valid, as in the case of an oral stipulation which is inadmissible to add to or vary a written subscription.⁶⁸

A subscription is to be counted though the company is given the option to convert half of it into bonds to be issued by it.⁶⁹

§ 703. — Evidence. This subject has already been discussed. As we have seen in a former section, the records of a corporation are competent and sufficient evidence to prove subscriptions to its capital stock, and to show whether or not the amount of stock required by its charter has been subscribed, where no proof is introduced to destroy their effect.⁷⁰ And a certificate by the commissioners appointed to

Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

In *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236, a subscription for preferred stock which was to draw ten per cent. interest at once was excluded in determining whether the required amount of stock had been subscribed.

⁶⁵ *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105; *New York, H. & M. R. Co. v. Hunt*, 39 Conn. 75; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571; *Troy & G. R. Co. v. Newton*, 8 Gray (Mass.) 596. See also *Sigler v. Winstead & Co. (Ky.)*, 125 S. W. 272.

Only subscriptions payable in cash can be counted. *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399.

⁶⁶ *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233; *Phillips v. Covington & C. Bridge Co.*, 2 Metc. (Ky.) 219.

An agreement whereby a construction company agrees to take all the unsubscribed stock of a railroad company as a part of the consideration for constructing the road may be counted. *Sweeney v. Tennessee Cent. R. Co.*, 118 Tenn. 297, 100 S. W. 732.

⁶⁷ *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

⁶⁸ *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86.

A subscription which is unconditional on its face may be counted, though the subscriber contends that he was to hold the stock in trust as treasury stock of the corporation. *Newmann v. Sexton*, 156 Ill. App. 517.

But see *Sigler v. Winstead & Co. (Ky.)*, 125 S. W. 272.

As to the validity of such oral stipulations, see § 609, *supra*.

⁶⁹ *Phillips v. Covington & C. Bridge Co.*, 2 Metc. (Ky.) 219.

⁷⁰ See § 569, *supra*.

receive subscriptions and to certify when the required amount of stock has been subscribed, is conclusive on the subscribers.⁷¹

§ 704. Waiver and estoppel—General principles. A condition, express or implied, that the full amount of the capital stock, or a certain percentage thereof, shall be subscribed before the subscribers shall be liable on their subscriptions, may be waived by a subscriber, and the waiver may be either express or implied.⁷² And aside from

⁷¹ See § 569, *supra*.

⁷² **United States.** *Converse v. Gardner Governor Co.*, 174 Fed. 30; *Winters v. Armstrong*, 37 Fed. 508. See also *Hollander v. Heaslip*, 222 Fed. 808.

California. *Auburn Opera-House & Pavilion Ass'n v. Hill* (Cal.), 32 Pac. 587; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Colorado. *Stearns v. Sopris*, 4 Colo. App. 191, 35 Pac. 281.

Georgia. *Hendrix v. Academy of Music*, 73 Ga. 437; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *May v. Memphis Branch R. Co.*, 48 Ga. 109.

Iowa. *Guthrie Ice Co. v. Selby*, 166 Iowa 474, 147 N. W. 923.

Maine. *Ticonic Water Power Manufacturing Co. v. Lang*, 63 Me. 480.

Maryland. *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; *Musgrave v. Morrison*, 54 Md. 161; *Morrison v. Dorsey*, 48 Md. 461; *Stillman v. Dougherty*, 44 Md. 380; *Hager v. Cleveland*, 36 Md. 476.

Michigan. *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338; *Curry Hotel Co. v. Mullins*, 93 Mich. 318, 53 N. W. 360.

Minnesota. *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

Missouri. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

Nebraska. *McFarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

New York. *Myers v. Sturgis*, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

Pennsylvania. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53; *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36.

Tennessee. *Anderson v. Railroad*, 91 Tenn. 44, 17 S. W. 803.

Texas. *Orynski v. Loustannan* (Tex.), 15 S. W. 674; *Kampmann v. Tarver* (Tex. Civ. App.), 29 S. W. 1144.

Washington. *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

With the consent of the subscribers the company may not only organize without complying with such condition, but may do all other things incident to and necessary for the prosecution of the particular business for which it was incorporated. *Hager v. Cleveland*, 36 Md. 476.

The parol evidence rule does not prevent proof of oral agreements or understandings which have been acted upon or performed, waiving or modifying the written contract. *Guthrie Ice Co. v. Selby*, 166 Iowa 474, 147 N. W. 923.

The incorporators cannot "by any acts alleged to operate by way of waiver or estoppel, relieve the cor-

any question of waiver in the proper sense, a subscriber may be estopped from setting up nonperformance of the condition.⁷³

To constitute a technical estoppel there must be some act or acts on the subscriber's part upon the faith of which debts were contracted,⁷⁴ and it must appear that the persons seeking the benefit of the estoppel extended credit to the corporation or otherwise altered their position for the worse in reliance on something that the subscriber did or omitted to do.⁷⁵

It has been held, however, that it is not necessary to show that any particular person was induced to alter his position because of the acts

poration from its obligation to have the capital required by its charter." Oldtown & L. R. Co. v. Veazie, 39 Me. 571.

In *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, it is said, "And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?"

See also cases cited in following notes and §§ 716-720, *infra*.

⁷³ *United States*. *Allen v. Rhodes*, 230 Fed. 321. See also *Hollander v. Heaslip*, 222 Fed. 808.

Colorado. *Stearns v. Sopris*, 4 Colo. App. 191, 35 Pac. 281.

Maryland. *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; *Musgrave v. Morrison*, 54 Md. 161.

Minnesota. See *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

New Hampshire. *New Hampshire Cent. R. R. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

Pennsylvania. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53; *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

Vermont. *Montpelier & W. River R. Co. v. Langdon*, 45 Vt. 137.

Washington. *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

In *Academy of Music v. Flanders Bros.*, 75 Ga. 14, it was held that the action of a corporation in commencing business before the amount of its capital stock had been taken and the required percentage thereof paid in was contrary to law, and was ultra vires and void, and was incapable of ratification, and that any promise or undertaking which induced it to pursue such a course was contrary to law and could not be invoked as an estoppel in an action on a subscription.

See also cases cited in following notes and §§ 716-720, *infra*.

⁷⁴ *Garling v. Baechtel*, 41 Md. 305.

Under this rule the mere fact that he pays his subscription with knowledge that the whole capital stock has not been paid in and that the company is incurring debts for property and materials is not such an act of participation as to estop him from setting up that the full amount had not been subscribed. *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; *Garling v. Baechtel*, 41 Md. 305.

⁷⁵ *Hollander v. Heaslip*, 222 Fed. 808.

of the subscriber, but that it is sufficient that others may have been induced to act by reason thereof.⁷⁶

Generally a technical estoppel is not required, but any acts which constitute a waiver will be sufficient to bar the defense.⁷⁷ It has been said that "the safer rule in such a case is that, if his acts are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced if he be permitted to withdraw, he shall be held to have waived, or to be estopped to assert, the defense."⁷⁸

The question of waiver is one of intent.⁷⁹ It is a proper subject of inference from surrounding circumstances and may be proved by circumstances as well as by direct testimony.⁸⁰

A waiver must be voluntary,⁸¹ and generally the subscriber must have knowledge that the condition has not been performed.⁸²

⁷⁶ *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

It would be manifestly impossible to show, in most cases, that any particular subscriber had paid, or any particular person had contracted with the corporation on the faith of the defendant's acts alone, even though it was clear that his acts combined with others influenced every dealing with it. *McFarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

⁷⁷ *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

⁷⁸ *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

⁷⁹ *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

⁸⁰ *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

⁸¹ *California. California Southern*

Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Connecticut. Ridgefield & N. Y. R. Co. v. Brush, 43 Conn. 86.

Michigan. International Fair & Exposition Ass'n v. Walker, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Nebraska. McFarland v. West Side Improvement Ass'n, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

North Carolina. Alexander v. North Carolina Sav. Bank & Trust Co., 155 N. C. 124, 71 S. E. 69.

⁸² *California. California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Maine. Somerset & K. R. Co. v. Cushing, 45 Me. 524; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

Michigan. International Fair & Exposition Ass'n v. Walker, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Nebraska. McFarland v. West Side Improvement Ass'n, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

North Carolina. Alexander v.

As a rule acts done by a subscriber in the belief that the condition has been performed cannot operate as a waiver or estoppel.⁸³ So a waiver or estoppel will not result from the fact that the subscriber makes payments on his subscription in reliance in good faith on a false representation that the condition has been complied with.⁸⁴ There are holdings, however, that knowledge is not essential to an estoppel.⁸⁵ And it has been held that as against creditors actual knowledge is not necessary to either a waiver or an estoppel.⁸⁶

It has also been held that where the subscriber pays the entire amount of his subscription as called for, accepts a stock certificate, and continues as a stockholder until the corporation goes into bankruptcy, without making any attempt to ascertain whether the required amount has been subscribed, he cannot thereafter rescind and recover

North Carolina Sav. Bank & Trust Co., 155 N. C. 124, 71 S. E. 69.

Texas. Orynski v. Loustaunan (Tex.), 15 S. W. 674.

Washington. Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.

One who, with the consent of the corporation, permits his own agent to perform his duties as its treasurer, is chargeable with notice of all facts learned by such agent in the performance of such duties. *McFarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

⁸³ **Connecticut.** *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86.

Maine. *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

North Carolina. *Alexander v. North Carolina Sav. Bank & Trust Co.*, 155 N. C. 124, 71 S. E. 69.

Oregon. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320; *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688.

South Dakota. *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838.

Texas. Orynski v. Loustaunan (Tex.), 15 S. W. 674.

Washington. *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643; *Denny Hotel*

Co. of Seattle v. Gilmore, 6 Wash. 152, 32 Pac. 1004.

⁸⁴ *Hollander v. Heaslip*, 222 Fed. 808; *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86.

⁸⁵ *McFarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

In *McFarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736, it is said, "While many cases speak of knowledge as an essential, they are cases where there was knowledge, or where the conduct of the subscriber had not been such as to create an estoppel in pais."

In *Centre & K. Turnpike Road Co. v. M'Conaby*, 16 Serg. & R. (Pa.) 140, it was held that a subscriber to the stock of a turnpike company who was named as a corporator in the charter, accepted and acted upon the charter, and voted by proxy, could not escape liability on the ground that some of the subscriptions were fictitious, though he was then ignorant of that fact, since it was his duty to inform himself.

⁸⁶ *Musgrave v. Morrison*, 54 Md. 161.

back what he has paid on the ground that the condition has not been performed.⁸⁷

The burden of proving waiver⁸⁸ or an estoppel⁸⁹ is on the party setting it up.

Whether there has been a waiver,⁹⁰ whether the alleged waiver was voluntary,⁹¹ and whether the subscriber had knowledge that the condition had not been performed when he did the acts claimed to constitute a waiver,⁹² are generally questions of fact.

If liability is predicated solely on the ground that the stockholder participated in the organization and business of the company with knowledge that it was incurring debts for the purchase of property and materials necessary to carry on its business, he cannot be held liable for any greater amount than the par value of the stock held by him and on the basis of which he participated in the affairs and business of the company.⁹³

§ 705. — Particular acts constituting waiver or estoppel. A waiver will generally be implied, or else the subscriber will be estopped, if, with knowledge of nonperformance of the condition, he has participated in or consented to the letting of contracts, the creation of debts, or the doing of any other corporate act which involves the necessity of calling for payment of subscriptions,⁹⁴ or has participated in the

⁸⁷ *In re Sharood Shoe Corporation*, 192 Fed. 945.

⁸⁸ *International Fair & Exposition Co. v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

⁸⁹ *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375.

⁹⁰ *Georgia. Hendrix v. Academy of Music*, 73 Ga. 437.

Iowa. Guthrie Ice Co. v. Selby, 166 Iowa 474, 147 N. W. 923.

Michigan. International Fair & Exposition Ass'n v. Walker, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Pennsylvania. Hanover Junction & S. R. Co. v. Grubb, 82 Pa. St. 36.

Washington. Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.

⁹¹ *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

⁹² *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Alexander v. North Carolina Sav. Bank & Trust Co.*, 155 N. C. 124, 71 S. E. 69.

⁹³ So, where before the full amount of stock has been subscribed, and before any indebtedness has been incurred, a subscriber applies to the directors to reduce his subscription from fifteen to ten shares, to which they consent, and he receives a certificate for ten shares and votes at a stockholders' meeting as the owner of ten shares, he cannot be held liable to creditors as the owner of fifteen shares. *Garling v. Baechtcl*, 41 Md. 305.

⁹⁴ *California. California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Iowa. Guthrie Ice Co. v. Selby, 166 Iowa 474, 147 N. W. 923.

Maryland. Gettysburg Nat. Bank

affairs of the company in a way that could only properly be done

v. Brown, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; *Musgrave v. Morrison*, 54 Md. 161; *Morrison v. Dorsey*, 48 Md. 461; *Stillman v. Dougherty*, 44 Md. 380; *Garling v. Baechtel*, 41 Md. 305; *Hager v. Cleveland*, 36 Md. 476.

Michigan. *International Fair & Exposition Ass'n v. Walker*, 83 Mich. 386, 47 N. W. 338.

Minnesota. *Masonic Temple Ass'n v. Channell*, 43 Minn. 353.

Missouri. *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

New Hampshire. *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

New York. *Hutchins v. Smith*, 46 Barb. 235.

Pennsylvania. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53; *Centre & K. Turnpike Road Co. v. McConaby*, 16 Serg. & R. 140.

Tennessee. *Anderson v. Railroad*, 91 Tenn. 44, 17 S. W. 803.

Texas. *Kampmann v. Tarver* (Tex. Civ. App.), 29 S. W. 1144.

Wisconsin. *Gibbons v. Ellis*, 83 Wis. 434, 53 N. W. 701.

An officer of a corporation who, by an agent to whom he has delegated performance of his duties, has received subscriptions and disbursed money in the business of the corporation, is chargeable, by virtue of his office, with notice of a deficiency in stock subscriptions, and is estopped to set up such deficiency to escape liability for assessments on his subscription. *Macfarland v. West Side Improvement Ass'n*, 56 Neb. 277, 76 N. W. 584, 53 Neb. 417, 73 N. W. 736.

A subscriber cannot avail himself of this defense where, as a member of the board of directors, he takes an active part in the selection of a site

for a building which the corporation was formed to erect. *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

Where the corporation has held itself out and contracted debts on the faith of its proper organization, and the stockholder has stood by and interposed no objection, he cannot set up as against a receiver that a part of the necessary subscriptions were not bona fide. *Beck v. Henderson*, 76 Ga. 360.

Subscribers before the organization of a corporation, which is subsequently organized without the full amount being subscribed, but who make no objection and do not seek to escape liability on their subscriptions while the corporation is a going concern, cannot do so as against creditors after it becomes insolvent. *Allen v. Rhodes*, 230 Fed. 321.

The rule that the fact that the required amount has not been subscribed is a good defense to an action by the corporation against the stockholder on his subscription, does not apply as between stockholders and creditors, and such fact is no defense where it is sought to subject unpaid subscriptions to the payment of their claims. *National Realty Co. v. Neilson*, 73 Wash. 89, 131 Pac. 446; *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

In *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523, it is held that subscribers are estopped to set up this defense as against creditors, and this holding was followed in *National Realty Co. v. Neilson*, 73 Wash. 89, 131 Pac. 446, and *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175.

In *National Realty Co. v. Neilson*, it is said that *Elderkin v. Peterson*, 8

upon the assumption that the subscribers intended to carry on business with the stock only partially subscribed,⁹⁵ or if he has done any other act from which an intention to waive his right to insist upon the whole capital being taken may be fairly inferred.⁹⁶

A waiver may also be implied if a subscriber, with knowledge that the condition has not been performed, pays his subscription or a part thereof, or gives his unconditional note therefor, or if he acts as a stockholder or officer of the corporation in doing business, or participates in the organization of the corporation, or in corporate meetings, or the like,⁹⁷ unless the circumstances are such as to show that

Wash. 674, 36 Pac. 1089, and *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643, are in effect overruled by *Cox v. Dickie*, in so far as they permit this defense to be set up as against creditors.

A subscriber who, without objection, permits the corporation to consolidate with another corporation, and the consolidated company to incur liabilities and make contracts, cannot escape liability on his subscription as against creditors of the consolidated corporation on the ground that all of the stock of the original corporation was not subscribed for. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

⁹⁵ *Winters v. Armstrong*, 37 Fed. 508; *Stillman v. Dougherty*, 44 Md. 380.

⁹⁶ *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Morrison v. Dorsey*, 48 Md. 461.

⁹⁷ *United States. Allen v. Rhodes*, 230 Fed. 321. See also *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260; *Hollander v. Heaslip*, 222 Fed. 808.

California. *Auburn Opera-House & Pavilion Ass'n v. Hill* (Cal.), 32 Pac. 587; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Colorado. *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 Pac. 123.

Connecticut. *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75.

Georgia. *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *May v. Memphis Branch R. Co.*, 48 Ga. 109.

Illinois. *Housley v. Feilchenfeld Co.*, 152 Ill. App. 68; *Rutz v. Esler & Ropiquet Mfg. Co.*, 3 Ill. App. 83.

Indiana. *Slipher v. Earhart*, 83 Ind. 173; *Evansville, I. & C. Straight Line R. Co. v. Dunn*, 17 Ind. 603; *McAllister v. Indianapolis & C. R. Co.*, 15 Ind. 11; *O'Donald v. Evansville, I. & C. Straight Line R. Co.*, 14 Ind. 259.

Maryland. *Musgrave v. Morrison*, 54 Md. 161; *Morrison v. Dorsey*, 48 Md. 461.

Michigan. *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Minnesota. *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716. See also *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149.

Missouri. *Central Plankroad Co. v. Clemens*, 16 Mo. 359; *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911.

Montana. *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

New York. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 34 Am. Rep.

there was no intention to waive performance of the condition, and not to operate as an estoppel.⁹⁸

536; *Myers v. Sturgis*, 123 App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162; *George Irish Paper Co. v. White*, 91 Misc. 261, 154 N. Y. Supp. 778.

Ohio. *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Dayton & C. R. Co. v. Hatch*, 1 Disney 84.

Pennsylvania. In re *Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258; *Craig v. Cumberland Valley State Normal School*, 72 Pa. St. 46.

Texas. *Orynski v. Loustaunan (Tex.)*, 15 S. W. 674.

Washington. *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700.

The fact that the full amount was not subscribed is not available as a defense, at least as against creditors, where the subscriber alleges that he fully paid for his stock, and that in accordance with a by-law he ceased to be a stockholder by surrendering his stock to the corporation and receiving a note, given by him for the amount of his subscription in return. *Farnsworth v. Robbins*, 36 Minn. 369, 31 N. W. 349.

An original subscriber, who is also one of the commissioners for receiving subscriptions, and is elected and acts as one of the managers of the corporation, cannot set up as a defense to an action on his subscription that a sufficient number of shares were not subscribed to authorize the organization of the company. *Rockville & W. Turnpike Road v. Van Ness*, 2 Cranch C. C. (U. S.) 449, Fed. Cas. No. 11,986.

A subscriber who was also a commissioner to receive subscriptions, and who has recited in his certificate subscription of the required amount of stock, is estopped to deny the fact.

See *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

But it has been held that the mere fact that a subscriber pays his subscription with knowledge that the whole amount has not been paid in and that the company is incurring debts for property and materials is not such an act of participation as to estop him from setting up that the full amount has not been subscribed. *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 92 Atl. 975; *Garling v. Baechtel*, 41 Md. 305.

⁹⁸ *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688. See also *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75.

Voluntary payment of one assessment will not estop the subscriber to set up this defense as to subsequent ones, where it does not appear under what circumstances such payment was made. *Somerset & K. R. Co. v. Cushing*, 45 Me. 524.

Where the subscription contract provides that money paid on subscriptions shall be kept intact in a special fund and returned to the subscribers if a specified amount is not subscribed within sixty days, the fact that a subscriber receives a stock certificate and does not return it does not estop him from recovering the money so paid from a receiver of the corporation who is appointed before the sixty days have expired, it not appearing that he had ever acted or held himself out as a stockholder, or that the company had contracted any debts on the faith of his subscription. *Grier v. Union Nat. Life Ins. Co.*, 217 Fed. 287.

The acts of a stockholder which will constitute a waiver or estoppel are those which constitute a part of the business for which the corporation is formed, and which evince a willingness to enter upon that business with the stock already subscribed.⁹⁹

“Participation in acts done for perfecting the organization of the corporation, and setting it on its feet for business,—such as preparing and procuring the execution of the articles, procuring subscriptions to its stock, preparing by-laws for its government, and the like,—will not be regarded as a waiver of the defense, or as an estoppel against asserting it, for these are things proper, and to some extent necessary, to be done, although the full amount of stock be not subscribed.”¹

Since the rule requiring subscription to the full amount of stock, or the required percentage thereof, does not prevent the levying of a sufficient assessment to defray necessary and contemplated preliminary expenses,² the payment of a call or assessment made for that purpose will not prevent the subscriber from setting up nonperformance of the condition as a defense to subsequent calls or assessments not made for that purpose.³

Mere presence of a subscriber at a stockholders’ meeting as a spectator, without taking any part therein, will not operate as a waiver or estoppel,⁴ nor will the fact that he is elected a director, where he never qualifies or acts as such.⁵ Nor will the mere fact that a stock-

Where a subscriber attended one of the corporate meetings, and voted his stock, but afterwards refused to receive a certificate or pay assessments on his stock, it was held that whether he waived a condition that the whole capital stock should be subscribed was for the jury. *International Fair & Exposition Ass’n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086. See also *Hards v. Platte Valley Improvement Co.*, 35 Neb. 263, 53 N. W. 73.

⁹⁹ *Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; *Masonic Temple Ass’n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

¹ *Masonic Temple Ass’n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716.

Participation in the solicitation for

subscriptions, to the stock of a railroad company, the organization of the company, the survey and location of the road, and the making of estimates of its cost, will not constitute a waiver. *Ridgefield & N. Y. R. Co. v. Reynolds*, 41 Conn. 375.

² See § 675, *supra*.

³ *Somerset & K. R. Co. v. Cushing*, 45 Me. 524; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

Payment by a subscriber to stock of a railroad company of assessments made for the purpose of having the route surveyed will not have such effect. *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

⁴ *New Hampshire Cent. R. R. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

⁵ *Ticonic Water Power & Manufacturing Co. v. Lang*, 63 Me. 480; *Mor-*

holder, who was also a director, was present at a directors' meeting at which a resolution was adopted making an assessment on the stock have such effect, where it does not appear whether he acted in favor of or against the resolution, or remained entirely neutral, his simple presence at the meeting being as much in accord with one supposition as either of the others.⁶

It has been held that a waiver cannot be predicated upon acts done prior to the preparation and execution of the articles of incorporation.⁷

§ 706. — Objections to counting particular subscriptions. A subscriber whose conduct is such as would necessarily induce his associates to believe that he consented to certain subscriptions as satisfying the terms of his contract cannot set up as a defense to an action thereon that they were not made in good faith.⁸ So he cannot set up this defense where he participated in the organization of the corporation and was elected and served as a director, and as such participated in the making of corporate contracts, without in any way questioning the sufficiency of such subscriptions.⁹ And he may be barred by laches from setting up as against creditors that certain of the subscriptions were fictitious and were made by persons who were insolvent.¹⁰ Nor will he be heard to say that because he has not paid his subscription according to the terms of his contract, he himself was not a subscriber in good faith, and hence that the required amount of good faith subscriptions were not secured.¹¹ Similarly, subscribers who become such after the making of invalid subscriptions, and with knowledge of their invalidity, cannot defend against liability on their own subscriptions on the ground that, because of such invalidity, the required amount was not subscribed.¹² So one who subscribes by

gan v. Landstreet, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399.

⁶ Ridgefield & N. Y. R. Co. v. Reynolds, 46 Conn. 375.

⁷ Curry Hotel Co. v. Mullins, 93 Mich. 318, 53 N. W. 360. See also Stearns v. Sopris, 4 Colo. App. 191, 35 Pac. 281.

⁸ McConnaghy v. Monticello Const. Co., 135 Ky. 667, 117 S. W. 372.

⁹ McConnaghy v. Monticello Const. Co., 135 Ky. 667, 117 S. W. 372.

¹⁰ He cannot set up this defense as

against a receiver where he permits his name to remain on the books of the corporation as a stockholder for more than two years after its organization, and during that time takes no steps to repudiate his contract, and pays the first assessment on his stock. Heiskell v. Morris, 135 Tenn. 238, 186 S. W. 99.

¹¹ Edwards v. Johnston, 23 Wyo. 384, 152 Pac. 273.

¹² Especially as against creditors. Cox v. Hardee, 135 Ga. 80, 68 S. E. 932.

signing a subscription agreement which has previously been signed by a corporation cannot escape liability on the ground that the subscription by such corporation was *ultra vires*,¹³ especially where he subsequently pays a part of his subscription.¹⁴ Nor can he do so where he stood by without objection or repudiation of his subscription on that ground during the entire proceedings looking to the organization of the company,¹⁵ or where he fails to object when a list of the subscribers containing the name of the corporation is submitted to him,¹⁶ or where he pays his subscription with knowledge of the subscription by the corporation.¹⁷ And he is estopped to set up this defense where he claims to be a stockholder and is recognized as such, and gives his note for a part of his subscription and is released from the rest.¹⁸ Similarly one who subscribes after married women have subscribed, and with knowledge of that fact, cannot escape liability as against creditors on the ground that such subscriptions are void and hence the required amount has not been subscribed, especially where he subsequently participates in stockholders' meetings and pays calls.¹⁹

XI. PAYMENTS ON SUBSCRIPTIONS

§ 707. Effect of nonpayment on legality of incorporation or right to commence business. A statute authorizing the formation of a corporation may require subscribers for stock therein to pay the whole or a certain percentage of their subscriptions as a condition precedent to acquiring a legal corporate existence. If such an inten-

¹³ This is true where he would have seen the name of the corporation among the signers, if he had read the subscription agreement, which he must be presumed to have done. *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932.

¹⁴ *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149.

¹⁵ *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043, aff'g 87 Ill. App. 605.

¹⁶ A subscriber failing to object to any of the subscriptions, upon the list thereof being submitted to him, will be deemed to have impliedly made admission that all of the subscriptions

were genuine, and cannot thereafter object to a subscription by a corporation on the ground that there is no proof of its organization or of its power to make such subscription. *Pacific Mill Co. v. Inman*, 46 Ore. 352, 80 Pac. 424.

¹⁷ This is especially true where the purpose of the action is to procure funds with which to pay the creditors of an insolvent corporation. *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700.

¹⁸ *Litchfield Bank v. Church*, 29 Conn. 137.

¹⁹ *In re Mack's Appeal* (Pa.), 7 Atl. 481; *In re Cornell's Appeal*, 114 Pa. St. 153, 6 Atl. 258.

tion appears, a de jure corporation cannot be formed without the required payments being made.²⁰

Payment of subscriptions, or of a part thereof, may also be required as a condition precedent to the right to commence business or contract debts.²¹

20 Alabama. *Floyd v. State*, 177 Ala. 169, 59 So. 280.

California. *People v. Chambers*, 42 Cal. 201.

Florida. *Southern Life Ins. & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

Georgia. *Napier v. Poe*, 12 Ga. 170.

Illinois. *Foster v. Staar*, 148 Ill. App. 485.

Maryland. *Munich Re-Insurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579.

New Jersey. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

Ohio. *Parkside Cemetery Ass'n v. Cleveland, B. & G. L. Traction Co.*, 93 Ohio St. 161, 112 N. E. 596; *Queen City Tel. Co. v. Cincinnati*, 73 Ohio St. 64, 76 N. E. 392.

South Carolina. *Meyer v. Brunson*, — S. C. —, 88 S. E. 359.

Until the required amount is paid in, the corporation cannot elect a secretary and is not liable for his salary if it attempts to do so. *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59.

In the case of railroad companies ten per cent. of the capital must have been paid in cash at the time when the certificate of incorporation is filed, otherwise such certificate is void and of no effect. *People v. Board of R. Com'rs*, 81 N. Y. App. Div. 242, 81 N. Y. Supp. 20, aff'd 175 N. Y. 516, 67 N. E. 1088.

A certificate which is void for this reason cannot be amended, but a new certificate filed after the required payment has been made, and which contains everything which the statute requires an original certificate to contain, will be regarded as an original

certificate, and will be sufficient to effect the organization of the company, although it is called an amended certificate. *People v. Board of R. Com'rs*, 81 N. Y. App. Div. 242, 81 N. Y. Supp. 20, aff'd 175 N. Y. 516, 67 N. E. 1088.

As to what constitutes a sufficient payment, see § 712, *infra*.

21 United States. *W. L. Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003, rev'g 128 Fed. 369, 118 Fed. 190; *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 90.

Alabama. *Tramwell v. Pennington*, 45 Ala. 673.

Georgia. *McCandless v. Inland Acid Co.*, 115 Ga. 968, 42 S. E. 449; *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Wikle v. Avary*, 12 Ga. App. 148, 76 S. E. 1039; *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

Illinois. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

Wisconsin. *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

Under the Wisconsin statute (1 Sanf. & B. Ann. St. §§ 1771-1775), while the corporation exists in a limited and qualified sense from the time when its articles are filed, it has no power to engage in any transactions except such as are necessary to perfect its organization until the requisite amount of capital is subscribed and paid. *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 90, 26 L. R. A. 470.

It is sometimes expressly provided

Such payment, however, is not a condition precedent, either to legal incorporation, or to the right to commence business, unless it is expressly so provided.²²

Where payment is required merely as a condition precedent to the right to commence business, or contract debts, nonpayment, while it may render the charter of the corporation subject to forfeiture by the state, does not affect the existence of the corporation,²³ and cannot be set up either by the corporation or by the stockholder to avoid liabilities assumed by them.²⁴

that the stockholders shall be individually liable for the debts of the company until a specified amount of the capital shall have been paid in. *Perkins v. Sanders*, 56 Miss. 733. See chapter on Stock and Stockholders, *infra*.

22 United States. *Young Reversible Lock-Nut Co. v. Young Lock-Nut Co.*, 72 Fed. 62; *Stokes v. Findlay*, 4 McCrary 205, Fed. Cas. No. 13,478.

Alabama. *Smith v. Tallassee Branch of Cent. Plank-Road Co.*, 30 Ala. 650.

Arkansas. *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319.

Connecticut. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Georgia. *Wood v. Coosa & C. R. R. Co.*, 32 Ga. 273; *Mitchell v. Rome R. Co.*, 17 Ga. 574.

Maryland. *Hammond v. Straus*, 53 Md. 1.

Massachusetts. *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 29 N. E. 510; *Chase's Patent Elevator Co. v. Boston Tow-Boat Co.*, 152 Mass. 428, 9 L. R. A. 339, 28 N. E. 300.

South Dakota. *Singer Mfg. Co. v. Peck*, 9 S. D. 29, 67 N. W. 947.

Texas. *National Bank of Jefferson v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101; *Blair v. Rutherford*, 31 Tex. 465.

Payment is not a condition precedent to incorporation where the charter provides that the incorporators "are hereby created a body politic and corporate," and that the corpora-

tion shall have power to commence business as soon as a certain amount of stock is subscribed and paid for. *W. L. Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003, rev'g 128 Fed. 369, 118 Fed. 190.

A provision that commissioners to procure stock subscriptions shall receive no subscriptions unless five per cent. thereof shall be paid in cash at the time of subscribing, and that if they do so they shall be personally liable to pay the same to the corporation when organized, does not make payment of five per cent. a condition precedent to organization. *Blair v. Rutherford*, 31 Tex. 465.

In Georgia the corporation may organize and collect subscriptions before such payment is made. *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Wikle v. Avary*, 12 Ga. App. 148, 76 S. E. 1039; *Bingo v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

23 United States. *Young Reversible Lock-Nut Co. v. Young Lock-Nut Co.*, 72 Fed. 62.

Illinois. *Baker v. Backus' Adm'r.*, 32 Ill. 79.

Maryland. *Hammond v. Straus*, 53 Md. 1.

Missouri. *Staunton Copper Mining Co. v. Thurmond*, 7 Mo. App. 587.

South Carolina. *Spartanburg & A. R. Co. v. Ezell*, 14 S. C. 281.

24 Jones v. Dodge, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828.

As to the right of a stockholder to

A subscriber may be estopped by his conduct from attacking the legal existence of the corporation on the ground that the required payment was not made,²⁵ or from claiming that corporate debts are invalid because contracted before the required amount was paid in and hence that his subscription cannot be enforced for the purpose of paying them.²⁶

§ 708. Effect of nonpayment on validity of subscriptions and liability of subscribers—In general. The validity and binding effect of subscriptions for stock in a corporation, whether they are made after or before the corporation is formed, is clearly not in any way affected by failure of the subscribers to pay the whole or part of the same, unless payment is expressly required by the charter or enabling act or the articles of association.²⁷ Whether such failure renders a subscription invalid when payment is expressly required depends upon the purpose of the requirement and the intention.

When the charter of a corporation or the enabling act under which it is organized clearly requires that a certain percentage of subscriptions shall be paid as a condition precedent to incorporation, there can be no liability on subscriptions in the absence of such payment, unless the subscriber can be held estopped to deny legal incorpora-

set up nonpayment as a defense to an action on his subscription, see § 708, *infra*.

²⁵ See § 716, *infra*.

²⁶ One who signed the certificate of incorporation as a subscriber for stock and who has acted as a director cannot escape liability to creditors on his subscription on the ground that their claims are not valid debts of the corporation because contracted before the amount of capital specified in the certificate as the amount with which the corporation would commence business was paid in. *George Irish Paper Co. v. White*, 91 N. Y. Misc. 261, 154 N. Y. Supp. 778.

²⁷ **Alabama.** See *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

Illinois. *Chandler v. Northern Cross R. Co.*, 18 Ill. 190.

Iowa. *Waukon & M. R. Co. v. Dwyer*, 49 Iowa 121.

Missouri. *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248.

New York. *Wheeler v. Millar*, 90 N. Y. 353; *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457.

Texas. *Nicholson-Watson Shoe & Clothing Co. v. Urquhart*, 32 Tex. Civ. App. 527, 75 S. W. 45; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Wisconsin. *Port Edwards, C. & N. Ry. Co. v. Arpin*, 80 Wis. 214, 49 N. W. 828.

A provision that no certificate shall be issued nor shall any stock be considered as acquired until paid for in full was held not intended to exempt a subscriber from the payment of the unpaid part of his subscription. *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243.

tion,²⁸ for a subscription cannot be binding until the corporation is in existence.²⁹

This cannot apply where payments on subscriptions are not required as a condition precedent to becoming incorporated, but merely for the purpose of providing funds for preliminary expenses, or as a condition precedent to engaging in business or contracting debts.³⁰ And, as a rule, under such circumstances, the fact that the required percentage of the capital has not been paid in is no defense to an action on a subscription, since the collection of subscriptions is a legitimate method of realizing in cash the amount required to be paid before the corporation can lawfully begin the transaction of its corporate business and the purpose of the action is to obtain a compliance with the provisions of the statute.³¹

Some courts, however, hold that where the statute requires a certain percentage of the capital to be paid in before the corporation is authorized to commence business, compliance therewith is essential to the validity of any call or assessment, except the first one for preliminary expenses.³²

§ 709. — Failure of one subscribing after incorporation to pay required deposit at time of subscription. In so far as subscriptions after the corporation has been organized are concerned, a charter or statutory requirement that a certain amount or percentage shall be paid at the time of subscribing is to be construed as intended merely for the benefit of the corporation, so that it may be waived by it, unless a contrary intention clearly appears. As a rule, failure to make the required payment cannot be set up by a subscriber to escape lia-

²⁸ See § 718, *infra*.

²⁹ See § 586, *supra*.

³⁰ Where a charter provided that, before the corporation should proceed to the transaction of business, a certain percentage of its capital stock should be subscribed and paid in, the requirement that such amount should be actually paid in was held not a condition precedent to the company's right to enforce payment of calls on subscriptions. *McDermott v. Donegan*, 44 Mo. 85. See also *Naugatuck Water Co. v. Nichols*, 58 Conn. 403, 8 L. R. A. 637, 20 Atl. 315; *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29. Compare *Halsey*

Fire Engine Co. v. Donovan, 57 Mich. 318, 23 N. W. 828.

³¹ *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Wikle v. Avary*, 12 Ga. App. 148, 76 S. E. 1039; *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

A failure to collect the required amount will not bar a suit to collect it. *McCandless v. Inland Acid Co.*, 115 Ga. 968, 42 S. E. 449.

³² *La Crosse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 464, 84

bility on his subscription, unless subscriptions without such payment are expressly prohibited or declared to be void.³³

A reason given for so holding is that, under such circumstances, the provision is for the benefit of the corporation and may be waived by it, and that if the corporation "sees fit to accept the subscription, without requiring the concurrent payment which it is authorized to require, this is a waiver of its right to insist upon such payment, a waiver to which the subscriber assents and agrees by the very act of subscription without concurrent payment."³⁴

The rule is especially applicable where the subscription is conditional, for in such case the subscriber is not bound to pay anything until the condition is performed.³⁵

If the charter or statute expressly forbids subscriptions to be taken without payment of a certain amount, or a certain percentage thereof, or expressly declares that they shall be void, a subscription without such payment is absolutely void, and cannot be enforced.³⁶

N. W. 838; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226.

³³ *Minneapolis & St. L. Ry. Co. v. Bassett*, 20 Minn. 535, 18 Am. Rep. 376.

See also in this connection:

Alabama. *Selma & T. R. Co. v. Rountree*, 7 Ala. 670.

Georgia. *Mitchell v. Rome R. Co.* 17 Ga. 574.

Illinois. *Ryder v. Alton & S. R. Co.* 13 Ill. 517.

Maryland. *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *Oler v. Baltimore & R. R. Co.*, 41 Md. 583; *Elysville Mfg. Co. v. Okisko Co.*, 5 Md. 152. See dictum in *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

New York. *Beach v. Smith*, 30 N. Y. 116; *Jenkins v. Union Turnpike Road*, 1 Cai. Cas. 86.

Vermont. *Montpelier & W. River R. Co. v. Langdon*, 46 Vt. 284.

West Virginia. *Pittsburgh, W. & K. R. Co. v. Applegate*, 21 W. Va. 172.

In *Galveston Hotel Co. v. Bolton*, 46 Tex. 633, it was held that, where

the charter of a corporation provides that ten per cent. of the amount subscribed shall be deposited with the treasurer at the time of the subscription, a subscriber may show, in an action on his subscription, that he did not pay the ten per cent., as tending to show that there was not a complete contract of subscription. See also *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

³⁴ *Minneapolis & St. L. Ry. Co. v. Bassett*, 20 Minn. 535, 18 Am. Rep. 376.

³⁵ *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36.

As to the effect of conditional subscriptions, see § 573, et seq., supra.

³⁶ *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473; *Beach v. Smith*, 30 N. Y. 116, 28 Barb. (N. Y.) 254; *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208; *Van Schaick v. Mackin*, 129 N. Y. App. Div. 335, 113 N. Y. Supp. 408; *Hapgoods v. Lusch*, 123 N. Y. App. Div. 23, 107 N. Y. Supp. 331; *South Buffalo Natural Gas Co. v. Bain*, 9 N. Y. Misc. 425, 30 N. Y. Supp. 264; *Harriman*

Provisions requiring the payment to commissioners, appointed to receive subscriptions prior to incorporation, of a certain sum on each share subscribed, are generally held not to apply to subscriptions received by the corporation itself after it has been fully organized.³⁷

§ 710. — Failure of one subscribing before incorporation to pay required deposit at time of subscription. The courts have not agreed in construing charter or statutory provisions requiring payment of a certain percentage of subscriptions made prior to the organization

Nat. Bank v. Palmer, 158 N. Y. Supp. 111; *McRae v. Russel*, 12 Ired. (N. C.) 224; *Charlotte & S. C. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245. See also *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420.

Such a subscription is not validated by assignment thereof as collateral security to a third person with notice of the nonpayment, and the assignee cannot enforce it. *Harriman Nat. Bank v. Palmer*, 158 N. Y. Supp. 111.

Where no stock book is shown to have been kept, but it appears from the minutes of different meetings of the stockholders that a portion of the shares were taken, it will be presumed, in the absence of any showing to the contrary, that the amount required by the articles of incorporation was paid. *Sweney v. Talcott*, 85 Iowa 103, 52 N. W. 106.

In *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491, it was held that nonpayment only rendered the contract voidable at the option of the corporation and was no defense to an action on the subscription, though a by-law provided "ten per cent. shall be payable upon subscription, or the subscription shall be void."

In New York a distinction is recognized in this regard between subscriptions made before and after incorporation. See § 576, et seq., supra.

³⁷ *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Under a statute authorizing the

formation of a corporation, which appointed commissioners to open books and receive subscriptions to its capital stock, and provided that, on their certificate to the governor that a certain amount of stock was subscribed, he should issue letters patent erecting the subscribers into a corporation, the court held that a requirement therein that a certain amount should be paid to the commissioners on each share at the time of subscribing, while it required such payment on all subscriptions received by the commissioners, and which were necessary to authorize the issuance of letters patent, did not apply to subscriptions received by the corporation itself after its creation. *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. St. 318. And see *Montpelier & Wells River R. Co. v. Langdon*, 46 Vt. 284.

And where a statute providing for the formation of corporations required, in one section, that a certain amount should be paid to the commissioners at the time of subscribing, and provided, in another section, that, after the organization of a corporation thereunder, it should have the power to enlarge its stock by new subscriptions, in such manner and form as it should think proper, it was held that no payment at the time of subscribing was required on subscriptions after organization. *Erie & W. Plank Road Co. v. Brown*, 25 Pa. St. 156.

of a corporation. Some of the courts have held that, where the charter or statute merely requires such payment, without expressly prohibiting subscriptions without payment, or declaring that they shall be void, a subscriber's failure to comply with the requirement does not render his subscription void, and cannot be set up by him to defeat an action thereon. These decisions are based either upon the ground that the failure of the subscriber to make the payment is wrongful, and that he should not be permitted to take advantage of his own wrong for the purpose of escaping liability on his subscription, or on the ground that the requirement is intended for the benefit of the corporation, rather than of the public, and that it may therefore be waived by the corporation, or by the commissioners receiving the subscription, who act as its agents, or on both grounds.³⁸

Other courts have taken a contrary view, and have construed the requirement as intended, not merely for the benefit of the corporation, but for the protection of the public, to prevent the subscription list from being filled up with names of nominal stockholders, and the

³⁸ **Alabama.** *Smith v. Tallassee Branch of Cent. Plank-Road Co.*, 30 Ala. 650; *Selma & Tennessee R. Co. v. Rountree*, 7 Ala. 670.

Georgia. See *Mitchell v. Rome R. Co.*, 17 Ga. 574.

Illinois. *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

Indiana. See *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

Kentucky. *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522. See also *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358.

Louisiana. *Vicksburg, S. & T. R. Co. v. McKean*, 12 La. Ann. 638; *Canal Bank v. Holland*, 5 La. Ann. 363; *Red River R. Co. v. Young*, 6 Rob. 39.

Minnesota. See *Minneapolis & St. L. Ry. Co. v. Bassett*, 20 Minn. 535, 18 Am. Rep. 376.

North Carolina. See *McRae v. Russell*, 12 Ired. 224; *Haywood & P. Plank Road Co. v. Bryan*, 6 Jones 82.

Ohio. See *Henry v. Vermillion & A. R. Co.*, 17 Ohio 187; *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

Pennsylvania. See *McHose v. Wheeler*, 45 Pa. St. 32.

Utah. See *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

Virginia. *Stuart v. Valley R. Co.*, 32 Gratt. 146. See also *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

West Virginia. See *Pittsburgh, W. & K. R. Co. v. Applegate*, 21 W. Va. 172.

Failure to make the required payment will not avoid the subscription, but will do so only at the option of the corporation. The provision requiring such payment is for the benefit of the corporation and not for the benefit of the subscriber who fails to make such payment. Moreover the latter will not be permitted to take advantage of his own wrong. *Sedalia, W. & S. Ry. Co. v. Abell*, 17 Mo. App. 645.

Violation of a provision that no certificate shall be issued and the stock shall not be considered as acquired until the whole sum which such certificate shall represent shall be paid, is no defense to an action

irresponsible creatures of others.³⁹ And these courts have held, therefore, that the requirement cannot be waived by the corporation or the agents receiving subscriptions, and that a subscription upon which the required deposit is not paid is illegal and void, and no action can be maintained upon it.⁴⁰

to recover the unpaid balance of a subscription. It is the duty of the subscriber to pay, and if he does not he cannot take advantage of his own wrong to escape liability. *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243.

³⁹ Per Gibson, J., in *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593.

⁴⁰ **United States.** *State Ins. Co. v. Redmond*, 1 McCrary 308, 3 Fed. 764.

Florida. See *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 152, 58 Am. Dec. 448.

Maryland. *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760.

Mississippi. *Fiser v. Mississippi & T. R. Co.*, 32 Miss. 359.

New York. *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, aff'd 189 N. Y. 504, 81 N. E. 1164; *Excelsior Grain Binder Co. v. Stayner*, 25 Hun 91, 61 How. Pr. 456; *Union Turnpike Road v. Jenkins*, 1 Cal. 381, 1 Cal. Cas. 86; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Goshen & M. Turnpike Road v. Hurtin*, 9 Johns. 217, 6 Am. Dec. 273. See also *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473; *Beach v. Smith*, 30 N. Y. 116; *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208.

Pennsylvania. *Leighly v. Susquehanna & W. Turnpike Co.*, 14 Serg. & R. 434; *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. 219, 11 Am. Dec. 593.

Under the New York Business Corporations Law (§§ 41-43), subscribers must pay ten per cent. on subscrip-

tions after incorporation, but not on subscriptions prior thereto. *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 334, 51 N. Y. Supp. 969; *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

This was also true as to railroad corporations organized under Act April 2, 1850 (L. 1850, 211). *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Harriman Nat. Bank v. Palmer*, 158 N. Y. Supp. 111; *Ogdensburgh, R. & C. R. Co. v. Frost & Spriggs*, 21 Barb. (N. Y.) 541.

In a Pennsylvania case, an act to incorporate a turnpike company, appointed commissioners to open books and receive subscriptions, and provided that, when fifty or more persons should subscribe two hundred shares of the stock, the commissioners should certify to the governor the names of the subscribers, and the number of shares subscribed by each, whereupon the governor should issue letters patent erecting the subscribers and those who might afterwards subscribe into a corporation. It also provided that every person offering to subscribe in the said books, in his own or any other name, should previously pay to the commissioners the sum of five dollars for each and every share to be subscribed, out of which should be defrayed the expense of taking the subscription and other incidental charges, and the remainder paid over to the corporation when organized. It was held that this provision was not intended merely for the benefit of the corporation, or merely to raise money for expenses preliminary to

If a charter or statute expressly declares that subscriptions shall be void unless a payment is made at the time of subscribing, a subscription without such payment cannot be enforced.⁴¹ And the same is true where there is an express prohibition against taking subscriptions without such payment,⁴² or where payment is expressly required

organization, but for the protection of the public against subscriptions by persons without ability to pay, and persons who might subscribe for the purpose of speculation merely, and that subscriptions on which the required payment was not made were illegal and void. *Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593.

Such payment is not necessary where the subscription is conditional, however. *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. St. 36.

Where the charter of a corporation required the commissioners appointed to receive subscriptions and organize the corporation to give notice for the election of directors as soon as the specified amount of stock should be subscribed, and a certain per cent. of each subscription paid, it was held that it did not require the payment of such proportion of subscriptions at the time of subscribing, and that the commissioners might receive subscriptions payable at a future time. *Napier v. Poe*, 12 Ga. 170.

In *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 151, 58 Am. Dec. 448, it was held that a provision requiring subscribers to pay ten per cent. did not apply to persons who purchased from the corporation stock which had been surrendered to it by the original subscribers.

Failure to pay the required deposit may be cured by the legislature, and it is cured by a statute providing that all defects and irregularities in the proceedings of the commissioners in taking subscriptions to the stock shall be cured, and that such proceedings

shall be valid as though the statute relating to such acts had been fully complied with. *Clark v. Monongahela Nav. Co.*, 10 Watts (Pa.) 364. See, however, to the contrary, under a New York statute, *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473.

⁴¹ *McRae v. Russel*, 12 Ired. (N. C.) 224; *Charlotte & S. C. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245.

As where it is expressly provided that no subscription shall be valid unless the required amount is paid. *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169.

⁴² *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473; *Beach v. Smith*, 30 N. Y. 116, 28 Barb. (N. Y.) 254; *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208; *Knickerbocker Trust Co. v. Hard*, 67 N. Y. App. Div. 463, 73 N. Y. Supp. 979; *Excelsior Grain Binder Co. v. Stayner*, 25 Hun (N. Y.) 91, 61 How. Pr. (N. Y.) 456, aff'g 58 How. Pr. (N. Y.) 273.

This is true where it is provided that "no subscription shall be received and allowed" unless a specified sum shall be paid to the commissioners at the time of such subscription. *Wood v. Coosa & C. R. R. Co.*, 32 Ga. 273.

Where a clause in a charter of a railroad company provided that the board of commissioners should receive no subscription to stock unless a certain per cent. thereof in cash should be paid at the time of subscription, and that, if they should receive subscriptions without such payment, they should be personally liable to pay the same, it was held that the fact that the commissioners did not exact the

to be made contemporaneously with the making of the subscription.⁴³

As a rule a stockholder is estopped to set up his failure to make the required payment to defeat an action on his subscription if he has exercised the rights and privileges conferred upon him thereby and acted as a stockholder.⁴⁴

A subscriber who transfers his stock to another, and thus treats it as valid, is estopped to deny that the payment necessary to give his subscription validity was made.⁴⁵

§ 711. — Effect of requirement in by-law as to payment of deposit at time of subscription. A by-law of a corporation requiring a certain percentage of subscriptions to be paid at the time of subscribing, and declaring that subscriptions without such payment shall be void, is for the benefit of the corporation only, and does not render subscriptions absolutely void because of nonpayment of the required

required payment from subscribers afforded no defense to a note given by a stockholder in payment for stock. *Blair v. Rutherford*, 31 Tex. 465.

⁴³ *Napier v. Poe*, 12 Ga. 170.

⁴⁴ *Erie & Waterford Plank-Road Co. v. Brown*, 25 Pa. St. 156. And see *Litchfield Bank v. Church*, 29 Conn. 137; *Haywood & P. Plank Road Co. v. Bryan*, 6 Jones (N. C.) 82; *Garret v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Clark v. Monongahela Nav. Co.*, 10 Watts (Pa.) 364; *Greenville & C. R. Co. v. Woodsides*, 5 Rich. (S. C.) 145, 55 Am. Dec. 708. See also *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169.

He is so estopped where he afterwards pays it; *Hall v. Selma & T. R. Co.*, 6 Ala. 741; or where he participates in the organization of the corporation, pays a note given by him for the amount of the first payment, and accepts the office of director; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; or where he signs the certificate of incorporation as a subscriber for stock, and acts as a director. *George Irish Paper Co. v. White*, 91 N. Y. Misc. 261, 154 N. Y. Supp. 778.

One who subscribes after he has acted as a director, and in order to qualify as such, is estopped from contesting his subscription on the ground that its terms of payment were violative of the charter. *Keystone Life Ins. Co. of Louisiana v. Von Schlemmer*, 122 La. 280, 47 So. 606.

A subscriber who pays for a small part of the stock, receives dividends on the whole of the stock subscribed, and later sells it all at a profit, is estopped to assert that he never became a stockholder, and is not liable for the balance due on his subscription because he failed to pay the required amount on his subscription. *Jeffery v. Selwyn*, — N. Y. App. Div. —, 159 N. Y. Supp. 430.

A person who gives his note in payment of a subscription to the stock of a corporation is estopped to set up, to escape liability thereon, that the transaction was a fraud upon the cash subscribers. *Clark v. Farrington*, 11 Wis. 306.

⁴⁵ *Jeffery v. Selwyn*, — N. Y. App. Div. —, 159 N. Y. Supp. 430; *Everhart v. West Chester & P. R. Co.*, 28 Pa. St. 339.

amount. The corporation, if it sees fit, may treat them as valid, and, if it does so, the subscribers are bound.⁴⁶

§ 712. Sufficiency of payment. The deposit must be paid in money or its equivalent, whether a payment in "cash" or in "money" is expressly required or not, for otherwise it would be an easy matter to evade the statute.⁴⁷ Sometimes there is an express requirement to this effect.⁴⁸

Giving a promissory note for the amount required by a statute to be paid on a subscription is not a compliance with the statute.⁴⁹

But a payment in goods or services for which the corporation has the power to contract, under an agreement entered into at the time of subscribing, is sufficient.⁵⁰

The state may object that stock in another corporation was accepted

⁴⁶ *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491. Compare *State Ins. Co. v. Redmond*, 1 McCrary (U. S.) 308, 3 Fed. 764.

⁴⁷ See *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169, and other cases in the notes following.

⁴⁸ *Hapgoods v. Lusch*, 123 N. Y. App. Div. 23, 107 N. Y. Supp. 331.

⁴⁹ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *Leighty v. Susquehanna & W. Turnpike Co.*, 14 Serg. & R. (Pa.) 434; *In re McKinley-Lanning Loan & Trust Co.*, 12 Pa. Co. Ct. 40. Compare *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784, rev'g 39 Hun (N. Y.) 22; *Hapgoods v. Lusch*, 123 N. Y. App. Div. 23, 107 N. Y. Supp. 331; *Harriman Nat. Bank v. Palmer*, 158 N. Y. Supp. 111; *McRae v. Russell*, 12 Ired. (N. C.) 224. See also *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

If the constitutional provision that no corporation shall issue stock or bonds except for labor done or money or property actually received, and a charter provision that no stock shall be issued until the amount subscribed for shall have been fully paid, are not complied with in that notes are given for a part of the amount subscribed,

the corporation is not legally organized. *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827, 26 So. 586.

It has been held that a subscriber who has given his note in payment is estopped to set up such fact to escape liability. *Selma & T. R. Co. v. Roundtree*, 7 Ala. 670; *Franklin v. Two-good*, 18 Iowa 515.

One who gives a note for the amount of his subscription cannot escape liability thereon on the ground that it was the duty of the company to require payment in money. *Finnell v. Sanford*, 17 B. Mon. (Ky.) 748.

As to the right to pay subscriptions in notes or other securities generally, see chapter on Stock and Stockholders, *infra*.

⁵⁰ *McCandless v. Inland Acid Co.*, 115 Ga. 968, 42 S. E. 449; *State v. Wood*, 13 Mo. App. 139; *Beach v. Smith*, 30 N. Y. 116, 28 Barb. (N. Y.) 254; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225.

As to the right to receive goods or services in payment of subscriptions generally, see chapter on Stock and Stockholders, *infra*.

as cash in order to make up the amount which the charter required to be paid in before the corporation could organize and commence business, but the corporation after its organization cannot repudiate the transaction and recover the amount represented by the stock from the subscriber, at least after it has ratified the transaction by having the stock transferred to its name and accepting dividends thereon.⁵¹

Giving a check for the amount of the deposit is not sufficient, where the drawer has no funds to meet the same, or where the check is not given in good faith, but for the purpose of evading the requirement, and without any intention that it shall be presented for payment, or where payment is countermanded before its presentment.⁵² As a rule it is otherwise if a check is given in good faith, and is presented and paid,⁵³ although there are holdings to the effect that payment by a check which is not certified, and where no arrangement has been

⁵¹ *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798.

⁵² *People v. Chambers*, 42 Cal. 201; *Van Schaick v. Mackin*, 129 N. Y. App. Div. 335, 113 N. Y. Supp. 408; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. See also *Harri-man Nat. Bank v. Palmer*, 158 N. Y. Supp. 111.

Where the check is given with the understanding that it shall not be presented for payment or paid. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784, rev'g 39 Hun (N. Y.) 22.

This was held to be true where the check was countermanded before it was presented for payment, and nothing was ever received either by the commissioners or the corporation on the subscription. *Excelsior Grain Binder Co. v. Stayner*, 25 Hun (N. Y.) 91, 61 How. Pr. (N. Y.) 456, aff'g 58 How. Pr. (N. Y.) 273.

⁵³ *Rothchild v. Hoge*, 43 Fed. 97; *People v. Stockton & V. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178; *In re Staten Island Rapid Transit R. Co.*, 38 Hun (N. Y.) 381. See also *Union Water Co. v. Kean*, 52 N. J. Eq. 111, 27 Atl. 1015, rev'd (for want of jurisdiction)

52 N. J. Eq. 813, 46 Am. St. Rep. 538, 31 Atl. 282.

Where a statute required payment of ten per cent. in cash on subscriptions prior to the filing of articles of incorporation, it was held that payment on a subscription by a certified check on the 13th of the month was a good payment, where the check was deposited on the 14th, and credited to the payee on the 15th, although the articles of incorporation were filed on the 14th. *In re Staten Island Rapid Transit R. Co.*, 38 Hun (N. Y.) 381.

Where a statute required a certain amount of stock to be subscribed and paid in cash, it was held that the giving of checks by subscribers in good faith on banks in which there were funds, and which would have been paid if presented, was a substantial and sufficient compliance with the statute, although the checks were not in fact presented because the money was not needed, and were afterwards returned to the drawers on their payment of the money. *People v. Stockton & V. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178.

made with the bank, or in any manner, to appropriate the fund against which it is drawn solely to its payment, is not a payment in cash.⁵⁴

Though a statute may expressly or impliedly require payment of a deposit at the time of subscribing, payment after subscribing is sufficient to render a subscription valid.⁵⁵ So it has been held that non-payment at the time of the subscription will not affect the liability of the subscriber if he pays before the subscription books are closed,⁵⁶ or before the corporation is organized.⁵⁷ And also that if no time is fixed by the charter for payment, commissioners have discretionary power to permit it to be made within a reasonable time after the making of the subscription.⁵⁸ And that the fact that the required amount was not paid prior to the filing of the articles of incorporation as required by the statute is available only to the state, and is no defense to an action to recover the amount of an assessment or call.⁵⁹

Under a statute providing that no subscription shall be taken without a payment of a certain amount thereof, a subscription is binding if payment of the deposit is made under legal compulsion, as where a judgment is recovered therefor, and paid or collected.⁶⁰ And especially is this true where the judgment is recovered in an action to which no resistance is made.⁶¹

Payment by an agent having a power to subscribe in behalf of his principal and to do whatever is necessary to be done in the premises is sufficient though the money is not furnished by the principal.⁶² And payment by a third person for the subscriber is sufficient though made

⁵⁴ *People v. Board of R. Com'rs*, 81 N. Y. App. Div. 242, 81 N. Y. Supp. 20, aff'd 175 N. Y. 516, 67 N. E. 1088; *In re Kings, Q. & S. R. Co.*, 6 N. Y. App. Div. 241, 39 N. Y. Supp. 1004.

In *Harriman Nat. Bank v. Palmer*, 158 N. Y. Supp. 111, it is said by way of dictum that payment by check is not sufficient.

⁵⁵ *Alabama*. *Hall v. Selma & T. R. Co.*, 6 Ala. 741.

Illinois. *Klein v. Alton & S. R. Co.*, 13 Ill. 514.

Indiana. *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

Mississippi. *Fiser v. Mississippi & T. R. Co.*, 32 Miss. 359.

New York. *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208; *Ogdensburgh, C. & R. Co. v. Wooley*, 3 Abb.

Dec. 398; *Beach v. Smith*, 28 Barb. 254, 30 N. Y. 116.

⁵⁶ *Klein v. Alton & S. R. Co.*, 13 Ill. 514.

⁵⁷ *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

⁵⁸ *Napier v. Poe*, 12 Ga. 170.

⁵⁹ *Sedalia, W. & S. Ry. Co. v. Abell*, 17 Mo. App. 645.

⁶⁰ *Ogdensburgh, C. & R. Co. v. Wooley*, 3 Abb. Dec. (N. Y.) 398. See also *Hall v. Selma & T. R. Co.*, 6 Ala. 741.

⁶¹ Under such circumstances the subscriber must be taken to have conceded his liability and to have paid voluntarily. *Hall v. Selma & T. R. Co.*, 6 Ala. 741.

⁶² *Litchfield Bank v. Church*, 29 Conn. 137.

without his knowledge or consent, if he afterwards ratifies it, and such ratification may be implied from his subsequent conduct.⁶³

A provision requiring payment of a certain per cent. "on the amount of the stock subscribed," or of a certain amount on each share, has been held not to require each subscriber to pay that per cent. or amount upon his subscription, but merely the payment of that per cent. upon the gross amount of subscriptions, or that amount in the aggregate.⁶⁴

A subscription is not rendered invalid by failure to actually pay the deposit, where the subscriber is one of the commissioners to take subscriptions and receive the money required to be paid.⁶⁵

Where one of the commissioners to receive subscriptions makes a subscription in his own behalf, and credits the company in his account subsequently rendered to it with the amount of the deposit required to be paid, the subscription is binding.⁶⁶

⁶³ *Mississippi & T. R. Co. v. Harris*, 36 Miss. 17.

⁶⁴ *Munich Re-Insurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579; *Williamsburgh Sav. Bank v. Town of Solon*, 136 N. Y. 465, 32 N. E. 1058; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Beattys v. Town of Solon*, 19 N. Y. Supp. 37, aff'd 136 N. Y. 662, 32 N. E. 1062; *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Spartanburg & A. R. Co. v. Ezell*, 14 S. C. 281. See also *Parkside Cemetery Ass'n v. Cleveland, B. & G. Lake Traction Co.*, 93 Ohio St. 161, 112 N. E. 596.

A statute authorizing the formation of a railroad company or other corporation, and requiring that at least a certain amount of stock for every mile of the proposed road shall be subscribed, and ten per cent. paid thereon in good faith, before the articles of incorporation shall be filed, is complied with if the aggregate amount of payments amounts to ten per cent. of one thousand dollars for each mile of the proposed road. It is not required that each subscriber shall pay ten per cent. on his subscription.

Lake Ontario, Auburn & N. Y. R. Co. v. Mason, 16 N. Y. 451; *Beattys v. Town of Solon*, 64 Hun (N. Y.) 120; *Ogdensburgh, Rome & C. R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Spartanburg & Asheville R. Co. v. Ezell*, 14 S. C. 281.

In *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616, it was held that from the fact that the charter showed that ten per cent. of the stock then subscribed for had been paid in, it might properly be inferred that some one else paid the required ten per cent. for the plaintiff subscriber if he did not pay it himself.

⁶⁵ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Grayble v. York & G. Turnpike Road Co.*, 10 Serg. & R. (Pa.) 269. See also *Beach v. Smith*, 28 Barb. (N. Y.) 254, 30 N. Y. 116.

In law he is deemed to have received the money when he made the subscription. *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

⁶⁶ *Beach v. Smith*, 30 N. Y. 116, 28 Barb. (N. Y.) 254.

XII. OVERSUBSCRIPTION AND APPORTIONMENT OR DISTRIBUTION OF STOCK

§ 713. Effect of oversubscription. As is shown in another chapter, a corporation has no power to increase its capital stock without legislative authority,⁶⁷ and therefore, if it receives subscriptions in excess of its authorized capital stock, they are without consideration and void, and cannot be enforced either by the corporation or by creditors. In such a case, the subscriber is not estopped.⁶⁸ The mere fact, however, that the promoters of a corporation, before incorporation, received subscriptions in excess of the authorized capital stock, is altogether immaterial if the corporation, when organized, does not accept the excessive subscriptions. A plea in an action on a subscription, therefore, does not set up any defense, and is demurrable, where it alleges merely that the promoters received subscriptions in excess of the authorized capital stock, without showing that the excessive subscriptions were accepted by the corporation, so as to

⁶⁷ See chapter on Stock and Stockholders, *infra*.

⁶⁸ *United States*. *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957; *Winters v. Armstrong*, 37 Fed. 508.

Alabama. *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325.

Georgia. *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932; *Clark v. Turner*, 73 Ga. 1.

Illinois. See *Great Western Tel. Co. v. Bush*, 35 Ill. App. 213.

Indiana. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Kansas. *Tschumi v. Hills*, 6 Kan. App. 549, 51 Pac. 619.

Maryland. *Oler v. Baltimore & R. Co.*, 41 Md. 583.

New Hampshire. *Bristol Creamery Co. v. Tilton*, 70 N. H. 239, 47 Atl. 591.

New York. *Burrows v. Smith*, 10 N. Y. 550; *Lathrop v. Kneeland*, 46 Barb. 432.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Texas. *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

Washington. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489; *National Realty Co. v. Neilson*, 73 Wash. 89, 131 Pac. 446.

Wisconsin. *Level Land Co. No. 3 v. Hayward*, 95 Wis. 109, 69 N. W. 567.

England. *Mackley's Case*, 1 Ch. Div. 247.

Where the defendant's subscription brings the amount of the outstanding stock to a sum in excess of the amount which the corporation is authorized to issue, and there is no means of distinguishing the legal part of the subscription from the illegal part, the whole subscription will be held to be invalid. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Where there are subscriptions in excess of the authorized amount and no allotment or apportionment has been made, there is no contract of membership upon which either the corporation or the subscribers can be held liable. *Bristol Creamery Co. v. Dalton*, 70 N. H. 239, 47 Atl. 591.

A subscriber cannot be compelled

enter into its capital stock.⁶⁹ So, too, if no more than the amount authorized is actually issued, the fact that the promoters or organizers of the corporation nominally subscribe for all the stock does not make a subsequent independent subscription an overissue, where the arrangement is merely for convenience, and neither the corporation nor the persons so subscribing intend that the latter shall take it all, but it is understood that a part of it shall be apportioned to persons who subsequently subscribe. In such case the original subscribers will be regarded as mere conduits through whom the stock is to be distributed, and as self-appointed trustees or agents for subsequent subscribers.⁷⁰

§ 714. Distribution or apportionment by commissioners. Where commissioners are appointed to receive subscriptions to the capital stock of a corporation to be formed, until a certain sum is subscribed, and are then required to call a meeting of the stockholders to elect directors, they have no power to make a proportionate deduction of all shares subscribed, without reference to the priority of subscription, when excessive subscriptions are received, but their authority is limited to receiving subscriptions up to the authorized amount.⁷¹ The commissioners, however, may be authorized to receive subscriptions in excess of the authorized capital stock, and then to apportion or distribute the stock among the subscribers, and they may be given a discretion in the distribution.⁷²

to accept preferred stock in excess of the amount which the charter authorizes the corporation to issue. *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

As to what constitutes an overissue, see § 589, *supra*.

As to estoppel, see § 716, *infra*.

⁶⁹ *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48. See also *Oler v. Baltimore & R. R. Co.*, 41 Md. 583.

⁷⁰ *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

By the articles of incorporation five hundred shares were to be issued. At the time the articles were drawn the names of all the subscribers were not at hand and the organizer put him-

self down for a specified number of shares, regarding himself as the agent of absent parties intending to subscribe. The aggregate of these subscriptions by individuals and the organizer exceeded five hundred. But five hundred were actually issued, however, the shares taken by the organizer being allotted in accordance with his intention. These transactions were with the consent of all stockholders. The court held that there had been no overissue. *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

⁷¹ *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932; *Van Dyke v. Stout*, 8 N. J. Eq. 333.

⁷² *Clarke v. Brooklyn Bank*, 1 Edw. Ch. (N. Y.) 361; *Haight v. Day*, 1

When commissioners are appointed to receive subscriptions for stock in a corporation to be formed, and to apportion or distribute the stock among the subscribers in the case of oversubscription, a valid distribution of the stock is a condition precedent to the existence of the corporation, and to liability on subscriptions.⁷³ In an action on a subscription, however, the presumption, in the absence of evidence to the contrary, is that only the authorized amount of stock has been subscribed, and the burden is on the subscriber if he claims that excessive subscriptions have been received, and that there has been no distribution.⁷⁴

Commissioners appointed to receive subscriptions and distribute the stock among the subscribers where more than the required amount of stock is subscribed, "in such manner as they shall deem most conducive to the interests of the said corporation," act in a judicial capacity in distributing the stock, since they must exercise a discretion, and distribute the stock as may be most beneficial to the interests of the company, and therefore they cannot appoint an agent or deputy to make the distribution.⁷⁵

Johns. Ch. (N. Y.) 18; Walker v. Devereaux, 4 Paige (N. Y.) 229; Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Perkins v. Savage, 15 Wend. (N. Y.) 412.

Under an act of incorporation authorizing commissioners to receive subscriptions, and "to apportion the excess of shares among the several subscribers, as they should judge discreet and proper," they are not required to make apportionments to each subscriber in proportion to the amount of his subscription. Haight v. Day, 1 Johns. Ch. (N. Y.) 18.

When they are given such discretion, their apportionment is final, if they act in good faith. Walker v. Devereaux, 4 Paige (N. Y.) 229.

If they abuse their discretion, however, and act fraudulently or unjustly in distributing or apportioning stock, a person aggrieved may maintain a suit in equity for relief by injunction and reapportionment. Meads v. Walker, Hopk. Ch. (N. Y.) 587; Walker v. Devereaux, 4 Paige (N. Y.) 229.

⁷³ Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336; Burrows v. Smith, 10 N. Y. 550; Walker v. Devereaux, 4 Paige (N. Y.) 229; Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

Until there has been an allotment or apportionment there is no contract of membership on which either the corporation or the subscribers would be liable. Bristol Creamery Co. v. Dalton, 70 N. H. 239, 47 Atl. 591.

A check given for stock in a corporation which acquires no existence because the stock is not distributed by the number of commissioners required to constitute a legal board is void for want of consideration. Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. See *infra*, this section.

⁷⁴ Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336.

⁷⁵ Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

A majority of the commissioners may decide any question within the scope of their powers, but, unless it is expressly provided that a majority shall constitute a quorum and have power to act, they must all be present at meetings. If a mere majority meet and distribute the stock, the proceeding is without jurisdiction, and void.⁷⁶

As was shown in a former section, the powers and authority of the commissioners cease as soon as the corporation is organized and officers elected,⁷⁷ and thereafter any apportionment or distribution of stock is to be made by the corporation.⁷⁸

Fraud practiced by one of the commissioners upon his co-commissioners as to the distribution of stock, being in a matter as to which they act judicially, does not render their proceedings void as respects the subscribers, if they have jurisdiction in the premises.⁷⁹ The effect of fraud or wrong on the part of the commissioners in refusing to allow persons to subscribe, and subscribing for all the shares themselves, is considered in another section.⁸⁰

XIII. ESTOPPEL OF SUBSCRIBERS

§ 715. Estoppel to deny corporate existence. As was shown in a former chapter, it is a general principle, recognized in most jurisdictions, although not in all, that a person who contracts with an association as a corporation thereby admits and estops himself to deny its corporate existence, whether it be a corporation *de facto* or not.⁸¹ It has been held, therefore, that a person who subscribes for stock in an association as an existing corporation is thereby estopped to deny its legal corporate existence for the purpose of escaping liability on his subscription, not only as against creditors of the corporation or its receiver or assignee in bankruptcy,⁸² but also as against

⁷⁶ *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. "It has long been perfectly well settled," said Judge Cowen, in this case, "that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide." See *Ex parte Rogers*, 7 Cow. (N. Y.) 526.

⁷⁷ See § 560, *supra*.

⁷⁸ *State v. Lehre*, 7 Rich. L. (S. C.) 234, 323.

⁷⁹ *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

⁸⁰ See § 561, *supra*.

⁸¹ See Chap. 11, *supra*, where this doctrine is discussed at length.

⁸² *United States*. *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801; *Upton v. Jackson*, 1 Flip. 413, Fed. Cas. No. 16,802. See also *In re Sharood Shoe Corporation*, 192 Fed. 945; *Wallace v. Hood*, 89 Fed. 11, *aff'd* 97 Fed. 865, 182 U. S. 555, 45 L. Ed. 1227.

the corporation itself.⁸³ And for the same reason, a subscriber for

Georgia. Chappell v. Lowe, 145 Ga. 717, 89 S. E. 777; Torras v. Raeburn, 108 Ga. 345, 33 S. E. 989.

Illinois. McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83.

Iowa. Farmers' Mut. Tel. Co. v. Howell, 132 Iowa 22, 109 N. W. 294; Courtright v. Deeds, 37 Iowa 503.

Louisiana. Reychaud v. Lane, 24 La. Ann. 404.

Maine. Skowhegan & A. R. Co. v. Kinsman, 77 Me. 370.

Minnesota. Hause v. Mannheim, 67 Minn. 194, 69 N. W. 810; Columbia Elec. Co. v. Dixon, 46 Minn. 463, 49 N. W. 244.

Nebraska. See Capps v. Hastings Prospecting Co., 40 Neb. 470, 24 L. R. A. 259, 42 Am. St. Rep. 677, 58 N. W. 956.

New Hampshire. Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295.

Oregon. Nickum v. Burkhardt, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788.

Washington. Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489.

"The rule applies to increasing the stock of a corporation when the question arises upon paying a subscription for stock forming a part of such increase." Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; In re Sharood Shoe Corporation, 192 Fed. 945.

Such estoppel cannot be taken advantage of unless it is pleaded. Nickum v. Burkhardt, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788.

⁸³ **United States.** Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; American Alkali Co. v. Campbell, 113 Fed. 398, aff'd 125 Fed. 207.

Alabama. National Commercial Bank v. McDonnell, 92 Ala. 387, 9 So. 149.

Georgia. Wood v. Coosa & C. R. R.

Co., 32 Ga. 273; Orr v. McLeay, 6 Ga. App. 417, 65 S. E. 164.

Illinois. Hickling v. Wilson, 104 Ill. 54; Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 237; Rice v. Rock Island & A. R. Co., 21 Ill. 93. See, however, Hudson v. Green Hill Seminary Corporation, 113 Ill. 618.

Indiana. Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; Mullen v. Beach Grove Driving Park, 64 Ind. 202; Brownlee v. Ohio, I. & L. R. Co., 18 Ind. 68; Evansville, I. & C. Straight Line R. Co. v. Evansville, 15 Ind. 395; Anderson v. Newcastle & R. R. Co., 12 Ind. 376, 74 Am. Dec. 218; Ft. Wayne & B. Turnpike Co. v. Deam, 10 Ind. 563; Judah v. American Live Stock Ins. Co., 4 Ind. 333.

Kansas. McCune Min. Co. v. Adams, 35 Kan. 193, 10 Pac. 468.

Kentucky. Lail v. Mt. Sterling Coal Road Co., 13 Bush 32.

Louisiana. American Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 So. 369; Latiolais v. Citizens' Bank of Louisiana, 33 La. Ann. 1444; East Pascagula Hotel Co. v. West, 13 La. Ann. 545.

Maine. South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

Maryland. Baile v. Calvert College Educational Society, 47 Md. 117.

Massachusetts. Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128.*

Michigan. Parker v. Northern Cent. M. R. Co., 33 Mich. 23; Monroe v. Ft. W., J. & S. R. Co., 28 Mich. 272.

Minnesota. Columbia Elec. Co. v. Dixon, 46 Minn. 463, 49 N. W. 244.

Missouri. Home Stock Ins. Co. v. Sherwood, 72 Mo. 461; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128.

New Hampshire. Ossipee Hosiery &

stock who has given the corporation a promissory note in payment of his subscription cannot escape liability thereon, either as against the corporation or as against an assignee of the note, by denying the existence of the corporation on the ground that it was illegally organized beyond the limits of the state, or that it failed to comply with conditions precedent to legal incorporation, or the like.⁸⁴

A subscriber is not estopped, however, either as against the corporation or its creditors, if his subscription was prior to the organization of the corporation, and therefore conditional upon legal incorporation, unless he has participated in some way in the defective organization, or in holding out the corporation as legally organized.⁸⁵

Woolen Mfg. Co. v. Canney, 54 N. H. 295.

New York. **Buffalo & A. R. Co. v. Cary**, 26 N. Y. 75; **Black River & U. R. Co. v. Clarke**, 25 N. Y. 208; **Dutchess Cotton Manufactory v. Davis**, 14 Johns. 238, 7 Am. Dec. 459.

North Carolina. **Wilmington, C. & R. R. Co. v. Thompson**, 7 Jones 387; **Wilmington & M. R. Co. v. Saunders**, 3 Jones 126.

Utah. **Ogden Clay Co. v. Harvey**, 9 Utah 497, 35 Pac. 510.

Vermont. **Montpelier & W. River R. Co. v. Langdon**, 46 Vt. 284.

West Virginia. **Greenbrier Industrial Exposition v. Rodes**, 37 W. Va. 738, 17 S. E. 305.

A subscriber to an increase of stock cannot set up as a defense to an action on his subscription that a witness to the signatures of the corporators on the application for an amendment permitting the increase was incompetent. **Pope v. Merchants' Trust Co.**, 118 Tenn. 506, 103 S. W. 792.

Bibb v. Hall, 101 Ala. 79, 14 So. 98; **Goodrich v. Reynolds, Wilder & Co.**, 31 Ill. 490, 83 Am. Dec. 240; **Camp v. Byrne**, 41 Mo. 525.

⁸⁴**Alabama.** **Bibb v. Hall**, 101 Ala. 79, 14 So. 98. Compare **Haas v. Hall**, 111 Ala. 442, 20 So. 78.

Arkansas. **Jones v. Dodge**, 97 Ark.

248, L. R. A. 1915 A 472, 133 S. W. 828.

Connecticut. **Northrop v. Bushnell**, 38 Conn. 498.

Illinois. **Goodrich v. Reynolds, Wilder & Co.**, 31 Ill. 490, 83 Am. Dec. 240.

Iowa. **Franklin v. Twogood**, 18 Iowa 515.

Maine. **South Bay Meadow Dam Co. v. Gray**, 30 Me. 547.

Missouri. **Camp v. Byrne**, 41 Mo. 525. See also **Ohio & M. R. Co. v. McPherson**, 35 Mo. 13, 86 Am. Dec. 128.

⁸⁵**Alabama.** **Schloss v. Montgomery Trade Co.**, 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360.

Illinois. **Henry v. Centralia & C. R. Co.**, 121 Ill. 264, 12 N. E. 744; **Hudson v. Green Hill Seminary Corporation**, 113 Ill. 618.

Indiana. **Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co.**, 68 Ind. 388; **Nelson v. Blakey**, 47 Ind. 38; **Indianapolis Furnace & Mining Co. v. Herkimer**, 46 Ind. 142.

Maine. **Richmond Factory Ass'n v. Clarke**, 61 Me. 351.

Minnesota. **Hause v. Mannheimer**, 67 Minn. 194, 69 N. W. 810; **Columbia Elec. Co. v. Dixon**, 46 Minn. 463, 49 N. W. 244.

Nebraska. **Capps v. Hastings Prospecting Co.**, 40 Neb. 470, 24 L. R. A.

Some of the cases apparently hold that the rule that the subscriber is estopped by his subscription applies even under such circumstances, but it will generally be found that the statements to that effect were mere dicta, or else that the subscriber recognized the validity of his subscription after the formation of the corporation and hence was estopped on that ground.⁸⁶

A subscriber for stock, whether after or before formation of the corporation, is estopped to deny the legality of its organization or its corporate existence, either as against creditors or as against the corporation itself, if he participated in its organization, or acquiesced therein with knowledge of the facts, or if he has recognized it as being legally organized, or if he has acted as an officer or stockholder or otherwise participated in holding it out to the public as a legally constituted corporation.⁸⁷ And if debts are incurred by a de facto

259, 42 Am. St. Rep. 677, 58 N. W. 956.

New York. *Dorris v. Sweeney*, 60 N. Y. 463.

Pennsylvania. *Tonge v. Item Pub. Co.*, 244 Pa. 417, 91 Atl. 229.

Washington. *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643.

West Virginia. *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

That a subscription prior to incorporation is upon the implied condition of legal incorporation, see § 587, *supra*.

⁸⁶ See *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562; *Lehman, Durr & Co. v. Warner*, 61 Ala. 455; *Wood v. Coosa & C. R. R. Co.*, 32 Ga. 273; *Medlin v. Commonwealth Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 180 S. W. 899.

⁸⁷ **United States.** *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Allen v. Rhodes*, 230 Fed. 321; *Rockville & W. Turnpike Road v. Van Ness*, 2 Cranch C. C. 449, Fed. Cas. No. 11,986.

Alabama. *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 211; *Schloss v.*

Montgomery Trade Co., 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 So. 120; *Lehman v. Warner*, 61 Ala. 455; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

Arkansas. *Jones v. Dodge*, 97 Ark. 248, L. R. A. 1915 A 472, 133 S. W. 828.

California. *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

Connecticut. *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536; *Litchfield Bank v. Church*, 29 Conn. 137; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

Georgia. *Orr v. McLeay*, 6 Ga. App. 417, 65 S. E. 164.

Illinois. *Hickling v. Wilson*, 104 Ill. 54; *Dows v. Naper*, 91 Ill. 44; *Corwith v. Culver*, 69 Ill. 502; *Ramsey v. Peoria Marine & Fire Ins. Co.*, 55 Ill. 311; *Rutz v. Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83.

Indiana. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

Iowa. *State Bank Bldg. Co. v. Pierce*, 92 Iowa 668, 61 N. W. 426.

Kansas. *Aultman v. Waddle*, 40

corporation, even if it has never been legally organized, subscribers

Kan. 195, 19 Pac. 730; *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412.

Kentucky. *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358; *Tanner v. Nichols*, 25 Ky. L. Rep. 2191, 80 S. W. 225.

Louisiana. *American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 So. 369; *East Pascagoula Hotel Co. v. West*, 13 La. Ann. 545.

Maine. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

Maryland. *Musgrave v. Morrison*, 54 Md. 161; *Hager v. Cleveland*, 36 Md. 476; *Maltby v. Northwestern Virginia R. Co.*, 16 Md. 422.

Massachusetts. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

Michigan. *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Minnesota. *Minnesota Gas-Light Economizer Co. v. Denslow*, 46 Minn. 171, 48 N. W. 771.

Missouri. *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Smith v. Heidecker*, 39 Mo. 157; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Central Plank Road Co. v. Clemens*, 16 Mo. 359; *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911; *Smith v. Peck*, 13 Mo. App. 586.

Nebraska. *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417, 73 N. W. 736.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New York. *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729, aff'g 67 Hun 356, 22 N. Y. Supp. 407; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 6 Hun 293; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Lyell Ave.*

Lumber Co. v. Lighthouse, 137 App. Div. 422, 121 N. Y. Supp. 802; *United Growers' Co. v. Eisner*, 22 App. Div. 1; *Dorris v. French*, 4 Hun 292.

North Carolina. *Wadesboro Cotton Mills Co. v. Burns*, 114 N. C. 353, 19 S. E. 239; *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680; *Tar River Nav. Co. v. Neal*, 3 Hawks 520.

Ohio. *Dickason v. Grafton Sav. Bank Co.*, 27 Ohio Cir. Ct. 357.

Pennsylvania. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53; *Weinman v. Wilkinsburg & E. L. Passenger Ry. Co.*, 118 Pa. St. 192; *In re Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532.

Utah. *Ogden Clay Co. v. Harvey*, 9 Utah 497, 52 Am. St. Rep. 884, 35 Pac. 510.

West Virginia. *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 31 S. E. 1015.

Wisconsin. *Black River Improvement Co. v. Holway*, 85 Wis. 344, 55 N. W. 418.

A subscriber who is also a promoter cannot set up defects in the organization of the corporation to defeat an action on his subscription. *State Bank Building Co. v. Pierce*, 92 Iowa 668, 61 N. W. 426.

One who signs the certificate of incorporation cannot escape liability on his subscription as against creditors on the ground that the corporation is not one de jure but only de facto, though he did not personally participate in the organization of the corporation. *McCarter v. Ketcham*, 74 N. J. L. 825, 67 Atl. 610.

Where a bonus tax is made a condition precedent to the right of a corporation to do business, parties becoming stockholders prior to the time of payment of the tax by the corpora-

who stand by and make no objections will be estopped to plead the nonexistence of the corporation when sued for the benefit of creditors.⁸⁸

Payment of a subscription or of an instalment thereon will generally be a sufficient recognition of the legal existence of the corporation to operate as an estoppel.⁸⁹

§ 716. Estoppel to deny subscription or the validity thereof—In general. If a person knowingly allows himself to appear as a subscriber and stockholder in a corporation, and, a fortiori, if he acts as a stockholder, by accepting a certificate of stock, making payments,

tion will be deemed to have ratified their subscriptions, and hence may not claim nonliability to creditors on the ground that the corporation was without power to issue stock to them at the time they subscribed, where they have accepted dividends after the corporation has paid the tax. *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62.

A subscriber holding certificates which show on their face that they are not fully paid up, and who accepts dividends thereon, is estopped to assert, after the company has become insolvent, that it was never legally incorporated because the required amount of stock was never subscribed. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

A subscriber to an increase of stock cannot question the validity of the increase where he paid a part of the subscription, attended meetings of the stockholders in person and by proxy, acted as a director, and was elected and acted as president of a branch of the company. *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523.

⁸⁸ *Allen v. Rhodes*, 230 Fed. 321.

Where the action is brought by a receiver for the benefit of creditors, defects in the organization are not available as a defense. *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175; *National Realty Co. v. Neilson*, 73

Wash. 89, 131 Pac. 446; *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523.

⁸⁹ *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Allen v. Rhodes*, 230 Fed. 321; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *Maltby v. Northwestern Virginia R. Co.*, 16 Md. 422; *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884, 21 S. E. 1015.

The payment of an instalment without objection is a sufficient recognition of the legal existence of the corporation to enable it to recover subsequent assessments. *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

Where a subscriber for stock in a corporation to be subsequently organized paid for one of his shares, and transferred others after an attempted organization, it was held that he could not deny the legal existence of the corporation. *In re Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177.

But a stockholder will not be estopped to deny the corporate existence by his payment of part assessments, unless they were called under color of corporate authority, and not as preliminary to organization. *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360. See also *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643.

receiving dividends, participating in corporate meetings, accepting a corporate office, or otherwise, he will be estopped to deny that he is a subscriber and stockholder, or to allege that the subscription was invalid, not only as against creditors of the corporation, but also as against the corporation itself, or its assignee in bankruptcy or insolvency.⁹⁰

⁹⁰ **United States.** *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Nugent v. Supervisors of Putnam Co.*, 19 Wall. 241, 22 L. Ed. 83.

Connecticut. *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536; *Lane v. Brainard*, 30 Conn. 565; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

Illinois. *Hickling v. Wilson*, 104 Ill. 54; *Corwith v. Culver*, 69 Ill. 502; *Boggs v. Olcott*, 40 Ill. 303.

Iowa. *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653, 44 N. W. 797.

Kansas. *McCormick v. Great Bend Gas & Fuel Co.*, 48 Kan. 614, 29 Pac. 1147.

Kentucky. *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

Maryland. *Musgrave v. Morrison*, 54 Md. 161.

Michigan. *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053.

Minnesota. *Blien v. Rand*, 77 Minn. 110, 46 L. R. A. 618, 79 N. W. 606; *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

Missouri. *Erskine v. Loewenstein*, 82 Mo. 301, 11 Mo. App. 595; *Bray's Adm'r v. Seligman's Adm'r*, 75 Mo. 31; *Fisher v. Seligman*, 75 Mo. 13; *Griswold v. Seligman*, 72 Mo. 110; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Guilbert v. Kessinger*, 173 Mo. App. 680, 16 S. W. 17; *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439; *Newland Hotel Co. v. Wright*, 83 Mo. App. 240.

Montana. *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.

Nebraska. *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440.

Nevada. *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New York. *Lyell Ave. Lumber Co. v. Lighthouse*, 137 App. Div. 422, 121 N. Y. Supp. 802; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635; *Ruggles v. Brock*, 6 Hun 164.

Ohio. *Clarke v. Thomas*, 34 Ohio St. 46.

Oregon. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286; *Nickum v. Burkhardt*, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788; *Portland & F. R. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688.

Pennsylvania. *Hays & Black v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489; *Erie & W. Plank Road Co. v. Brown*, 25 Pa. St. 156; *Barlow v. Wren*, 1 Walk. 297; *Clark v. Monongahela Nav. Co.*, 10 Watts 364.

South Carolina. *Greenville & C. R. Co. v. Woodsides*, 5 Rich. 145, 55 Am. Dec. 708; *Greenville & C. R. Co. v. Coleman*, 5 Rich. 118.

Texas. *McWhirter v. First State Bank of Amarillo*, — Tex. Civ. App. —, 182 S. W. 682; *Kampmann v. Tarver* (Tex. Civ. App.), 29 S. W. 1144.

Washington. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

West Virginia. *Pittsburgh, W. & K. R. Co. v. Applegate*, 21 W. Va. 172.

"The parties cannot set up their failure to comply with the statu-

England. *Ex parte Besley*, 2 Macn. & G. 176.

"If one manifests his intention to become a shareholder in a corporation by some overt act, and, with the consent of the corporate body, assumes the duties and accepts the privileges of a stockholder he may be estopped thereafter from denying his liability as such." *Butler University v. Schoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

Where a person represents or admits that he is a subscriber, and others subscribe on the faith of such representation or admission, he is estopped to deny that he is a subscriber, or that his subscription is binding. *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489.

Where a subscriber attends a stockholders' meeting and acts as a stockholder for the purpose of considering a corporate act, and is recognized by the corporation as a stockholder, both he and the corporation are estopped to deny that he is one. *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Since the charter and the previous certificate of the directors on which it is granted are public acts, a person who is named therein as a stockholder cannot evade liability as a member to creditors by showing that he was not in fact a subscriber, if he afterwards acts as a member, or unless he disavows the relation as soon as he discovers the use of his name. "He must immediately and publicly disavow the act, or else be deemed as ratifying it as relates to creditors." *McHose v. Wheeler*, 45 Pa. St. 32.

A subscriber who signs and swears to a certificate for incorporation, which shows that he has subscribed

for a certain number of shares and names him as treasurer of the company, is estopped to set up, as against the corporation, that it was agreed that he should only be required to take a less number of shares. *Greater Pittsburg Real Estate Co. v. Riley*, 210 Pa. 283, 59 Atl. 1068.

A party who has permitted his name to remain in the certificate of incorporation as that of a subscriber for shares, and who has shared in the profits of the corporation, cannot afterwards deny the subscription, particularly as against creditors. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

One who gives a note payable to himself to a corporation under an agreement whereby the latter is to collect the same and apply the proceeds to the payment for stock of said corporation which he has agreed to take, and who, pursuant to such arrangement, acts as a stockholder and director, and receives dividends, is estopped to deny liability to creditors after the company has become insolvent, on the ground that the note was given as an escrow merely and that since it was not collected until after the corporation had failed and that at that time there had been an over-issue of stock, it could not issue any stock to him. *Allen v. Edwards*, 93 Miss. 719, 47 So. 382.

One who signs a subscription book for stock in a proposed corporation for the purpose of inducing others to subscribe, leaving the amount of his subscription blank, will be estopped, as against other subscribers and creditors, to deny the authority of the officers or agents of the corporation to fill in the blank. *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

A person who applies for and is allotted shares under an alias is es-

tory requirements to escape the result of what they did when they had a right to do what they did by complying with the statute.”⁹¹ So one may be estopped to deny the validity of his subscription on the ground that it was only in parol,⁹² or that the directors had no authority to open subscription books at the place where he subscribed,⁹³ or that the corporation was not in existence when he made it,⁹⁴ or that he was not eligible to membership in the corporation,⁹⁵ or because

topped from denying his liability as a shareholder. In *re Central Klondyke Gold Mining & Trading Co.*, 5 Manson, Bankr. Cas. 336.

Subscribers participating in an arrangement and course of dealing whereby stock is issued so as to give all parties an equal interest rather than in accordance with their original subscription contracts are estopped to deny their liability for unpaid stock held by them. In *re Grand Rapids Furniture Agency*, 209 Fed. 483.

The defense of no valid subscription is not available in an action by a receiver for the benefit of creditors. *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175.

In an action to recover the amount due on alleged subscriptions, a recovery cannot be had on the theory that the defendants acted as directors and hence were estopped to say that they did not own at least one share of stock, where no estoppel was pleaded. *McFarland v. Martin* (Tex. Civ. App.), 86 S. W. 639.

⁹¹ *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

⁹² Where the subscription contract provides that it shall be void unless a specified amount is subscribed, and a bank refuses to make a loan to the corporation because the full amount has not been subscribed, persons who orally agree to take the balance to induce it to make the loan, which it hereafter does, are estopped to question the validity of their subscriptions because they are not in writing.

Rutenbeck v. Hohn, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698.

A director, who consents verbally to subscribe for stock, and while occupying that position authorizes the entry of his subscription in the books of the company, and the including of the amount so subscribed in the statements of the amount subscribed, is estopped to deny that he is a stockholder, on the ground that he did not sign a formal subscription contract. *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

A person who orally subscribes for stock, and recognizes the subscription as binding by postponing the time of payment until the corporation, on the faith of it, enters into contracts and makes improvements on its property, is estopped, in an action by the corporation, to deny the validity of the subscription on the ground that it was not in writing. *Perkiomen Brick Co. v. Dyer*, 187 Pa. St. 470, 41 Atl. 326.

See also *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943.

⁹³ He is so estopped where he subsequently pays the amount required by the charter to be paid at the time of subscribing. *Hall v. Selma & T. R. Co.*, 6 Ala. 741.

⁹⁴ One who, after the corporation is formed, pays for one of the shares for which he subscribed, and transfers others, thereby recognizing and affirming his subscription, cannot be heard to disaffirm it on this ground. In *re Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177.

⁹⁵ Where subscribers have acted as

he did not sign the articles of incorporation,⁹⁶ or because his name does not appear as a stockholder in the articles of incorporation,⁹⁷ or on the ground that his subscription was never formally accepted by the directors after the corporation was organized,⁹⁸ or because he did not make the required payment at the time of his subscription,⁹⁹ or did not give full value for it,¹ or because no by-law was ever adopted authorizing the issuing of shares before they were paid for,² or because no certificate has been issued to him,³ or because of infor-

stockholders for a number of years, they are estopped to set up the fact that they were not eligible for membership under articles of association limiting the membership to persons of a particular nationality. *Blien v. Rand*, 77 Minn. 110, 46 L. R. A. 618, 79 N. W. 606.

⁹⁶ One who signs a preliminary subscription paper and takes part in a meeting preliminary to organization, at which he joins with the other subscribers in appointing certain of them to subscribe to the articles and formally incorporate the company, is estopped to deny that he is a stockholder, in an action against him by the corporation on his subscription, though he did not personally subscribe the articles and was not named therein as a subscriber. *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409; *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439; *Newland Hotel Co. v. Wright*, 73 Mo. App. 240.

Payment of part of his subscription will also work such an estoppel. *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439.

⁹⁷ See *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308.

⁹⁸ He is so estopped where he signed and acknowledged the charter of the company, and acted as director, and as such, with the other directors, levied assessments upon those who signed the subscription list, and paid

several of such assessments. *McCormick v. Great Bend Gas & Fuel Co.*, 48 Kan. 614, 29 Pac. 1147.

A subscriber who has actual notice of the organization meeting, and who afterwards ratifies the proceedings, cannot contend that his subscription was never accepted because the statutory notice of the first meeting was not given and hence the corporation was never legally organized. *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

⁹⁹ See § 709, et seq., supra.

¹ Stockholders cannot escape liability to creditors by setting up that their stock was issued without value received and hence is void under an express provision of the constitution. *Dilzell Engineering & Construction Co. v. Lehmann*, 120 La. 273, 45 So. 138.

² *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

³ One who votes as a stockholder at stockholders' meetings is estopped to contend that he is not a stockholder on this ground. *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509.

And the same is true of one who receives dividends and benefits as a stockholder, or who takes his place and acts as a stockholder. *Clark v. Hamilton*, 217 Fed. 229.

That the issuance of a certificate is not a condition precedent to liability unless the contract so provides, see § 593, et seq., supra.

malities or irregularities in the issuance of stock which the corporation has the power to issue.⁴ And one who signs the certificate of incorporation as a subscriber for a certain number of shares will not be permitted to assert as against creditors that he subscribed for a part of them with the understanding that they were to be later transferred to other parties.⁵

One who knowingly permits the corporation to hold him out as a stockholder for the purpose of inducing others to subscribe and to make contracts with the company, is estopped, as against creditors, to set up that his contract was not a subscription, but was merely an option to take stock which he never exercised, and that he was induced to make it by fraud.⁶ And one who advances money to a corporation and receives its note therefor, and to whom stock is issued under an agreement whereby he may, at his election, become the absolute owner of the shares by surrendering the note, or may surrender the shares and demand payment of the note, is estopped, as against subsequent

⁴ *Seoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616, rev'g *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957, on the ground that the corporation had power to issue the stock in question; *Winters v. Armstrong*, 37 Fed. 508; *Steele v. Hughes*, 104 Ark. 517, 149 S. W. 336; *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

Subscribers to increased stock who pay instalments thereon and otherwise recognize its validity cannot escape liability on their subscriptions after the company becomes insolvent because of irregularities in the proceedings to increase the stock. *Clarke v. Thomas*, 34 Ohio St. 46.

A subscriber cannot set up irregularities in the issuance of increased stock as against a receiver, where he has made payments, voted for directors, and received dividends. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 45 Atl. 951.

"Where one subscribes for stock in

a corporation unconditionally, and the contract of subscription is substantially performed, and he either takes his place and acts as a stockholder, or receives dividends or benefits as such, he may be estopped as against creditors from denying that he is a stockholder, although a certificate of stock has not been issued to him, or some formal prerequisite, such as publishing or recording the vote authorizing the issue of additional stock has not been complied with." *Clark v. Hamilton*, 217 Fed. 229.

This rule has no application where one loans money to a corporation and agrees that if the company will issue and deliver to him valid full-paid increased stock in double the amount of the loan, he will accept it in payment of the loan and become a stockholder, and the company never issues nor takes any steps to issue such stock. *Clark v. Hamilton*, 217 Fed. 229.

⁵ *George Irish Paper Co. v. White*, 91 N. Y. Misc. 261, 154 N. Y. Supp. 778.

⁶ *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

creditors and after the bankruptcy of the corporation, to claim his right as a creditor under the contract, where he has acted as treasurer of the company and permitted his name to appear on its records as a stockholder, without previously making an election as to which position he would assume.⁷

To constitute an estoppel in favor of the corporation or those claiming under it, it must appear that by reason of the acts or representations of the party sought to be estopped it did or omitted some act to its injury, which it would not otherwise have done or omitted, or was in some way misled to its prejudice. "An estoppel was never intended to work a positive gain to a party, but its whole office is to protect him from a loss which, but for the estoppel, he could not escape." So one who agrees to subscribe for stock in the future on a condition precedent which is not performed, is not estopped to deny his liability where it does not appear that the corporation was in any way prejudiced by his promises or representations, but rather that their only effect was to enable it to procure additional subscriptions.⁸

Of course, if a person has never subscribed for stock, and has never held or become entitled to any, he cannot be estopped to deny that he is a stockholder by the mere fact that his name appears as a subscriber on the corporate books.⁹

Nor can subscriptions to a wholly unauthorized issue of stock be validated on the principle of estoppel, either in favor of the corporation or its receiver,¹⁰ though the subscriber may be estopped even in such case as against individual creditors.¹¹

The fact that the subscriber had full knowledge of the illegality of the contract at the time when the subscription was made will not

⁷In re W. A. Silvernail Co., 218 Fed. 977.

⁸Webb v. Moeller, 87 Conn. 138, 87 Atl. 277.

⁹Lathrop v. Kneeland, 46 Barb. (N. Y.) 432; Silvain v. Benson, 83 Wash. 271, 145 Pac. 175.

¹⁰As in the case of a subscription to stock in excess of the authorized capital. Clark v. Turner, 73 Ga. 1; Pruitt v. Oklahoma Steam Baking Co., 39 Okla. 509, 135 Pac. 730.

Or a void increase of stock. Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968.

Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.,

72 Fed. 957. The judgment in this case was reversed in Peck v. Elliott, 79 Fed. 10, 38 L. R. A. 616, on the ground that the increase of stock to which the defendant subscribed was not unauthorized or void.

Winters v. Armstrong, 37 Fed. 508; Steele v. Hughes, 104 Ark. 517, 149 S. W. 336; Marion Trust Co. v. Bennett, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; Tschumi v. Hills, 6 Kan. App. 549, 51 Pac. 619.

See also § 589, supra.

¹¹See Marion Trust Co. v. Bennett, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

preclude him from setting up such illegality as a defense to an action thereon by the corporation.¹²

Mere inaction and neglect on the part of a corporation to repudiate its subscription to the stock of another corporation will not estop it from setting up the defense of *ultra vires* in an action on the subscription.¹³

A subscriber is estopped, particularly as against creditors, to say that his subscription was fictitious, or was made fraudulently with a view to evading the requirements of the charter.¹⁴ Nor will he be permitted to allege that his subscription was not made in good faith, for the purpose of raising the point that the full amount of stock has not been subscribed, or for any other purpose.¹⁵

A subscriber who was also a commissioner to receive subscriptions for the purpose of organizing a corporation, and who has certified that the subscriptions have all been taken in good faith and in compliance with the law, is estopped to allege that his subscription was fraudulent or invalid or conditional.¹⁶ Nor can he escape liability on the ground that he did not pay the required amount at the time of his subscription, since it is his official duty to require payment from subscribers and he will not be permitted to profit by the breach of it.¹⁷

A subscriber for stock may be estopped by recitals in the articles of association or subscription book or paper which he has signed. As a general rule, if the articles of association or subscription paper con-

¹² That he had knowledge of the existence of conditions which would make the issuance of common stock to him as a bonus, as provided in his contract, illegal. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

¹³ *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unoff.) 888.

¹⁴ *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 7 L. Ed. 445; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489.

A subscriber cannot set up any fraud to which he was a party as a ground for his discharge. *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165.

¹⁵ *Bushnell v. Consolidated Ice-Mach. Co.*, 138 Ill. 67, 27 N. E. 596; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489.

One who gives a note for stock cannot show that he did so on the understanding that it was to be surrendered to him subsequently without payment, where it appears that he gave it to enable the corporation to deceive the insurance commissioner as to its then financial condition, he being estopped to take advantage of his own fraud. *New England Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

¹⁶ *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358; *Grayble v. York & G. Turnpike Road Co.*, 10 Serg. & R. (Pa.) 269.

¹⁷ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

tain recitals to the effect that certain requirements of the charter or enabling act have been complied with, all subscribers who sign the articles are estopped to deny the truth of such recitals for the purpose of avoiding liability on their subscriptions,¹⁸ unless the recitals are too ambiguous to operate as an estoppel,¹⁹ or the requirements of the charter or statute are such that they cannot be waived by the subscribers.²⁰

One may also be estopped to deny that he is a subscriber by recitals in separate instruments, such as bonds executed to the corporation.²¹

§ 717. — Estoppel to set up release or discharge. As we have seen in previous sections, a subscriber may, upon various grounds, be released or discharged from liability on his subscription. Thus, he may be discharged by an alteration of his subscription, by alteration or amendment of the charter of the corporation, by consolidation, by nonperformance of conditions precedent, and the like.²²

He may, however, be estopped to set up a release or discharge, and as a general rule he will be estopped, both as against creditors of the corporation and as against the corporation itself, if with full knowledge of the facts he expressly waives the ground of discharge, or if he afterwards acts as a stockholder by taking part in meetings or otherwise.²³ Of course, there must have been knowledge of the facts, actual

¹⁸ *Royce v. Tyler*, 2 Ohio Cir. Ct. 175.

¹⁹ Where articles of association stated that the capital stock had been bona fide subscribed, and "one-half thereof actually paid up," it was held that the statement was ambiguous as to whether one-half of the aggregate capital or of each share subscribed for had been paid, and did not estop a stockholder from showing the truth as to his subscription, and what had been actually paid thereon. *Shepard v. Drake*, 61 Mo. App. 134.

²⁰ See *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473.

²¹ A recital in a bond given to a corporation to secure a loan from it that the obligor "has retained of his subscription for two shares of capital stock the sum of two hundred dollars, being the amount of his subscription, as a loan," is not, without more, con-

clusive, either upon the corporation or the obligor, that the latter was a stockholder, though it is evidence of that fact. *Butler University v. Schoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

²² See § 638, et seq., supra.

²³ *Connecticut. Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536.

Illinois. Chetlain v. Republic Life Ins. Co., 86 Ill. 220.

Iowa. Tama Water-Power Co. v. Hopkins, 79 Iowa 653, 44 N. W. 797.

Maine. Kennebec & P. R. Co. v. Palmer, 34 Me. 366.

Michigan. Detroit Driving Club v. Fitzgerald, 109 Mich. 670, 67 N. W. 899.

Minnesota. Duluth Inv. Co. v. Witt, 63 Minn. 538, 65 N. W. 956.

Missouri. Kirkwood Gymnasium & Armory Hall Ass'n v. Van Ness, 61 Mo. App. 361.

or constructive; in order that his continuing as a stockholder may estop him.²⁴

As we have seen, a subscriber may be estopped to set up that he is not liable on his subscription because the corporation as formed is materially different from the corporation contemplated in the subscription contract.²⁵

§ 718. — Estoppel to set up nonperformance of conditions precedent. A subscriber may be estopped by his conduct from setting up as a defense, to defeat an action on his subscription, that express or implied conditions precedent upon which the subscription was made have not been performed. It is a general rule that when a subscription is upon a condition precedent, express or implied, the subscriber is estopped to set up nonperformance of the condition, if, with knowledge that it was not performed, he has participated in stockholders' meetings, and in voting for expending money or making contracts, or in any other acts which could not be properly done except upon the assumption that performance of the condition was waived.²⁶ For example, a subscriber may be so estopped from setting up nonperformance of an express or implied condition that the whole amount of the capital stock, or a certain percentage thereof, should be subscribed.²⁷ And a subscriber may be estopped to set up his failure to pay a certain percentage of his subscription at the time of subscribing, as required by the charter or enabling act.²⁸ The same is true of any other condition precedent, unless it is one which is imposed by the legislature, and which the subscribers cannot waive.²⁹

§ 719. — Estoppel to set up conditional delivery of subscription. A subscriber will be estopped to set up that his subscription was deliv-

Pennsylvania. *Barlow v. Wren*, 1 Walk. 297.

Wisconsin. *Gibbons v. Ellis*, 83 Wis. 434, 53 N. W. 701.

A subscriber is estopped to set up as against creditors that his subscription was altered without his consent by striking out provisions making it a subscription to preferred stock, where the articles do not provide for issuing preferred stock, and, with knowledge that his subscription is necessary to make up the amount required to enable it to commence business, acts

as a director and actively assists in the management of the company. *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653, 44 N. W. 797.

²⁴ *Strong v. Southwestern Bridge & Iron Co.* (Tex. Civ. App.), 38 S. W. 546; *Denny Hotel Co. of Seattle v. Gilmore*, 6 Wash. 152, 32 Pac. 1004.

²⁵ See § 525, *supra*.

²⁶ See § 599, *supra*.

²⁷ See § 704, *supra*.

²⁸ See § 710, *supra*.

²⁹ See § 598, *supra*.

ered to the promoter of the corporation subject to an oral condition, where others have subscribed and made payments, and the corporation has been formed, and has expended money and contracted liabilities, all on the faith of the subscriptions, and in ignorance of the oral condition.³⁰

§ 720. — Estoppel of corporation and other subscribers. Estoppel to deny the validity of a subscription does not operate against the particular subscriber only. The corporation and the other subscribers may also be estopped. If a corporation accepts a subscription which is not made with the formalities prescribed by the charter, enabling act, or articles of association, and the other stockholders consent or acquiesce, both the corporation and the other stockholders will be estopped to deny that the subscription is valid, unless the provisions of the charter or enabling act are such as to render it absolutely void.³¹ And where the corporation recognizes a subscriber as a stockholder, it will be estopped to deny that he is one.³²

³⁰ See § 599, *supra*.

³¹ *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943. Compare *Coyote Gold & Silver Min. Co. v. Ruble*, 8 Ore. 284.

A corporation is estopped to deny the validity of a subscription where it has accepted it, treated it for years as valid, and received and retained the benefits accruing from it. *Lilylands Canal & Reservoir Co. v. Wood*, 56 Colo. 130, 136 Pac. 1026.

Where a subscription is made by an agent of the company for the purpose of obtaining a loan from a third person, and is recognized by the stockholders and directors of the company, who accept the loan with knowledge that it would not have been made without the subscription, and presumably with knowledge that the loan would have been invalid without it, the stockholders and directors will not be permitted to deny its validity on the ground that it is not in writing, and that the required formalities have not been complied with. *Shellenberger*

v. Patterson, 168 Pa. St. 30, 31 Atl. 943.

The fact that a subscriber is elected a director and vice president at the organization meeting, in which all of the then stockholders participate, estops the corporation from thereafter denying that he is a duly constituted member thereof on account of his not having paid anything upon his subscription. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

³² *International Fair & Exposition Ass'n v. Walker*, 97 Mich. 159, 56 N. W. 344, 88 Mich. 62, 49 N. W. 1086, 83 Mich. 386, 47 N. W. 338.

Where the corporation recognizes a subscriber as a stockholder and votes him a share of increased stock, it will be estopped to deny that he is a stockholder because of irregularities in voting the increase. *Gowdy Gas, Well, Oil & Mineral Water Co. v. Patterson*, 29 Ind. App. 261, 64 N. E. 485.

CHAPTER 18

NAME

- § 721. Necessity of name.
- § 722. Name which may be adopted—In general.
- § 723. — Effect of National Banking Act.
- § 724. Refusal of charter or license under identical or similar name.
- § 725. Injunction against use of identical or similar name in general.
- § 726. Unfair competition—In general.
- § 727. — Effect of incorporation on right to use prejudicial name.
- § 728. — Character of corporations entitled to protect names.
- § 729. — When injunction will lie in general.
- § 730. — Basis of injunction.
- § 731. — Generic terms.
- § 732. — Competition, deception and damage.
- § 733. — Intent.
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- § 735. — Injunction by domestic corporation against foreign corporation.
- § 736. — Injunction by foreign corporation against domestic corporation.
- § 737. Necessity that name be in English language.
- § 738. Legal name—In general.
- § 739. — Name under which corporation may sue and be sued.
- § 740. — Use of assumed name.
- § 741. Statutory requirement of use of "Incorporated" in connection with name.
- § 742. Effect of misnomer—In grants, conveyances, contracts, wills, etc.
- § 743. — In pleadings, process, etc.
- § 744. Change of name—Right in general.
- § 745. — Name which may be adopted.
- § 746. — Mode of changing name.
- § 747. — Effect of change.
- § 748. Use of corporate names by natural persons and unincorporated organizations—In general.
- § 749. — Statutory prohibition.
- § 750. Judicial notice of name.

§ 721. Necessity of name. As has been seen in an earlier chapter, one of the attributes of a corporation is a name,¹ and it has been said that "a corporation exists only in its corporate name."² In other words, a corporate name is essential to corporate existence.³

¹ See § 8, *supra*.

² *Senn v. Lev*, 111 Ky. 313, 63 S. W. 776.

³ *United States. Investor Pub. Co. of Massachusetts v. Dobinson*, 72 Fed. 603; *Newby v. Oregon Cent. Ry. Co.*,

The great object of a name in the case of a corporation as in the case of a natural person is identification.⁴ Indeed, "the only means of identifying a corporation aggregate is by the name. The members are liable to change and it can only be known by its name."⁵ As it has been quaintly put, "the names of corporations are given of necessity; for the name is, as it were, the very being of the constitution; for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name."⁶

Formerly, when corporations were created by special act, the name by which the corporation was to be known was ordinarily expressed in the legislative charter granted.⁷ At the present time, however,

Deady (U. S.) 609, Fed. Cas. No. 10,144.

Alabama. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

Georgia. *Rome Machine & Foundry Co. v. Davis Foundry & Machine Works*, 135 Ga. 17, 68 S. E. 800.

Indiana. *Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind. 376.

Louisiana. *Mioton v. Del Corral*, 132 La. 730, 61 So. 771; *Bridgeford & Co. v. Hall*, 18 La. Ann. 211.

Missouri. *State v. McGrath*, 92 Mo. 355, 5 S. W. 29.

Pennsylvania. *American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey*, 198 Pa. 189, 47 Atl. 936.

Washington. *State v. Nichols*, 38 Wash. 309, 80 Pac. 462.

West Virginia. *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792.

"According to the case of *Marriott v. Mascall* [Anderson, 206], a corporation is a body politic, consisting of material bodies, which, joined together, must have a name to do things which concern the corporation; and in *Rolle's Abridgement*, 'Corporation,' 512, citing the *Sutton-Hospital Case* [10 Coke 285], it is laid down, that the name of incorporation is as a

proper name, or a name of baptism. A name, therefore, is essential to a corporation." *Conservators of the River Tone v. Ash*, 10 B. & C. 349 (per *Littledale, J.*). See also 1 Bl. Com. 474.

⁴ *Walrath v. Campbell*, 28 Mich. 111, 121. See also *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W. Va. 281, 54 S. E. 349.

⁵ *McGary v. People*, 45 N. Y. 153, 159.

"The identity of name is the principal means of effecting that perpetual succession, with members frequently changing, which is an important purpose of incorporation." *Reg. v. Registrar of Joint Stock Companies*, 10 A. & E. (N. S.) 839, quoted in *Sykes v. People*, 132 Ill. 32, 23 N. E. 391.

⁶ 2 Bacon Abr. 440; 1 Bl. Com. 475, quoted, in whole or in part in *Grand Lodge, K. P. of North & South America v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963; *Sykes v. People*, 132 Ill. 32, 23 N. E. 391; *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538; *Ft. Pitt Building & Loan Ass'n v. Model Plan Building & Loan Ass'n*, 159 Pa. St. 308, 28 Atl. 215.

⁷ "The provision fixing the name of the corporation created is an essen-

when corporations are ordinarily organized under a general law, it is commonly provided by such law, in effect, that the name under which incorporation is desired shall be stated in the articles of association.⁸ But regardless of the mode in which incorporation is obtained, the name under which the corporation is to be chartered is usually a matter for the determination of the corporators.

§ 722. Name which may be adopted—In general. A corporate name, it has been said, should indicate the purpose of the charter,⁹ but aside from this and unless it is otherwise provided by statute,¹⁰

tial part of the act, and is an express legislative declaration that the corporate name shall be as there given." *Sykes v. People*, 132 Ill. 32, 23 N. E. 391.

It would seem, however, that the fact that a name was not given in express terms by the statute creating the corporation, did not render the charter void. Thus, in an old case, where the king had incorporated the inhabitants of Dale, with power to choose a mayor annually, without giving the corporation a name, it was held to be a good corporation by the name of the "Mayor and Commonalty of Dale." *Anon.*, 1 Salk. 191.

That a corporate name, when none was given might be acquired by usage and reputation, see *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650; *Dutch West India Co. v. Van Moses*, 1 Str. 612.

⁸ The placing of the words "Fairview Turnpike" at the head of articles of association, without more, is not the assumption of a corporate name by a proposed turnpike company and the setting forth of the name assumed in the articles of association within the meaning of a statutory requirement to that effect. *Rhodes v. Piper*, 40 Ind. 369, adhering to *Piper v. Rhodes*, 30 Ind. 309.

⁹ In *re Nether Providence Ass'n Charter*, 2 Pa. Dist. 702, 12 Pa. Co. Ct. 666.

¹⁰ The statute may require that there be joined as part of the name assumed by a corporation some word designating the business to be carried on together with the word "company" or "corporation." *State v. Colias*, 150 Ala. 515, 43 So. 190, where in it was held, construing such statute with one in *pari materia*, that a defect in the corporate name was curable before proceedings of ouster were instituted.

Under a statute forbidding a corporation to take the name of a person or firm without adding the word "company" or "corporation," together with some word designating the business, it was held that the name "Mallinckrodt Chemical Works" was not objectionable, although the first word was a family name. *State v. McGrath*, 75 Mo. 424.

A statute requiring corporate names to begin with the word "The" and end with the word "Company" held not to make the retention of a corporate name, which was selected in strict conformity with the law as it existed at the time but which did not begin and end as required by the subsequently enacted statute, illegal or improper, so as to preclude the corporation having such name from obtaining injunctive relief against a corporation adopting a name similar except in so far as the latter's name began with "The" and ended with

corporators may choose any name they see fit,¹¹ however strange, uneuphonious or unrhethorical it may be,¹² provided it is not one identical with or prejudicially similar to a name which has previously been adopted and is being used by another corporation as its corporate name, or by a corporation, an unincorporated organization or a natural person as a trade name,¹³ or, it would seem, does not otherwise conflict with the public policy of the state.

"Company." *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324.

Under a statute prohibiting a corporation, unless formed under the banking or insurance law, from adopting a name containing the word "insurance," a corporation which is not thus formed, which cannot do an insurance business, and which was organized for the purpose of doing a general business as insurance agent or broker cannot adopt as its name "Lloyds, New York, Incorporated," "Lloyds" being synonymous, in the mind of the general public, with "insurance." *Barker v. Koenig*, 135 N. Y. App. Div. 16, 119 N. Y. Supp. 777.

Statute forbidding a corporation, under penalty of dissolution, from using the word "co-operative" as part of its corporate name unless it has complied with the statutes relating to co-operative associations held unconstitutional, as applied to an existing corporation, as impairing the obligation of the state's contract embodied in the corporation's articles. *Lorntsen v. Union Fisherman's Co.*, 71 Ore. 540, 143 Pac. 621.

Where a statute requires that the name of a corporation include the county or city in which it is formed, the name "Westminster Savings Bank," being that of a corporation of the well-known city of Westminster, sufficiently complies with the law. *Erb v. Grimes*, 94 Md. 92, 50 Atl. 397.

"Firemen's Benevolent Association

of Atlantic City" held to comply with a statute requiring firemen's relief associations to use the name "Firemen's Relief Association," or such other name as should indicate the purpose of the organization, with the name of the city or town where located. *Firemen's Benev. Ass'n v. A. H. Phillips Co.*, 74 N. J. L. 6, 64 Atl. 1012. See also § 723, *infra*.

¹¹ See *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, 40 N. E. 616, *aff'd* 51 Ill. App. 231.

¹² "A corporation * * * may select any name which it pleases, without regard to whether the name chosen represents any person connected with its affairs or not. The name so chosen may violate the rules of rhetoric; it may be strange, harsh, or uneuphonious; or it may be pleasing, attractive, and alluring to trade. All these considerations are of no consequence unless also it be chosen purposely to mislead the public as to the identity of the corporation with another establishment, and so produce injury to the other beyond that which results from the similarity of the names." *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403.

¹³ "Persons seeking to form a corporation may ordinarily choose any name their fancy dictates, subject, however, to the rule that they may not choose the name of a corporation already existing, or one that is to be used to deceive the public, or to be passed off for that of some other person or firm in business." *Bender v.*

§ 723. — Effect of National Banking Act. The National Banking Act prohibits, under penalty, "all banks not organized and transacting business under the national-currency laws, or under this title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by Congress to use the word 'national' as a part of their corporate name * * * from using the word 'national' as a portion of the name or title of such bank, corporation, firm or partnership."¹⁴ This prohibition has been held not to apply to a state corporation of the building and loan association class possessing functions, powers and franchises distinguishable from the functions, powers and franchises of the corporations referred to, and carrying on a business other than that against the transaction of which under a name containing the word "national" the prohibition is directed.¹⁵ Again, it would seem that the prohibition does not extend to the use of the word "international" by a state bank as part of its corporate name.¹⁶

Bender Store & Office Fixture Co., 178 Ill. App. 203. And see §§ 726-736, *infra*.

The fact that two corporations have the same name does not make them the same entity, or in any way affect their property rights. Contracts or conveyances by or to one of such corporations cannot confer rights or impose liabilities on the other. See *Clark v. Milligan*, 58 Minn. 413, 59 N. W. 955. They are just as distinct as two natural persons having the same name, and will be protected in their respective property rights to the same extent. Thus, if two corporations have the same name, and the sheriff, having an execution against one of them, levies upon the property of the other, he is liable to the latter in an action of trespass. *Hallowell & A. Bank v. Howard*, 14 Mass. 182.

¹⁴ 5 Fed. St. Ann. p. 191, § 5243.

¹⁵ *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670.

In *People v. National Sav. Bank*, 129 Ill. 618, 22 N. E. 288, it was said to be "a serious question" whether, in view of this prohibition, a corporation, chartered by the state

legislature in 1869, which changed its name in 1872 to "National Savings Bank" was legally entitled to use such name.

¹⁶ 22 Op. of Attys. Gen. 475. In his opinion relative to this matter, the attorney general said: "The section is a penal statute, and in derogation of the otherwise common right of individuals, corporations, and associations, and by settled rules of construction, must be construed strictly, and its provisions cannot be extended by construction, implication, or otherwise beyond the plain meaning of its language. The word 'international' is just as much a separate and distinct word in our language as is the word 'national,' and the two words, instead of being synonymous or of similar meaning, have entirely different meanings, and neither can be correctly used to express the idea conveyed by the other, nor is either so used in the ordinary use of our language. Under a statute not penal in its nature it might be proper to inquire, in view of the obvious purpose of this section, whether the word 'international' is either in sound or construction so simi-

§ 724. Refusal of charter or license under identical or similar name. Generally speaking, a corporation has the exclusive right to the use of its corporate name,¹⁷ and this right is frequently given

lar to the word 'national' as to be fairly calculated to deceive or to lead to the belief that the bank using it as part of its name was a national bank. Even in such case it would seem difficult to arrive at that conclusion. Such a question would be addressed to the average intelligence of mankind and not to a mere thoughtless observer or hearer of the word. And it is not believed that this average intelligence, with that ordinary thought and care which is expected of everyone, would be led to believe that a bank a portion of whose name was the word 'international' was therefore a national bank. But, however this may be, no such considerations are pertinent under such a statute as this. It will be also observed that Congress contents itself with the prohibition of the single word 'national' and does not prohibit the use of any similar word, or word of similar sound or meaning, or of any other word calculated or intended to lead to the impression or belief that the bank using it is a national bank. The whole matter is one for Congress alone, which might, if it had seen proper, have made its prohibition so broad as to include the word here under discussion; but as it has forbidden only the use of a single word, we are not permitted to extend its provisions by construction, to other words, although they might, perhaps, have been properly embraced in the prohibition. The same obstructions are alike applicable to the use of the word 'first,' 'citizens,' or other word preceding the word 'international' as a portion of the name or title of the bank. It quite suffices, as in the case of the other word, that its use is not

forbidden, and under such a statute we can not forbid it by construction."

17 United States. *Newby v. Oregon Cent. Ry. Co.*, Deady 609, Fed. Cas. No. 10,144.

Connecticut. *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324.

Georgia. *Rome Machine & Foundry Co. v. Davis Foundry & Machine Works*, 135 Ga. 17, 68 S. E. 800.

Illinois. *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, 40 N. E. 616, aff'g 51 Ill. App. 231; *Illinois Watch-Case Co. v. Pearson*, 140 Ill. 423, 16 L. R. A. 429, 31 N. E. 400; *Ottoman Cahvey Co. v. Dane*, 95 Ill. 203.

Iowa. *Red Polled Cattle Club of America v. Red Polled Cattle Club of America*, 108 Iowa 105, 78 N. W. 803.

Missouri. *State v. McGrath*, 92 Mo. 355, 5 S. W. 29.

New York. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

Pennsylvania. *In re First Presbyterian Church*, 2 Grant 240.

Tennessee. *Ex parte Walker*, 1 Tenn. Ch. 97.

England. *Tussaud v. Tussaud*, 44 Ch. Div. 678.

A statute, making it the duty of the secretary of state to strike from the records of his office the names of all corporations two years in arrears in the matter of their annual license fees, and giving the right to take, and have the exclusive use of, a name stricken from the records to any corporation subsequently organized, will not deprive a corporation of its name pending an honest effort on its part to adjust its delinquency, especially when

statutory recognition,¹⁸ there being a provision in the statutes of a number of the states to the effect that a proposed corporation shall not adopt a name identical with that of an existing corporation or so similar thereto as to result in confusion and be calculated to deceive.¹⁹

it has paid such an amount on the total sum due as to leave owing by it only a portion of one year's fee.

State v. Howell, 56 Wash. 694, 106 Pac. 470. Said the court: "The method of depriving a corporation of its name provided by this law is summary and without notice, and we do not think a corporation should be held to have incurred such a serious loss, by such a summary method, until its failure and neglect is shown beyond all question. We do not think there is such a showing here against this corporation."

¹⁸ The Pennsylvania practice of refusing a charter to a corporation where the name adopted is identical with or very similar to that of another corporation is, in the view of the attorney general of the commonwealth (*In re Standard Quemahoning Coal Co.*, 30 Pa. Co. Ct. 97), "based on the obvious necessity of avoiding confusion to the state in the imposition and collection of taxes and the necessity of avoiding uncertainty in the judicial process of the courts in which such corporations might sue or be sued." But see *American Clay Mfg. Co. v. American Clay Mfg. Co.* of New Jersey, 198 Pa. 189, 47 Atl. 936.

"Iron City Lodge No. 17, Improved Benevolent & Protective Order of Elks of the World," a negro organization, refused a charter on exceptions by "Pittsburg Lodge No. 11, Benevolent & Protective Order of Elks," whose membership is confined to persons of the white race. *In re charter of Iron City Lodge, etc.*, 39 Pa. Super. Ct. 365.

"Polish National Catholic Church

of St. Francis" refused a charter on exceptions by "St. Francis Roman Catholic Church," unincorporated. *In re Charter of Polish National Catholic Church*, 31 Pa. Super. Ct. 87.

The fact that there is a corporation by the name of the "North Fifth Street Real Estate Company" is no ground for refusing a charter to a corporation under the name of the "North Fifth Street Mutual Land Association." *In re North Fifth St. Mut. Land Ass'n*, 8 Pa. Co. Ct. 15.

¹⁹ One corporate name is to be regarded as an imitation of another, within the meaning of a statute prescribing such a name, when it so far resembles the other that a person using that care, caution and observation which the public uses and may be expected to use would mistake one for the other, the location of the corporations and the character of business conducted being considered. *State v. McGrath*, 92 Mo. 355, 5 S. W. 29.

Mere conjecture that some confusion will result is not sufficient ground for injunctive relief under statutes intended to prevent the adoption of names which will prejudice the rights of other corporations. *Michigan Sav. Bank v. Dime Sav. Bank*, 162 Mich. 297, 139 Am. St. Rep. 558, 127 N. W. 364.

A statute providing that the articles of association of a corporation shall state its name, which shall not be a name in use by any other corporation of the state, does not authorize assumption of the same name as that of an unincorporated society, and a court of equity will enjoin it at the instance of the members of

Under such circumstances, and even, perhaps, on principles of public policy, when the statute does not thus expressly provide, if incorporators select a name which has previously been adopted and is being used by another corporation, a certificate of incorporation should be refused.²⁰ In keeping with this view of the matter, it has been held

the society. *Aiello v. Montecalfo*, 21 R. I. 496, 44 Atl. 931.

The word "name" in a statute prohibiting the assumption of a name previously in use by an existing corporation must be construed as meaning "corporate name" and not "trade name." *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875.

²⁰ Under the New York law, it is the duty of the secretary of state to refuse to file and record a proposed certificate of incorporation where the name adopted by the incorporators so nearly resembles that of an existing corporation as to be calculated to deceive. *People v. O'Brien*, 101 N. Y. App. Div. 296, 91 N. Y. Supp. 649.

"*Kansas City Real-Estate Exchange*" held an imitation of "*Kansas City Real-Estate & Stock Exchange*" within the meaning of a statute prohibiting the adoption of a name which is an imitation of the name of another corporation. *State v. McGrath*, 92 Mo. 355, 5 S. W. 29.

"*Kennewick Fruit Exchange*" held to so nearly resemble "*Kennewick District Fruit Growers' Association*" as to make the refusal of the secretary of state to file the articles of incorporation of, and issue a license to persons, seeking to incorporate under the former name, proper under the statutory provision that such official shall refuse to file articles of incorporation when the name adopted is identical with or so similar to the name of a domestic corporation or that of a foreign corporation, which has complied with the laws of the state, as to be misleading. *State v.*

Howell, 80 Wash. 649, 141 Pac. 1157.

Suit will lie on behalf of an unincorporated association to enjoin the incorporation of a society by a part of the association's members under the association's name. *Rudolph v. Southern Ben. League*, 7 N. Y. Supp. 135.

One purchasing the good-will and a portion of the assets of a corporation is entitled to enjoin the presentation of an application for a charter by persons seeking to incorporate under the same name as the corporation. *Armstrong v. Atlantic Ice & Coal Corporation*, 141 Ga. 464, 81 S. E. 212.

Where the state constitution provides that foreign corporations shall not be permitted to do business in the state on more favorable conditions than domestic corporations, and the statute provides, in effect, that no domestic corporation shall take the name of any other domestic corporation or of any foreign corporation which has complied with the laws of the state, a foreign corporation, the name of which is identical with that of a domestic corporation, is not entitled to the privilege of doing business in the state. *State v. Nichols*, 51 Wash. 619, 99 Pac. 876.

In England, an injunction will lie to restrain a proposed new company from applying to the registrar of joint stock companies for registration under a name prejudicially similar to that of an existing corporation. *Hendriks v. Montague*, L. J. 50 Ch. Div. 456, granting an injunction, on the application of the "*Universal Life Assurance Society*," against the

that mandamus will not lie to compel the secretary of state to issue a certificate of incorporation to a corporation under a name which, by reason of its identity with or similarity to a name in use, the corporation might subsequently be enjoined from using.²¹ But although the statute provides that the name of a fraternal beneficiary corporation shall be one not previously in use by an existing corporation nor so similar to one thus in use as to be liable to be mistaken therefor, a corporation of a fraternal beneficiary character cannot enjoin the insurance commissioner from issuing a certificate of approval in the case of a proposed corporation, of the same character, which has adopted a similar name, when the statute further provides that such commissioner, upon the presentation to him of the prescribed certificate, "shall make such examination and require such evidence as he deems necessary; and if it appears that the purposes and proceedings of the corporation conform to law, he shall certify his approval thereof," after which the secretary of the commonwealth shall issue a certificate of incorporation which shall be conclusive evidence of the existence of the corporation at the date of the certificate, the determination of the question of prohibited similarity thus being

registration of the "Universe Life Assurance Association (Limited)."

Under the New York statutes prohibiting the filing of the certificate of a proposed corporation having the same or a similar name to that of another corporation, but allowing a corporation formed by reincorporation to have the same name as that of the former corporation, a company is entitled to its former name on reincorporation, although it may be the same as or similar to the name of an existing corporation, and to mandamus to compel the filing of its certificate of reincorporation under such name. *People v. Payn*, 161 N. Y. 229, 55 N. E. 849, aff'g 43 N. Y. App. Div. 621, 60 N. Y. Supp. 1146, 28 N. Y. Misc. 275, 59 N. Y. Supp. 851.

²¹ *People v. Rose*, 225 Ill. 496, 80 N. E. 293 ("National Liberty League" refused certificate because of existence of "National Liberty Legion"); *People v. Rose*, 219 Ill. 46, 76 N. E. 42 (writ sought to compel issuance of

certificate to "United States Express Company," notwithstanding the fact that the "United States Express Company," a joint stock company, was doing business in the state).

A foreign corporation is not entitled to mandamus to compel the secretary of state to register it and to issue to it the certificate authorized to be issued to foreign corporations seeking to do business in the state, when its name is identical with that of a domestic corporation and, hence, is one under which it has no right, under the law of the state, to do business in the state. *State v. Nichols*, 51 Wash. 619, 99 Pac. 876.

Where the secretary of state decides wrongfully that the name of a proposed corporation is the same as that of an existing corporation or so nearly resembles such a name as to be calculated to deceive, and therefore refuses to file and record a proposed certificate of incorporation, certiorari may lie to review his decision. *People*

committed to the insurance commissioner.²² Moreover, a foreign corporation, although doing business in the state and owning valuable

v. O'Brien, 101 N. Y. App. Div. 296, 91 N. Y. Supp. 649.

²² American Order of Scottish Clans v. Merrill, 151 Mass. 558, 8. L. R. A. 320, 24 N. E. 918. On this point the court said: "The plaintiff got no better standing by seeking to anticipate the action of the statutory tribunal. The case is not like those where a court of equity enjoins parties from proceeding with an action at law. That is done to enforce some equitable principle which a court of law would not recognize. But the commissioner is bound to proceed upon the same principles that this court would proceed upon. It is part of his duty to pass on the question whether the name applied for has the prohibited resemblance to that of an existing company. We must assume that he will do his duty, and is competent to form a judgment on the question. We cannot prohibit him from doing what the statute expressly commits to his determination. Neither can we prohibit private parties from applying to him to do it in the manner expressly authorized by statute."

Although the Kansas statutes relating to fraternal beneficiary societies provide against the use by such a society of a name too closely resembling that of a similar society, held, upon a consideration of their several provisions, that they do not repose in the state superintendent of insurance the power to determine the question of too close resemblance of name, but leave such question for the determination of the courts in a proper action, and, further, that the state charter board does not have jurisdiction to determine such question. *Modern Woodmen of America v. Hatfield*, 199 Fed. 270.

Under the Washington statute (Rem.

& Bal. Code, § 3680) providing that "no corporation shall take the name of a corporation theretofore organized under the laws of this state, nor of any foreign corporation having complied with the laws of this state, nor one so nearly resembling the name of such other corporation as to be misleading," and, further, that "the secretary of state shall refuse to file said articles of incorporation of any association or corporation violating the provisions of this section," the name of the proposed corporation is the controlling consideration, and the question whether the business intended to be conducted by such corporation is similar to that of another corporation bearing a similar name is immaterial. "It is not the duty of the secretary of state, under this section, to inquire into the character of the business. It is his duty only to inquire into the similarity of the names, and if, in his judgment, the names so nearly resemble each other as to be misleading, it is his duty to reject the offered articles of incorporation." *State v. Howell*, 80 Wash. 649, 141 Pac. 1157.

Under the Missouri statutes, one religious or benevolent society has no right to intervene in proceedings in the circuit court looking to the incorporation of another such society which the former charges with adopting a prejudicially similar name, it being intended that such proceedings shall be ex parte in character. *Young Women's Christian Ass'n v. St. Louis Women's Christian Ass'n*, 115 Mo. App. 228, 91 S. W. 171.

When the statute merely directs the probate judge not to record the certificate when the name adopted by the corporation is so nearly similar to that of an existing corporation as

property therein, cannot enjoin commissioners, licensed to open books for subscriptions to the capital stock of a proposed domestic corporation intended to carry on the same business as the foreign corporation under a name identical with that of the latter, from receiving stock subscriptions or taking other steps necessary to the creation of the corporation.²³

to lead to confusion and uncertainty, and does not declare the result of a failure to observe this direction, similarity of name will not of itself forfeit nor authorize the vacation of the corporation's charter, after the probate judge has accepted the name and recorded the certificate. *State v. Citizens' Light & Power Co.*, 172 Ala. 232, 55 So. 193.

²³ *Lehigh Valley Coal Co. v. Hamblen*, 23 Fed. 225. Said the court: "The object of the defendants in causing an Illinois corporation to be created, bearing the same name as the complainant company, is obvious. They hope, by this means, to secure the benefit of part, at least, of the patronage which the complainant has acquired. Unwilling to engage in open, manly competition with the complainant and others carrying on the same business, the defendants resort to a trick or scheme whereby they hope to deceive the public, and obtain an unfair advantage of the complainant. Such conduct might be fairly characterized more harshly; and it is with extreme reluctance that I deny the complainant the relief prayed for. The complainant is a foreign corporation, and it is only by comity that it is doing business in Illinois at all. The state can say to it any day, 'Go!' and it must go. That being so, I do not see that the complainant has a legal right to say a corporation shall not be created in Illinois bearing its (the complainant's) name. If the state of Illinois may create a corporation bearing the same name as the

complainant,—and it certainly can,—this court has no right by injunction to prevent anything from being done under the state law which is necessary in the creation of such a corporation. The commissioners perform a function under the laws of the state in the formation of the corporation. If they are not officers of the state they are instrumentalities employed by the state. If they can be enjoined from receiving stock subscriptions under the license issued to them by the secretary of state, I do not see why the latter might not be enjoined from issuing a license, or doing anything else under the state statute. The general law authorizing the secretary of state to issue a license to commissioners to receive stock subscriptions provides that no license shall be issued to two or more companies having the same name. Before bringing this suit the complainant should have brought to the attention of the secretary of state the matters alleged in the bill. He might, on a proper application, have revoked the license to the defendants, unless they adopted another name for their company. I do not think this court can interfere by injunction, at the instance of a foreign corporation, and prevent any necessary step from being taken under the statute of this state in the creation of a corporation. I do not say what may be done if the defendants succeed in creating their corporation bearing the complainant's name, and a suit shall be brought by the complainant to prevent individuals claiming to be

§ 725. Injunction against use of identical or similar name in general. The right of a corporation to the exclusive use of its corporate name²⁴ is not always respected, and the statutory prohibition against the adoption by a proposed corporation of a name the same as, or closely resembling that of an existing corporation²⁵ is not always heeded. Occasionally, the infringement of an existing corporation's rights in the matter is an innocent one; more often, it is otherwise. A name similar to that of an existing corporation is adopted and the business, whatever its nature, to which such corporation is justly entitled is diverted, in whole or in part, to the interloper. But equity abhors this species of fraud as much as it does any other, and will extend its protecting arm to frustrate the well-laid plans of the business pirate.²⁶

Corporate names are protected independently of statute²⁷ and, although, in a proper case, an action at law for damages will lie against the offending corporation,²⁸ the matter of protection is essentially of

officers of such corporation from interfering with the complainant's business, as already stated."

It seems that under the Nebraska statutes, a foreign fraternal benefit society doing business in Nebraska may enjoin the auditor from issuing a certificate to a domestic society on the ground of similarity of names. *Knights of Maccabees of World v. Searle*, 75 Neb. 285, 106 N. W. 448.

²⁴ See § 724, *supra*.

²⁵ See § 724, *supra*.

²⁶ "The subject of the unlawful use by competitors of the name under which a rival has previously presented himself to the public and has gained a business reputation, although the name is not strictly a trade-mark, and is either geographical or descriptive of quality, has been frequently of late before the courts, which have demanded a high order of commercial integrity, and have frowned upon all filching attempts to obtain the reputation of another." *Fuller v. Huff*, 104 Fed. 141, 51 L. R. A. 332. See also *German-American Button Co. v. A. Heymsfeld*, 170 N. Y. App. Div. 416, 156 N. Y. Supp. 223.

²⁷ *Investor Pub. Co. of Massachusetts v. Dobinson*, 72 Fed. 603; *Grand Lodge, K. P. of North & South America v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963.

"No corporation has the right, in assuming a name in which to carry on its business of publication, to adopt a name which, *prima facie* and without explanation, would fairly and reasonably indicate to a person dealing with it, of average and ordinary intelligence, that the work was the publication of another. The restrictions upon the selection and use of corporate names, or methods of business, tending to deceive the public, are independent of statutory restrictions and additional thereto, and may be enforced on behalf of persons (in this case other publishers) to whom the use of the name would occasion an injury." *Munn & Co. v. Americana Co.*, 82 N. J. Eq. 63, 88 Atl. 330.

²⁸ Where a corporation makes use of a name, invading the rights of another corporation, in the first instance, with knowledge of the facts, or continues to use such name, it having been innocently adopted, after

equitable cognizance because of the fact that the remedy at law would ordinarily be inadequate or incomplete,²⁹ and, as a general proposition, equity, at the suit of a corporation which has adopted a certain name and upon proof of the necessary facts, will enjoin a corporation, subsequently organized, which has adopted an identical or a similar name, from using such name—if not from using it under all circumstances, at least, from using it without explanation and in such manner as to deceive the public and thereby injure the complainant.³⁰

knowledge of the facts is acquired, an action at law for damages may be maintained against it *Hartzler v. Goshen Churn & Ladder Co.*, 55 Ind. App. 455, 104 N. E. 34.

²⁹ *Grand Lodge, K. P. of North & South America v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963.

One corporation attacking the right of another to use the name adopted on the ground that such name is proscribed by a statute prohibiting the adoption of a name which is the same as that of another corporation or resembles such a name so nearly as to be calculated to deceive, should proceed in equity and not by certiorari to review the action of the secretary of state in filing the certificate of incorporation. *People v. O'Brien*, 101 N. Y. App. Div. 296, 91 N. Y. Supp. 649.

³⁰ *United States. Baker v. Baker*, 115 Fed. 297, 299; *Newby v. Oregon Cent. Ry. Co.*, Deady 609, Fed. Cas. No. 10,144.

Alabama. *Grand Lodge, K. P. of North & South America v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963; *State v. Citizens' Light & Power Co.*, 172 Ala. 232, 55 So. 193.

Connecticut. *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324.

Georgia. *Rome Machine & Foundry Co. v. Davis Foundry & Machine Works*, 135 Ga. 17, 68 S. E. 800; *Lane v. Brothers & Sisters of Evening Star Society*, 120 Ga. 355, 47 S. E. 951.

Michigan. *Lamb Knit Goods Co. v.*

Lamb Glove & Mitten Co., 120 Mich. 159, 44 L. R. A. 841, 78 N. W. 1072; *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446.

Minnesota. *Nesue v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439, 3 Ann. Cas. 30, 101 N. W. 490.

New Jersey. *St. Patrick's Alliance of America v. Byrne*, 59 N. J. Eq. 20, 44 Atl. 716.

New York. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

Rhode Island. *Aiello v. Montecalfo*, 21 R. I. 496, 44 Atl. 931.

Tennessee. *Fite v. Dorman (Tenn.)*, 57 S. W. 129; *Ex parte Walker*, 1 Tenn. Ch. 97.

England. *Tussaud v. Tussaud*, 44 Ch. Div. 678.

See also cases cited *infra* this section and §§ 726-736.

"To change the defendant's name can injure no one, to retain it may mislead the public, confuse the trade and seriously injure the complainant's business. When such an alternative presents itself, the duty of a court of equity is plain, viz., to stop the unfair proceeding in limine. * * * If the defendant intends to deal fairly, it can do no harm to change its name; if it intends to use the name unfairly, it should be compelled to change it." *British-American Tobacco Co. v. British-American Cigar Stores Co.*, 211 Fed. 933, Ann. Cas. 1915 B 363, rev'g 206 Fed. 189.

. Again, a corporation may be enjoined from using its corporate name when such name is identical with or prejudicially similar to the trade name, as distinguished from the corporate name, which another corporation acquired prior to the time of the former's organization,³¹ or to the popular name by which such other corporation was known at such time.³² Similarly, an injunction will lie when the name dupli-

The right of a corporation to the name which it bears "does not rest in parol but is shown by the record, if at all, and is determined by the court in any form of proceeding," and the establishment in an action at law of the fact that the corporation is entitled to such name is not a condition precedent to a suit by the corporation to enjoin the wrongful appropriation of such name by another corporation. *Newby v. Oregon Cent. R. Co.*, *Deady* (U. S.) 609, *Fed. Cas. No. 10,144*.

On awarding an injunction against the defendant's use of its corporate name, the court may decree an accounting of the profits made by the defendant but not the ascertainment of the damage sustained by the complainant. *L. Martin Co. v. L. Martin & Wilches Co.*, 75 N. J. Eq. 257, 21 L. R. A. (N. S.) 256, 20 Ann. Cas. 57, 72 Atl. 294, rev'g 75 N. J. Eq. 39, 71 Atl. 409.

Where the right or privilege to use a certain corporate name is claimed in virtue of the authority to incorporate conferred by an act of congress, the right or privilege is one claimed under an authority exercised under the United States, which, being denied by the state court, is reviewable by the Supreme Court of the United States by virtue of the provisions of § 237 of the new Judicial Code (4 Fed. St. Ann., p. 467). *Creswill v. Grand Lodge, K. & P.*, 225 U. S. 246, 258, 56 L. Ed. 1074.

³¹ *Hartzler v. Goshen Churn & Ladder Co.*, 55 Ind. App. 455, 104 N. E. 34; *W. R. Lynn Shoe Co. v. Auburn-*

Lynn Shoe Co., 100 Me. 461, 4 L. R. A. (N. S.) 960, 62 Atl. 499; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

"Adopting a particular name as its corporate name does not necessarily give a corporation the right to use such name as a trade name. The names which it may select are so unlimited in number that there is no need to select one already appropriated by another, and if it sees fit to incorporate under a name already in use by another as a trade name, it acquires no right to use such name as its own trade name." *Rodseth v. Northwestern Marble Works*, 129 Minn. 472, Ann. Cas. 1917 A 257, 152 N. W. 885.

A corporation will not be permitted to use the name of one of its incorporators as a part of its corporate name when the name of such incorporator is the one by which the manufactured product of a rival corporation is usually called for and described. *J. & P. Coats v. John Coates Thread Co.*, 135 Fed. 177.

A corporation may be enjoined from using its corporate name when use of the same constitutes an infringement of a registered trade-mark of another corporation. *Oneida Community v. Oneida Game Trap Co.*, 154 N. Y. Supp. 391, modifying 150 N. Y. Supp. 918.

³² The original charter name of the complainant, taken in 1869, was "The Philadelphia Trust, Safe Deposit & Security Company of the City of Philadelphia." In 1871 its name was

cated or resembled is that previously assumed by an unincorporated

changed to "The Philadelphia Trust, Safe Deposit & Insurance Company." Thereafter it was popularly called "The Philadelphia Trust Company" or "Philadelphia Trust Company." In formal transactions, however, such as judicial proceedings, the company used its full corporate name. It conducted a general trust business in various parts of Pennsylvania including Philadelphia, and in other parts of the United States including Delaware and New Jersey. In 1902 the defendant was incorporated in Delaware and was empowered, among other things, to conduct a general trust business anywhere in the world, including, of course, Delaware, under the name of "Philadelphia Trust Company." The evidence showed that the mail for complainant was frequently addressed to one or the other of its popular names stated above. Based on these facts and certain other circumstances, the defendant was restrained from the use of the name which it had taken. The court said: "It will be observed that under the statute the name of the corporation 'shall be such as to distinguish it from any other corporation engaged,' etc.; but the statutory requirement neither in terms nor by fair implication is restricted only to cases in which the name of the corporation created under it is distinguished from the merely legal name of the other corporation. While a corporation generally, if not invariably, is confined to the use of its corporate name in judicial proceedings and its transactions of business, it may by usage be generally and commonly called by the public by a different name. This may result from the length or complexity of its legal name and consequent inconvenience in

expressing it orally or in writing, or possibly from other causes. The complainant, although its legal name is 'The Philadelphia Trust, Safe Deposit and Insurance Company,' is known in Delaware and elsewhere as 'The Philadelphia Trust Company.' The incorporators of the defendant in adopting the latter name in a charter clothing the defendant with some of the powers exercised by the complainant in Delaware, acted in violation of the statute, and did not acquire the right to use the name sought to be appropriated to the defendant. But, further, on the question of unfair competition in trade or business, it would be wholly immaterial, under the circumstances of this case, if the name adopted by the defendant were substantially unlike the legal name of the complainant. The name so adopted is precisely the name by which here and elsewhere the complainant is generally known, and was presumably known to the incorporators of the defendant when they obtained its charter. Many of the powers above cited from the charters of the two corporations are substantially alike, if not in all instances expressed in *ipsis* verbis, and can be exercised in the same territory. It is evident, from these circumstances, that the use of the name, adopted by the defendant, in the exercise of powers common to the two corporations would be directly calculated to produce confusion in their business, mislead the public as to the identity of the company with which it may be intended to deal in the matter of trusts and administration of estates, and in other respects create uncertainty or mistake as to identity leading to consequences of the gravest character; and also to pro-

organization.³³ Likewise, the trade name of a natural person will be protected by injunction.³⁴

While an enumeration of the specific names as to which protection has been granted or denied will not aid materially in determining the rules of law governing the question, it has been considered that it may prove of service to enumerate some typical cases³⁵ by way of

duce unfair competition in business." Philadelphia Trust, Safe Deposit & Insurance Co. v. Philadelphia Trust Co., 123 Fed. 534.

³³ See *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 16 Ann. Cas. 593, 98 Pac. 1116.

The formation of a corporation, by certain of the members of an unincorporated organization, under such organization's name, does not give the corporation the right to use such name to the exclusion either of the organization itself (*Original LaTosca Social Club v. LaTosca Social Club*, 23 App. Cas. (D. C.) 96; *Grand Lodge A. O. U. W. of Iowa v. Graham*, 96 Iowa 592, 31 L. R. A. 133, 65 N. W. 837. See also *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 38 L. R. A. 658, 71 N. W. 470), or of the corporation into which the organization was subsequently converted. *Original LaTosca Social Club v. LaTosca Social Club*, 23 App. Cas. (D. C.) 96.

³⁴ *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525; *Rosenburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886.

³⁵ The cases noted hereunder are not cited as showing the application of any particular rule or rules announced in this chapter, but merely as cases in which the right of a corporation to use its corporate name has been involved.

"*Allegretti Chocolate Cream Company*," a corporation, held entitled to

an injunction against "*Allegretti & Co.*," unincorporated. *Rubel v. Allegretti Chocolate Cream Co.*, 76 Ill. App. 581; aff'd 177 Ill. 129, 52 N. E. 487. (order, dismissing for want of equity petition seeking to have defendants in original suit adjudged guilty of contempt on ground of violations of injunction granted, reversed, *Allegretti Chocolate Cream Co. v. Rubel*, 86 Ill. App. 600). See also, *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. 643.

"*American Clay Manufacturing Company*," of Pennsylvania, held entitled to an injunction against the "*American Clay Manufacturing Company*," of New Jersey. *American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey*, 198 Pa. 189, 47 Atl. 936.

"*American Novelty & Manufacturing Company*" held entitled to an injunction pendente lite against the "*Manufacturing Electrical Novelty Company*." *American Novelty & Manufacturing Co. v. Manufacturing Electrical Novelty Co.*, 36 N. Y. Misc. 450, 73 N. Y. Supp. 755.

A partnership, which was doing business as the "*American Watchman's Clock Company*," and which had executed the papers necessary to its incorporation under such name prior to the creation of a corporation which adopted the same name and purposed to engage in the business carried on by the partnership, held entitled to enjoin the use of such name by such corporation. *Pettes v. Ameri-*

illustration, as has been done in the notes and it being believed

can Watchman's Clock Co., 89 N. Y. App. Div. 345, 85 N. Y. Supp. 900.

"American Wine Company," of Missouri, held not entitled to an injunction against the "American Wine Company," of Alabama. *American Wine Co. v. Kohlman*, 158 Fed. 830.

"Atlas Assurance Company, Limited" held entitled to an injunction against the "Atlas Insurance Company." *Atlas Assur. Co. v. Atlas Ins. Co. (Iowa)*, 112 N. W. 232.

"Bates Manufacturing Company" held entitled to a preliminary injunction against the "Bates Numbering Machine Company." *Bates Mfg. Co. v. Bates Numbering Mach. Co.*, 172 Fed. 892.

"Bates Manufacturing Company" held not entitled to a preliminary injunction against "The Bates Machine Company." *Bates Mfg. Co. v. Bates Mach. Co.*, 141 Fed. 213.

"Benevolent & Protective Order of Elks" held entitled to an injunction against the "Grand Lodge of the Improved Benevolent & Protective Order of Elks of the World," a negro organization, which, in its publications, dropped the words "Grand Lodge of the," and appeared simply as the "Improved Benevolent & Protective Order of Elks of the World." *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of World*, 205 N. Y. 459, L. R. A. 1915 B 1074, Ann. Cas. 1913 E 639, 98 N. E. 756, in which the court said: "The appellant insists that the names of the parties here have not enough similarity to support the action, and that in any event the judgment should not go further than to prohibit the use of the defendant's name without the prefix 'improved' and the suffix 'of the world.' We think that the names are so similar as to be extremely likely to deceive,

and that a limitation of the injunction in the manner suggested would not give the plaintiff the relief to which it is entitled. Indeed, the plaintiff's organization has become so well and widely known simply as Elks (as the trial court has found) that the assumption of a title containing that appellation by any other independent benevolent corporation or fraternal order would in and of itself convey the false impression that there was some connection between them. Therefore, the learned judge at Special Term was right in enjoining the defendant from in any wise using the word 'Elk' or 'Elks' as part of its title or incorporation. The case would be quite different if the members of the defendant organization had ever been members of the plaintiff corporation and had seceded therefrom because of dissatisfaction with its methods of administration or for any other good and sufficient reason. In that event, the representation that the members of the defendant were Elks or had been Elks would be true as matter of fact, and the use of the parent name as part of the name of a new society formed by members of the original organization as an offshoot thereof has sometimes been sanctioned. See *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 38 L. R. A. 658, 71 N. W. 470. Here, however, there has been no secession, and the defendant is in no sense an offshoot of the plaintiff association. * * * The chief practical result of the present judgment is to compel the defendant to adopt another name which contains no reference to the Elks. Its organization is not interfered with, and it may continue to exercise all its functions just as before. * * * It is only the virtual misrepresentation

that such an enumeration will constitute a useful index, of a char-

that they are Elks that is complained of here."

"Benevolent and Protective Order of Elks of the United States of America" held entitled to an injunction against the "Improved Benevolent and Protective Order of Elks of the World," a negro organization. *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks (Tenn.)*, 118 S. W. 389.

"Borden's Condensed Milk Company" held not entitled to an injunction against the "Borden Ice Cream Company." *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, rev'g 194 Fed. 554.

"British-American Tobacco Company, Limited," a British corporation, held to have stated a good cause of action against the "British-American Cigar Stores Company," a New Jersey corporation. *British-American Tobacco Co. v. British-American Cigar Stores Co.*, 211 Fed. 933, Ann. Cas. 1915 B 363, rev'g 206 Fed. 189.

"Cape May Yacht Club" held entitled to an injunction against the "Cape May Yacht and Country Club." *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972.

"Car Advertising Company" held not entitled to an injunction pendente lite against the "New York City Car Advertising Company." *Car Advertising Co. v. New York City Car Advertising Co.*, 57 N. Y. Misc. 105, 107 N. Y. Supp. 547.

"Celluloid Manufacturing Company" held entitled to an injunction against the "Cellonite Manufacturing Company." *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94, 102 note.

"Chas. S. Higgins Company" held entitled to enjoin the use by a foreign corporation, engaged in the same business in the same locality, of the name

"Higgins Soap Company." *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

"Chicago Landlords' Protective Bureau," a corporation, held entitled to a perpetual injunction against the "Landlords' Protective Department," unincorporated. *Koebel v. Chicago Landlords' Protective Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154, 71 N. E. 362, aff'g 112 Ill. App. 21.

"Chickering & Sons" held entitled to an injunction pendente lite against "Chickering Bros." *Chickering v. Chickering & Sons*, 120 Fed. 69.

On the ground that none of the organizations was engaged in business in the sense of seeking financial gain but were all equally seeking to accomplish patriotic and unselfish ends, and that, therefore, the rules governing the right to trade-marks and trade names should not be strictly applied, "Colonial Dames of America," incorporated under the laws of New York, held not entitled to an injunction against the "Colonial Dames of the State of New York," also a New York corporation, or the "National Society of the Colonial Dames of America," an unincorporated association. *Colonial Dames of America v. Colonial Dames of New York*, 29 N. Y. Misc. 10, 60 N. Y. Supp. 302, aff'd 63 N. Y. App. Div. 615, 71 N. Y. Supp. 1134, 173 N. Y. 586, 65 N. E. 1115.

"Computing Cheese Cutter Company," located in the city of Anderson, held to have stated prima facie grounds for injunctive relief against the "Anderson Cheese Cutter Company," located in the same city. *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

"Computing Scale Company" held not entitled to an injunction against the "Standard Computing Scale Com-

acter more or less practical to the typical decisions on a subject which

pany, Limited." *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. 965.

"Continental Insurance Company of the City of New York" held not entitled to an injunction pendente lite against the "Continental Fire Association of Ft. Worth, Texas." *Continental Ins. Co. v. Continental Fire Ass'n*, 101 Fed. 255.

"Corning Glass Works," located at Corning, N. Y., held not entitled to an injunction against the "Corning Cut Glass Company," located at the same place, but carrying on a dissimilar business. *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449, aff'g 126 N. Y. App. Div. 919, 110 N. Y. Supp. 1125.

"Crookston Marble & Monument Works," unincorporated, held entitled to an injunction against the "Crookston Marble Works," a corporation. *Rodseth v. Northwestern Marble Works*, 129 Minn. 472, Ann. Cas. 1917 A 257, 152 N. W. 885.

"Crookston Marble Works, a co-partnership, held entitled to a perpetual injunction against the "Crookston Marble Works," a corporation. *Nesue v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439, 3 Ann. Cas. 30, 101 N. W. 490.

"Crutcher & Starks" held entitled to a perpetual injunction against the "Starks Company." *Crutcher & Starks v. Starks*, 161 Ky. 690, 171 S. W. 433.

"Cyclops Machine Works," unincorporated, held entitled to a perpetual injunction against "Cyclops Iron Works," incorporated. *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014.

"Daughters of Isabella," and "National Circle, Daughters of Isabella," held entitled to an injunction against the "National Order of the Daugh-

ters of Isabella." *Daughters of Isabella No. 1 v. National Order Daughters of Isabella*, 83 Conn. 679, Ann. Cas. 1912 A 822, 78 Atl. 333.

"David E. Foutz Company" held entitled to an injunction against the "S. A. Foutz Stock Food Company." *David E. Foutz Co. v. S. A. Foutz Stock Food Co.*, 163 Fed. 408.

The successor of a partnership doing business under the name "De Grauw, Aymar & Co." held entitled to an injunction pendente lite against the use of such name by a corporation doing an identical business, notwithstanding one of the stockholders in such corporation was named "De Grauw" and another, "Aymar," it being apparent that the incorporators hoped by the use of the name adopted to induce persons to do business with the corporation upon the assumption that it was the successor of the partnership. *Schmid v. De Grauw*, 27 N. Y. Misc. 693, 59 N. Y. Supp. 569.

"Deister Concentrator Company" held not entitled to an injunction against the "Deister Machine Company." *Deister Concentrator Co. v. Deister Machine Co.*, — Ind. App. —, 112 N. E. 906.

"Eastern Outfitting Company," unincorporated, held entitled to an injunction against the "Eastern Outfitting Company of Seattle, Washington," a foreign corporation. *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 433, 35 L. R. A. (N. S.) 251, 110 Pac. 23 (in rendering its decision the court observed that "we have treated the question as if the parties had used the same trade name, and have given no consideration to the fact that the words 'Seattle, Washington,' were a part of the corporate name of the appellant").

"Edison Polyform Manufacturing Company" held subject to an injunc-

has been and continues to be the source of numerous and seem-

tion at the suit of Thomas A. Edison. *Edison v. Edison Polyform Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392, distinguished in *Edison v. Mills-Edison*, 74 N. J. Eq. 521, 70 Atl. 191.

"Eureka Fire Hose Company" held entitled to an injunction against "Eureka Rubber Manufacturing Company" to the extent that the latter's name was used in connection with the manufacture and sale of goods or of the class of goods which the complainant was putting on the market under its name at the time of the defendant's incorporation. *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 69 N. J. Eq. 159, 60 Atl. 561.

"Farmers' Loan & Trust Co." of New York held entitled to a preliminary injunction restraining "Farmers' Loan & Trust Co. of Kansas" from doing business in New York City except as the latter uses its full corporate name as quoted. *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas*, 21 Abb. N. Y. Cas. 104, 1 N. Y. Supp. 44, 48.

"Free and Accepted Masons of the State of Texas," a negro organization, held not entitled to an injunction against the "Ancient Free and Accepted Masons, Colored," likewise a negro organization, which was subordinate to the "Sunset Grand Lodge Free and Accepted Masons, Colored, of Texas." *Free & Accepted Masons of State of Texas v. Ancient Free & Accepted Masons, Colored* (Tex. Civ. App.), 179 S. W. 265.

"German-American Button Company," a corporation, held entitled to an injunction against the "German-American Hand Crochet Button Works," unincorporated. *German-American Button Co. v. A. Heymsfeld*, 170 N. Y. App. Div. 416, 156 N. Y. Supp. 223.

"Glucose Sugar Refining Company"

held entitled to base its claim for injunctive relief against the "American Glucose Sugar Refining Company" either upon the statute which prohibited a corporation from assuming a name in use by another corporation of the state or so nearly similar thereto as to lead to uncertainty and confusion, or "upon the inequitable conduct of the defendant in assuming the name of the complainant." *Glucose Sugar Refining Co. v. American Glucose Sugar Refining Co.* (N. J. Ch.), 56 Atl. 861.

"Grand Lodge, Knights of Pythias" held properly awarded decree overruling demurrer to its bill for injunctive relief against the "Grand Lodge, Knights of Pythias of North and South America," a negro organization. *Grand Lodge, K. P. of North & South America v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963.

"Herring-Hall-Marvin Safe Company" held entitled to an injunction against the "Hall's Safe Company." *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 52 L. Ed. 616, modifying 146 Fed. 37, 14 L. R. A. (N. S.) 1182.

The use of the name "Howes" in the corporate name of the "Howes Grain-Cleaner Co." held to have resulted in unfair competition and to amount to at least a constructive fraud upon the rights of the "S. Howes Co.," and, hence, to be subject to injunction at the suit of the latter. *S. Howes Co. v. Howes Grain-Cleaner Co.*, 24 N. Y. Misc. 83, 52 N. Y. Supp. 468.

"Hygeia Distilled Water Company" held not entitled to an injunction against the "Hygeia Ice Company" restraining the latter from using the word "Hygeia" as part of its corporate name. *Hygeia Distilled Water Co.*

ingly irreconcilable judicial decisions, indicating in most cases the

v. Hygeia Ice Co., 72 Conn. 646, 48 L. R. A. 147, 45 Atl. 957, rev'g in part 70 Conn. 516, 40 Atl. 534.

"Hygeia Water Ice Company" held not entitled to an injunction against the "New York Hygeia Ice Company, Limited." Hygeia Water Ice Co. v. New York Hygeia Ice Co., Ltd., 140 N. Y. 94, 35 N. E. 417.

"Imperial Automobile Parts Company," a copartnership, held entitled to an injunction against the "Imperial Sales & Parts Company," a corporation. Dayton v. Imperial Sales & Parts Co., — Mich. —, 161 N. W. 958.

"J. B. Williams Soap Company" held entitled to an injunction against the "Williams Soap Company." Williams Soap Co. v. J. B. Williams Soap Co., 193 Fed. 384, writ of certiorari denied 225 U. S. 712, 56 L. Ed. 1268 (mem. dec.).

"J. & P. Coats, Limited" held entitled to an injunction against the "John Coates Thread Company." J. & P. Coats v. John Coates Thread Co., 135 Fed. 177.

"Kalamazoo Wagon Company," unincorporated, held entitled to an injunction against the "Kalamazoo Buggy Company," a corporation. Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 52 Am. Rep. 811, 20 N. W. 545, 19 N. W. 961 (based on contract).

"Knights of the Maccabees of the World" held entitled to enjoin the state auditor from issuing a certificate of organization to the "Western Maccabees," the auditor, under the statute, having power to issue a certificate only when the name selected is not the same or does not so nearly resemble a name in use as to have a tendency to mislead the public. Knights of Maccabees of World v. Searle, 75 Neb. 285, 106 N. W. 448.

"Lamb Knit-Goods Company" held

entitled to an injunction against the "Lamb Glove & Mitten Company." Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co., 120 Mich. 159, 44 L. R. A. 841, 78 N. W. 1072.

"Legal Aid Society," a benevolent corporation, held entitled to an injunction pendente lite against "The Co-operative Legal Aid Society," a corporation organized for pecuniary profit. Legal Aid Society v. Co-operative Legal Aid Society, 41 N. Y. Misc. 127, 83 N. Y. Supp. 926.

"L. Martin Company" held entitled to an injunction against the "L. Martin & Wilkes Company." L. Martin Co. v. L. Martin & Wilkes Co., 75 N. J. Eq. 39, 71 Atl. 409, rev'd on another point 75 N. J. Eq. 257, 21 L. R. A. (N. S.) 526, 20 Ann. Cas. 57, 72 Atl. 294.

"Material Men's Mercantile Association, Limited," held entitled to an injunction against the "New York Material Men's Mercantile Association, Incorporated." Material Men's Mercantile Ass'n v. New York Material Men's Mercantile Ass'n, 155 N. Y. Supp. 706.

"Mills-Edisonia" held not subject to an injunction at the suit of Thomas A. Edison and certain of his manufacturing and selling agents. Edison v. Mills-Edisonia, 74 N. J. Eq. 521, 70 Atl. 191, distinguishing Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392.

"Modern Woodmen of America" held entitled to enjoin the organization of "The Kansas Fraternal Woodmen." Modern Woodmen of America v. Hatfield, 199 Fed. 270.

"Oneida Community, Limited," held entitled to an injunction against the "Oneida Game Trap Company, Incorporated." Oneida Community v. Oneida Game Trap Co., 154 N. Y. Supp. 391, modifying 150 N. Y. Supp.

relief which has been sought and granted or which has been denied.

918. The injunction in this case was granted on the ground that the use by defendant of its corporate name constituted an infringement of plaintiff's registered trade-mark.

"Order of Owls," an unincorporated organization of white persons, held not entitled to an injunction against the "Afro-American Order of Owls, Baltimore Nest No. 1," a negro corporation. *Afro-American Order of Owls, Baltimore Nest No. 1 v. Talbot*, 123 Md. 465, 91 Atl. 570.

"Order of Owls," unincorporated, held entitled to an injunction against the "Independent Order of Owls," a corporation organized by members of a local body of the former order, the charter of which local body had been revoked. *Talbot v. Independent Order of Owls*, 220 Fed. 660.

"Penberthy Injector Company" held entitled to an injunction against the "Lee-Penberthy Manufacturing Company." *Penberthy Injector Co. v. Lee*, 120 Mich. 174, 78 N. W. 1074.

"Remington-Sholes Company" held not identical with, nor an imitation of "Remington Standard Typewriter Company," "Remington Typewriter Company," or "E. Remington & Sons." *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 49 L. Ed. 972, rev'g 122 Fed. 348, 110 Fed. 520.

"Roy Watch-Case Company" held entitled to an injunction pendente lite against the "Camm-Roy Watch-Case Company." *Roy Watch-Case Co. v. Camm-Roy Watch-Case Co.*, 28 N. Y. Misc. 45, 58 N. Y. Supp. 979.

"Salvation Army in the United States" held entitled to a reversal of the judgment dismissing its complaint for injunctive relief against the "American Salvation Army", which was incorporated in Pennsylvania prior to the time of the plaintiff's

incorporation in New York but which did not come into the latter state until after such time, and to a new trial. *Salvation Army in United States v. American Salvation Army*, 135 N. Y. App. Div. 268, 120 N. Y. Supp. 471, rev'g 62 N. Y. Misc. 360, 114 N. Y. Supp. 1039. See also *Salvation Army in United States v. American Salvation Army*, 122 N. Y. Supp. 97, aff'd 141 N. Y. App. Div. 931, 126 N. Y. Supp. 1145.

"San Francisco Oyster House," a corporation, held entitled to an injunction against the "San Francisco Oyster & Chop House," a copartnership. *San Francisco Oyster House v. Mihich*, 75 Wash. 274, 134 Pac. 921 (question at issue was as to priority of legal acquisition of name).

"Scientific American Compiling Department" held subject to an injunction at the suit of the corporation entitled to use the trade name "Scientific American." *Munn & Co. v. Americana Co.*, 82 N. J. Eq. 63, 88 Atl. 330.

"Sheffield-King Milling Company" held entitled to an injunction against the "Sheffield Mill & Elevator Company." *Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co.*, 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447.

"Society of the War of 1812," incorporated under the laws of New York, held entitled to an injunction pendente lite against the use by another New York corporation of the name "Society of the War of 1812 in the State of New York." *Society of War of 1812 v. Society of War of 1812*, 46 N. Y. App. Div. 568, 62 N. Y. Supp. 355.

"Standard Distilling Company," a partnership, held to have alleged facts in their bill against the "Standard Distilling & Distributing Company,"

§ 726. Unfair competition—In general. It has been said that a

a corporation, which required the overruling of a demurrer to such bill on the ground that it did not state facts sufficient to constitute a cause of action. *Block v. Standard Distilling & Distributing Co.*, 95 Fed. 978, 980.

"*Stephen Merritt Burial & Cremation Company*" held entitled to enjoin the "*Stephen Merritt Company*" from carrying on an undertaking business. *Stephen Merritt Burial & Cremation Co. v. Stephen Merritt Co.*, 155 N. Y. App. Div. 565, 140 N. Y. Supp. 895.

"*The Fremont Undertaking Company*," unincorporated, held entitled to an injunction against "*The Fremont Undertaking Company, Inc.*," a corporation. *Rosenburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886.

"*The McFell Electric Company*" held entitled to an injunction against the "*McFell Electric and Telephone Co.*" *McFell Elec. & Tel. Co. v. McFell Elec. Co.*, 110 Ill. App. 182.

"*The New Method Steam Laundry Company*," a corporation, held entitled to an injunction against "*The New Method Damp Wash Laundry Company*," unincorporated. *New Method Steam Laundry Co. v. Tomlinson*, 35 Pa. Co. Ct. 296.

"*The Young Women's Christian Association of Chicago*" held entitled to a perpetual injunction against the "*International Committee of the Young Women's Christian Associations*." *International Committee of Young Women's Christian Ass'n v. Young Women's Christian Ass'n of Chicago*, 194 Ill. 194, 56 L. R. A. 888, 62 N. E. 551, aff'd 86 Ill. App. 607.

"*Travelers' Insurance Company*" held not entitled to an injunction against the "*Travelers' Insurance Machine Co.*" *Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford*,

142 Ky. 523, 134 S. W. 877, opinion corrected without affecting judgment, 143 Ky. 216, 136 S. W. 154.

"*United States Frame & Picture Co.*" held not entitled to an injunction against the use of the name "*New York Frame & Picture Co.*" or "*N. Y. Frame & Picture Co.*" by one of its former employees and officers, no intent to deceive on the part of the defendant being predicable on the mere assumption by him of such name or names and his wide advertisement thereof. *United States Frame & Picture Co. v. Horowitz*, 51 N. Y. Misc. 101, 100 N. Y. Supp. 705.

"*Valvoline Oil Company*" held not entitled to an injunction against the "*Havoline Oil Company*." *Valvoline Oil Co. v. Havoline Oil Co.*, 211 Fed. 189.

"*Wm. H. Rogers Corporation*" will be enjoined, at the suit of the corporation entitled to use the trade names "*Wm. Rogers & Son*," "*Wm. Rogers*," and "*Wm. Rogers Manufacturing Company*," "from using the word '*Rogers*' in any form—even as a part of * * * [its corporate] name—in connection with the manufacture and sale of silver-plated tableware carried on by [it] or on [its] behalf." *International Silver Co. v. William H. Rogers Corporation*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 3 Ann. Cas. 804, 60 Atl. 187, enlarging extent of injunctive relief awarded in 66 N. J. Eq. 119, 2 Ann. Cas. 407, 57 Atl. 1037, and reversing latter for entry of proper decree.

For other cases bearing upon the right to use the name "*Rogers*" in connection with the manufacture and sale of silver-plated ware, see *International Silver Co. v. Rodgers Bros. Cutlery Co.*, 136 Fed. 1019; *International Silver Co. v. Wm. G. Rogers Co.*, 113 Fed. 526, aff'd 118 Fed. 133; *Interna-*

corporate name is, of necessity, a trade-mark³⁶ and again, that even if it is not technically a trade-mark,³⁷ it will be protected on the same principles as one.³⁸

tional Silver Co. v. Simeon H. Rogers Co., 110 Fed. 955; Wm. Rogers Mfg. Co. v. Rogers, 84 Fed. 639, aff'd 95 Fed. 1007; Rogers v. Wm. Rogers Mfg. Co., 70 Fed. 1019; R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 70 Fed. 1017; William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co., 11 Fed. 495; William Rogers Mfg. Co. v. Simpson, 54 Conn. 527, 9 Atl. 395; Rogers v. Rogers, 53 Conn. 121, 55 Am. Rep. 78, 5 Atl. 675, 1 Atl. 807; William A. Rogers, Ltd. v. International Silver Co., 34 App. Cas. (D. C.) 410, 413, 484; Wm. A. Rogers v. International Silver Co., 30 App. Cas. (D. C.) 97.

A remote assignee of the right to use the trade name "Sarony" in connection with a photographic business held to have stated grounds for injunctive relief against the "Otto Sarony Company, Photographers" which was organized by a third person who, for one share of stock, secured from Otto Sarony, the executor of the original "Sarony" and, as such, the original assignor of the right to use the trade name "Sarony," the right to use the name "Otto Sarony" as part of the corporate name. Burrow v. Marceau, 124 N. Y. App. Div. 665, 109 N. Y. Supp. 105.

³⁶ "Under the law the corporate name is a necessary element of the corporation's existence. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name is to injure the business and rights of the

corporation by destroying or confusing its identity. The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity." Newby v. Oregon Cent. Ry. Co., Fed. Cas. No. 10,144, Deady 609. Followed in Merchants' Detective Ass'n v. Detective Mercantile Agency, 25 Ill. App. 250, 256, and criticised in Hopkins on Trademarks, pp. 150, 151.

In St. Patrick's Alliance of America v. Byrne, 59 N. J. Eq. 20, 44 Atl. 716, 718, it was said that the name of corporation "may stand as a trade-mark, which a court of equity will protect against infringement."

"A corporate name is regarded as in the nature of a trade-mark." Fite v. Dorman (Tenn.), 57 S. W. 129. See also Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co., 120 Mich. 159, 44 L. R. A. 841, 78 N. W. 1072; Williams v. Farrand, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446.

³⁷ "Although not technically a trade-mark, the authorities are in favor of holding that a corporate name deserves the same consideration as a trade-mark; some even going so far as to hold that it is a trade-mark, and will be protected as such." Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co., 1 N. Y. Supp. 44, 21 Abb. N. C. 104.

³⁸ "The law having authorized the selection of a name, and having declared the name so selected to be the name of the corporation, we see no reason why the law should not protect the corporation in the use of that

On the other hand, that a corporate name is a trade-mark has been squarely denied.³⁹

Without going into the question thus raised further than to call attention to the fact that since generic terms are not capable of appropriation as trade-marks,⁴⁰ there would to-day be many corporate names which would not be entitled to protection were the right thereto to be determined by the law of trade-marks, it is sufficient that courts of equity have found another and a broader ground upon which protection can be rested, namely that of unfair competition.⁴¹

Fraud is the essence of unfair competition,⁴² which has been said

name upon the same principle, and to the same extent, that individuals are protected in the use of trade-marks." *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324, quoted with approval in *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123. See also in this connection:

United States. *Investor Pub. Co. of Massachusetts v. Dobinson*, 72 Fed. 603.

Georgia. *Rome Machine & Foundry Co. v. Davis Foundry & Machine Works*, 135 Ga. 17, 68 S. E. 800.

Iowa. *Grand Lodge A. O. U. W. of Iowa v. Graham*, 96 Iowa 592, 31 L. R. A. 133, 65 N. W. 837.

Missouri. *State v. McGrath*, 92 Mo. 355, 5 S. W. 29.

New York. *Scarsdale Pub. Co. v. Carter*, 63 Misc. 271, 116 N. Y. Supp. 731.

³⁹ *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L. R. A. (N. S.) 251, 110 Pac. 23. See also *Hopkins on Trademarks*, p. 151.

"The use of a trade name is in some respects different from that of a trade-mark. The latter usually relates chiefly to the thing sold; while, in addition to this, the former involves the source from which it comes, the individuality of the maker, both for protection in trade and for avoiding confusion in business affairs, as

well as for securing to him the advantage of any good reputation which he may have gained. The law of trade-mark is designed chiefly for the protection of the public from imposition; that of trade name, for the protection of the party entitled to it. A case, therefore, in regard to trade name is of somewhat broader scope than one relating to a trade-mark." *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 79 Am. St. Rep. 786, 42 Atl. 308. See also *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L. R. A. (N. S.) 251, 110 Pac. 23.

⁴⁰ *Hopkins on Trademarks*, p. 83 et seq.

⁴¹ "The fertility of man's invention in devising new schemes of fraud is so great that the courts of equity have declined the hopeless attempt of embracing in formula all varieties of form and color, reserving to themselves the liberty to deal with it under whatever form it may present itself. As new devices of fraud are invented, they will be met by new correctives." *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

⁴² *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another." *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 49 L. Ed. 972.

to consist "in passing off one's goods as the goods of another, or in otherwise securing patronage that should go to another, by false representations that lead the patron to believe that he is patronizing the other person."⁴³

In order for an injunction to lie against the use of certain words on the ground that unfair competition results therefrom, it is not necessary that the complainant have an exclusive⁴⁴ or proprietary right⁴⁵ in such words.⁴⁶

"The principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."⁴⁷

See also *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449.

⁴³ Hopkins on Trademarks, p. 1.

⁴⁴ On the other hand, a "trademark right must be exclusive; by this test it stands or falls." Hopkins on Trademarks, p. 17.

⁴⁵ "The right to a trademark is a right of property." Hopkins on Trademarks, p. 16.

⁴⁶ *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

"Although the plaintiff has no copyright on the dictionary, or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words, unqualified and unexplained, when they would mislead the plaintiff's customers to another shop." *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 43 L. R. A. 826, 73 Am. St. Rep. 263, 53 N. E. 141.

⁴⁷ *Lee v. Haley*, L. R. 5 Ch. App. 155, 161 (although the names involved in this case were not those of corporations, the case is frequently cited and quoted in cases involving corporate names). See also *Grand Lodge*,

etc. *v. Grimshaw*, 34 App. Cas. (D. C.) 383, 385; *Original LaTosca Social Club v. LaTosca Social Club*, 23 App. Cas. (D. C.) 96; *Rubel v. Allegretti Chocolate Cream Co.*, 76 Ill. App. 581, 590, aff'd *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill. 129, 52 N. E. 487.

"Relief against unfair competition is granted solely upon the ground that one who has built up a good will and reputation for his goods or business is entitled to all of the resultant benefits. Good will or business popularity is property, and, like other property, will be protected against fraudulent invasion. The question to be determined in every case of unfair competition is whether or not, as a matter of fact, the name used by the defendant had come previously to indicate and designate the complainant's goods. Or, to put it in another way, whether the defendant, as a matter of fact, is, by his conduct, passing off his goods as the complainant's goods, or his business as the complainant's business." *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 513, rev'g 194 Fed. 554.

"While it is true that generic terms

§ 727. — Effect of incorporation on right to use prejudicial name.

The fact that the state issues a charter to a corporation by a certain name does not ordinarily give to such corporation a right to use that name, if it was deliberately chosen or is used for the purpose of deceiving the public and thereby appropriating the business of another.⁴⁸

"There is no sanctity in the name being used by a corporation either directly created by special charter or organized under general laws. If organized under a special charter, it is usually chosen by the petitioners therefor. If organized under a general law, it is chosen by the organizers. In either case they adopt it at their peril."⁴⁹

or mere descriptive words are the common property of the public, and not ordinarily susceptible of appropriation by an individual, that fact will not prevent the issuing of an injunction to restrain the use of such terms and words at the suit of one who has already adopted them, where the evidence shows a fraudulent design, and that the public will be misled." *International Committee of Young Women's Christian Ass'n v. Young Women's Christian Ass'n of Chicago*, 194 Ill. 194, 56 L. R. A. 888, 62 N. E. 551, aff'g 86 Ill. App. 607.

⁴⁸ *Bender v. Bender Store & Office Fixture Co.*, 178 Ill. App. 203.

In *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq. 595, 71 Atl. 383, it is said that the proposition that, because a corporation is chartered to use a certain name, a court of equity of the state creating the corporation cannot restrain the use thereof, does not have the sanction of the best authority.

Courts interfere in cases of similarity of names, not on the ground that the state may not bestow such names as it pleases upon its creatures, but to prevent fraud actual or constructive. *Grand Lodge, K. P. of North & South America, etc. v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963. See also *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

The name adopted is not binding upon, nor conclusive as to third persons who were not, and could not be made parties to the incorporation proceedings. *Mobile Transfer Co. v. Schwarz*, — Ala. —, 70 So. 640.

In Iowa, the name of a corporation is not a franchise since it may be selected by the corporators or acquired by usage. *Grand Lodge A. O. U. W. of Iowa v. Graham*, 96 Iowa 592, 31 L. R. A. 133, 65 N. W. 837, 839.

That under the Massachusetts statutes the right of a corporation to bear the name under which it was incorporated is a franchise "which can no more be impeached by private individuals, than can the [corporation's] franchise to be a corporation," see *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875.

⁴⁹ *Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44, 56 Atl. 861. See also *Nesue v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439, 3 Ann. Cas. 30, 101 N. W. 490.

A corporation adopts the name of an unincorporated society at its peril and may be enjoined from using it upon its appearing that the property rights of the society have been violated. *Aiello v. Montecarlo*, 21 R. I. 496, 44 Atl. 931.

Incorporation, in violation of the statute prohibiting the same, under an

A corporation cannot use its name, any more than a natural person can use his, in violation of the rights of another.⁵⁰

"In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the latter corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the state may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive."⁵¹

The statute, however, may give such effect to the certificate of incorporation as to preclude injunctive relief against the use of a similar name. Thus it has been held that a fraternal beneficiary corporation cannot enjoin the use of a similar name by another such corporation when the statute, although it provides that the name shall be one not previously in use by an existing corporation nor so similar to one thus in use as to be liable to be mistaken therefor, subsequently provides that if, upon the submission to the insurance commissioner

identical or a prejudicially similar name does not give the corporation the right to use such name as against the corporation, the business of which it was intended to obtain and it is highly probable will be obtained should an injunction not be granted. *Material Men's Mercantile Ass'n v. New York Material Men's Mercantile Ass'n*, 169 N. Y. App. Div. 843, 155 N. Y. 706.

The certificate of the corporation clerk touches no objections beyond those apparent in the name itself. In adopting a name, therefore, the organizers act, as far as their right to such name as against another corporation is concerned, at their own risk. *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 69 N. J. Eq. 159, 60 Atl. 561.

⁵⁰ *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 79 Am. St. Rep. 786, 42 Atl. 308.

If a natural person would not be permitted to use a certain word as

part of the name under which his business is conducted, a corporation cannot take such word as part of its name and thus by indirection accomplish what is otherwise forbidden. *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014, 1015.

⁵¹ *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490, quoted with approval in *Grand Lodge A. O. U. W. of Iowa v. Graham*, 96 Iowa 592, 31 L. R. A. 133, 65 N. W. 837. See also, to the point that the same rule applies as applies to the names of unincorporated organizations and natural persons, *Celluloid Mfg. Co. v. Cellomite Mfg. Co.*, 32 Fed. 94, 97; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co.*, 1 N. Y. Supp. 44, 21 Abb. N. C. 104; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123; *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L. R. A. (N. S.) 251, 110 Pac. 23.

of the prescribed certificate, it appears to him, after such examination and the production of such evidence as he deems necessary, that "the purposes and proceedings of the corporation conform to law," he shall certify his approval thereof, and the secretary of the commonwealth shall issue a certificate which "shall be conclusive evidence of the existence" of the corporation at the date of the certificate.⁵²

§ 728. — Character of corporations entitled to protect names.

Broadly speaking, the general rule is that the right of one corporation to enjoin the use of the same or a similar name by another depends upon whether such use has interfered with the former's business, whatever it may be⁵³ and without regard to whether it is commercial, trading or otherwise.⁵⁴ Thus, not only are corporations organized

⁵² *American Order of Scottish Clans v. Merrill*, 151 Mass. 558, 8 L. R. A. 320, 24 N. E. 918, dismissing bill by "American Order of Scottish Clans" against organizers of "Order of Scottish Clans," et al. In disposing of plaintiff's attempt to maintain its bill on the ground that it was entitled to have its name protected as a trade name, the court said: "We think it plain that, if its name can be called a trade name in any sense, the plaintiff gets no additional rights on that account. It received its name in the first instance as a corporate name, under the statute, subject as such to whatever interference by subsequent corporations might be permitted under the statute. The name remained subject to the same degree of interference whatever importance it might acquire in a business way. The principle is somewhat like that upon which patentees have been denied the exclusive right to the names of their patented articles as trade-marks after their patents have expired. The degree of protection to which the plaintiff is entitled is measured by the rights which the statute confers upon it. The limit is marked by the adjudication of the insurance commissioner. * * * When there are no statute provisions as to the choice of names, and parties

organize a corporation under general laws, it may be that they choose the name at their peril, and that, if they take one so like that of an existing corporation as to be misleading, and thereby to injure its business, they may be enjoined if there is no language in the statute to the contrary. * * * But * * * decisions [supporting such a proposition] do not apply to a case where the plaintiff and defendant both get their names under a statute requiring such an adjudication as was required by the act" here involved.

In *Paulino v. Portuguese Beneficial Ass'n*, 18 R. I. 165 (distinguished in *Armington v. Palmer*, 21 R. I. 109, 42 Atl. 308), it was held that the members of a voluntary association could not maintain a bill to enjoin the use of its name by a corporation, where the act of incorporation fixed that as the name of the corporation, since the right to use the name, when so fixed, was a part of the franchise of the corporation.

⁵³ See *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 15 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189, 114 N. W. 609, 112 N. W. 232.

⁵⁴ *Society of War of 1812 v. Society of War of 1812*, 46 N. Y. App. Div. 568, 62 N. Y. Supp. 355. See also

for pecuniary profit entitled to protect their names by injunction, but it has also been held that an injunction may issue to protect the name of a benevolent fraternal society,⁵⁵ a patriotic society,⁵⁶ a social club,⁵⁷ or a charitable religious society.⁵⁸

“The jurisdiction of courts of equity to prevent injury from

Longenecker v. Longenecker Bros., 140 N. Y. Supp. 403.

“A court of equity will lend its aid to restrain the unfair use of the name of a corporation formed not for pecuniary profit, to protect its property rights, i. e., the corporate entity, membership, its popularity and influence, and all that goes with them, of which the name is merely the badge.” *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972.

“The defendants endeavor to establish a distinction between cases where the corporations involved are created for the purpose of financial profit and membership corporations whose sole purposes are the literary and social advancement of the members and the payment of a death benefit at their decease. It is claimed that an injunction should not be in the latter class of cases although it lies in the former. No sufficient reason is suggested for a distinction. It will be more difficult to show that the use of the name is injurious and a fraud upon the public in the latter than in the former, but there is no difference in principle between the two.” *Daughters of Isabella No. 1 v. National Order Daughters of Isabella*, 83 Conn. 679, Ann. Cas. 1912 A 822, 78 Atl. 333, 335.

⁵⁵ *Modern Woodmen of America v. Hatfield*, 199 Fed. 270, 275; *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of the World*, 205 N. Y. 459, L. R. A. 1915 B 1074, Ann. Cas. 1913 E 639, 98 N. E. 756; *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks*

of the World, 60 N. Y. Misc. 223, 111 N. Y. Supp. 1067, aff'd 133 N. Y. App. Div. 918, 118 N. Y. Supp. 1094. See also *Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co.*, 156 N. Y. App. Div. 577, 141 N. Y. Supp. 598.

“Courts of chancery will protect corporations which are purely fraternal or benevolent in character and purpose, where their names have been wrongfully assumed by other corporations for similar purposes, when the objects and results of such wrongful assumption of name lead to confusion and detriment to the older corporation and to the public.” *Grand Lodge, K. P. of North & South America, etc. v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963.

⁵⁶ *Society of War of 1812 v. Society of War of 1812*, 46 N. Y. App. Div. 568, 62 N. Y. Supp. 355. See also *Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co.*, 156 N. Y. App. Div. 577, 141 N. Y. Supp. 598.

⁵⁷ *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972.

A social, literary and benevolent corporation may protect its name by injunction. *Daughters of Isabella No. 1 v. National Order Daughters of Isabella*, 83 Conn. 679, Ann. Cas. 1912 A 822, 78 Atl. 333.

⁵⁸ *Salvation Army in United States v. American Salvation Army*, 135 N. Y. App. Div. 268, 120 N. Y. Supp. 471. See also *Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co.*, 156 N. Y. App. Div. 577, 141 N. Y. Supp. 598.

infringement of trade names has been liberally exercised and applied in all circumstances whenever it appeared that the name was an established distinctive, and valuable adjunct to an undertaking, whether used to distinguish manufactured articles, a place of business, or a corporation, commercial, or one formed not for pecuniary gain. All that is required to bring into activity the injunctive powers of the court is to inform it that the complainant's trade is in danger of harm from the use of its name by the defendant in such a way as is calculated to deceive the public into the belief that the defendant's affairs, in the respect complained of, are those of the complainant."⁵⁹

§ 729. — When injunction will lie in general. Arbitrary rules regulating the right to an injunction cannot be laid down.⁶⁰

⁵⁹ *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972.

"A corporation has such a property right in its corporate name, whether organized for pecuniary profit or not, as a court of equity will protect by enjoining the use by another company of the same name or one so similar as to mislead the public." *People v. Rose*, 225 Ill. 496, 80 N. E. 293. See also *Daughters of Isabella No. 1 v. National Order Daughters of Isabella*, 83 Conn. 679, Ann. Cas. 1912 A 822, 78 Atl. 333.

⁶⁰ *Bates Mfg. Co. v. Bates Numbering Mach. Co.*, 172 Fed. 892, 895.

Laches will defeat the right to protection of a name. *Creswell v. Grand Lodge, K. of P.*, 225 U. S. 246, 56 L. Ed. 1074, 1080. But see *Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co.*, 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447, in which the court said: "In equity actions for relief against infringement of trade-marks or unfair competition in trade, greater diligence is required in bringing the action where an accounting for profits is sought than is required where an injunction is prayed against future infringements or acts of unfair competition. In the latter case equity will not, as a general rule, refuse the

injunction on account of delay in seeking the relief, even though the delay may be such as to preclude an accounting of profits."

A corporation is not entitled to injunctive relief against the infringement of its trade name or trade-mark when it does not come into court with clean hands, and, in this connection, it has been held that the inequitable conduct on the part of the complainant need not have been directed immediately towards the defendant, but it will be sufficient if there has been a misleading of the public coincidentally with the use of the trade name or trade-mark sought to be protected. *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq. 595, 71 Atl. 383. But see *Talbot v. Independent Order of Owls*, 220 Fed. 660, 662, a suit in behalf of the "Order of Owls," an incorporated organization, to restrain the "Independent Order of Owls," a corporation organized by members of a local body of the former order, the charter of which local body had been revoked, from, *inter alia*, using its corporate name, in which the court said: "Nor does the evidence which is found in this record upon which the defendants rely to defeat the plaintiffs, and to bring this suit under the ban of the principle, 'He

“Whether the court will interfere in a particular case must depend upon circumstances,—the identity or similarity of the names, the identity of the business of the respective corporations, how far the name is a true description of the kind and quality of the articles manufactured or the business carried on, the extent of the confusion which may be created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy.”⁶¹

While identity of name may not of itself be ground for relief,⁶² lack of identity may not be ground for refusing it.⁶³

who comes into equity must come with clean hands,’ sustain that defense. That principle does not repel all sinners from the precincts of courts of equity, nor does it disqualify any plaintiff from obtaining full relief there who has not done iniquity in the very transaction concerning which he complains. The wrong which may be invoked to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays. * * * The equity which the plaintiffs are endeavoring to enforce is the prevention of the fraudulent use by the defendants and their rival organization of a name and an emblem so similar to those of the Order of Owls that they are calculated to create confusion between the two organizations and to induce strangers to deal with the junior body in the belief that it is the senior one. The iniquity the defendants seek to present for the purpose of defeating the plaintiffs’ recovery has no necessary or other relation to that equity. Even if all the iniquity charged were proved, there is no evidence in this record that any of it induced or in any way affected the unlawful action of the defendants, in their use of the name or emblem they adopted for the evident purpose of appropriating to themselves the reputation and prestige of the Order of Owls. That alleged iniquity consisted of claimed personal

delinquencies of John W. Talbot in his relations with strangers to both organizations and in his relation to the Order of Owls, concerning which the defendants, a rival organization and its members, have no warrant to call him or the Order of Owls to account. No defense to the plaintiffs’ cause of action was established in this case, and their title to the relief they sought is clear.”

“‘Legal rights’ are not always identical with ‘clean hands.’” So it does not follow that a corporation, seeking to have its name protected by injunction, comes into court with clean hands merely because it was within its legal rights in adopting such name. *Great Western Live Stock Commission Co. v. Great Western Commission Co.*, 187 Ill. App. 196, 208.

⁶¹ *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490, quoted with approval in *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449, and followed in *Original LaTosca Social Club v. LaTosca Social Club*, 23 App. Cas. (D. C.) 96.

⁶² *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

⁶³ “The question of the right to relief against the infringement of a trade name in a given case depends upon the circumstances surrounding the adoption and advertisement of the

"Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."⁶⁴ So, to appropriate and use the distinctive portion of a corporate name is in effect to appropriate and use such name.⁶⁵

Whether the similarity between corporate names is sufficient to warrant injunctive relief is a question that must be determined upon the peculiar facts of the particular case.⁶⁶

It has been said, however, that "courts of equity must * * * assume that the public will use reasonable intelligence and discrimination with reference to the names of corporations with which they are dealing or intend to deal, the same as in cases of individuals bearing the same or similar names. It is timely enough in such cases for equity to use its extraordinary powers when it appears that deception or confusion has in fact resulted from the use of a word or a name, or when it clearly appears that such result is likely to follow."⁶⁷

name complained of, as much as upon its similarity to that of the complainant. The question in every case is whether the defendant is in fact attempting to sell his goods as the goods of some one else. When this fact is found, a basis for relief is established. The fact is to be found, as other facts, from the evidence, including therein all the relevant circumstances and conditions. Identity of name may not in itself be sufficient. A lack of identity in name will not always suffice to prevent relief being extended to one whose trade is being stolen."⁶⁴ *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

⁶⁴ *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94, 97, quoted in *Chicago Landlords' Protective Bureau v. Koebel*, 112 Ill. App. 21, aff'd 210 Ill. 176, 102 Am. St. Rep. 154; *Rubel v. Allegretti Chocolate Cream Co.*, 76 Ill. App. 581, aff'd 177 Ill. 129; *International Silver Co. v. William H. Rogers Corporation*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 3 Ann. Cas. 804, 60 Atl. 187; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *German-American Button*

Co. v. Heymsfeld, Inc., 170 N. Y. App. Div. 416, 156 N. Y. Supp. 223.

"The use of similar names is the usual artifice of the unfair trader." *Grand Lodge, K. P. of North & South America, etc. v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963.

⁶⁵ *Daughters of Isabella No. 1 v. National Order Daughters of Isabella*, 83 Conn. 679, Ann. Cas. 1912 A 822, 78 Atl. 333.

⁶⁶ *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94, 97; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co.*, 1 N. Y. Supp. 44, 21 Abb. N. C. 104.

"What degree of resemblance between the names * * * is sufficient to warrant the interference of a court * * * is not capable of exact definition. It is, and must be, from the very nature of the case, namely a question of fact, to be determined by the circumstances appearing in each particular case." *Atlas As-sur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 15 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189, 114 N. W. 609, 112 N. W. 232.

⁶⁷ *Hygeia Water Ice Co. v. New York Hygeia Ice Co.*, 140 N. Y. 94,

When a corporation has power, under the statute, to change its name, it cannot be argued that an injunction against the use of such name should not issue because the effect thereof would be to extinguish the corporation which could not act without a name.⁶⁸

§ 730. — Basis of injunction. Recognizing the fact that fraud is the essence of unfair competition,⁶⁹ the courts yet differ as to the persons for whose benefit it is their duty to intervene. Thus, some of them make fraud upon the public the ground for an injunction against the use of an identical or a similar name⁷⁰ while others—and

35 N. E. 417. See also *Car Advertising Co. v. New York City Car Advertising Co.*, 57 N. Y. Misc. 105, 107 N. Y. Supp. 547.

One trade name, in order to be an infringement upon another, need not be identical with it in form and sound; it is sufficient if the one so nearly resembles the other as to deceive persons of ordinary caution into the belief that in dealing with one concern they are dealing with the other. *Roseburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886.

"In general, it may be said that, if the resemblance is such as to mislead purchasers or those doing business with the * * * corporation using the name, who are acting with ordinary caution, this is sufficient" basis for injunctive relief. *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 15 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189, 114 N. W. 609, 112 N. W. 232. See also *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93. That whether there is a likelihood that deception of the "thoughtless" person will result from the use of the name is a question to be determined, see *British-American Tobacco Co., Ltd. v. British-American Cigar Stores Co.*, 211 Fed. 933, 935, Ann. Cas. 1915 B 363 (rev'g 206 Fed. 189), in which the court said: "We cannot resist the conclusion that the complaint states a case of

unfair competition. Unfair to the complainant because the use of its name may induce the thoughtless purchaser, anxious to secure its product, to take the defendant's instead, and unfair to the public because they may be induced to purchase not only the defendant's goods, but also its bonds and stocks, believing that they are issued by a corporation organized by or connected with the complainant."

⁶⁸ *Philadelphia Trust, Safe Deposit & Insurance Co. v. Philadelphia Trust Co.*, 123 Fed. 534, 546; *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 79 Am. St. Rep. 786, 42 Atl. 308. See also *Aiello v. Montecalto*, 21 R. I. 496, 44 Atl. 931.

⁶⁹ See § 726, *supra*.

⁷⁰ In *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co.*, 1 N. Y. Supp. 44, 21 Abb. N. C. 104, the court declared that injunctive relief is granted on the ground "First, the injury to the public, by leading them to suppose that the goods of one are the goods of the other; and, second, the injury to the owner of the trademark or name by the diversion of his trade into other channels, by the belief of the public that they are obtaining his goods."

In *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324, the court declared that "the ground on which courts of equity afford relief in this

it seems more properly—make the question whether there is a fraud upon the complainant the crucial one.⁷¹ “It has been said that the universal test question in cases of this class is whether the public is likely to be deceived as to the maker or seller of the goods. This, in our opinion, is not the fundamental question. The deception of the

class of cases is the injury to the party aggrieved, and the imposition upon the public by causing them to believe that the goods of one man or firm are the production of another.”

While it is said in *Keystone Oil & Manufacturing Co. v. Buzby*, 219 Fed. 473, 475, citing *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 55 L. Ed. 536, that “the authorities conclude that deceptive use of a name or word employed by another dealer, amounting ‘to a fraud on the public,’ must appear to sanction relief under this rule,” relating to unfair competition, it is believed that the case cited is not authority for the proposition stated, and is authority for the contrary proposition that the deceptive use need only amount to a fraud upon the one entitled to protection in the use of the name or word. Said the court in the cited case: “The essence of such a wrong [unfair competition] consists in the sale of the goods of one manufacturer or vendor for those of another.” But although the court, in *Keystone Oil & Manufacturing Co. v. Buzby*, *supra*, refers to this statement of the rule, which it quotes from *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 49 L. Ed. 972, as an apt definition thereof, it immediately thereafter makes the statement for which it cites—erroneously, it seems—*Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, *supra*, as authority. True, it is by deceiving the public that the fraud upon the one entitled to protection is accomplished, but it is the rights of the latter and not the rights of the public which the courts

seek, primarily, to vindicate. See further on this point, *Stix, Baer & Fuller Dry Goods Co. v. American Piano Co.*, 211 Fed. 271.

71 “There are numerous cases in the reports upon the subject of unfair competition in trade. From the general principle running through them all it may be said that when one has established a trade or business in which he has used a particular device, symbol, or name so that it has become known in trade as a designation of such person’s goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant. Plaintiff comes into a court of equity in such cases for the protection of his property rights. The private action is given, not for the benefit of the public, although that may be its incidental effect, but because of the invasion by defendant of that which is the exclusive property of complainant.” *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 283, 50 L. R. A. 609. See also *American Wine Co. v. Kohlman*, 158 Fed. 830, 832.

“The law of unfair competition rests on the principle that no person has the right to sell his own goods as those of another by misleading the public. The principle is one primarily to protect the party complaining, and but incidentally the public who may deal with either.” *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449.

public naturally tends to injure the proprietor of a business by diverting his customers and depriving him of sales which otherwise he might have made. This, rather than the protection of the public against imposition, is the sound and true basis for the private remedy. That the public is deceived may be evidence of the fact that the original proprietor's rights are being invaded. If, however, the rights of the original proprietor are in nowise interfered with, the deception of the public is no concern of a court of chancery." ⁷²

§ 731. — Generic terms. While the courts uniformly hold that there can be no appropriation of a generic term,⁷³ as a trade-mark,⁷⁴ and thereby, without more, preclude injunctive protection of any number of corporate names under the law of trade-marks,⁷⁵ some of

⁷² *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 513, rev'g 194 Fed. 554.

One corporation cannot enjoin the use of a similar name by another corporation for the alleged protection of certain of the former's customers who are not complaining. *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449.

⁷³ That, strictly, "generic term" includes geographical and descriptive words and proper names, see *Hopkins on Trademarks*, p. 83.

⁷⁴ "Geographical terms and words descriptive of the character, quality, or place of manufacture of an article are not capable of monopolization as a trade-mark. To entitle a person to the protection in the use of a name as a trade-mark his right to use it must be exclusive, and not a name which others may employ with as much truth as he who uses it." *American Wine Co. v. Kohlman*, 158 Fed. 830, 831. See also *Canal Co. v. Clark*, 13 Wall. (U. S.) 311, 20 L. Ed. 581.

⁷⁵ In holding "Goodyear Rubber Company" to be a name not capable of exclusive appropriation, the court, in *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 32 L. Ed. 535, said:

" 'Goodyear Rubber' are terms descriptive of well known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word 'company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. Thus parties united to produce or sell wine, or to raise cotton or grain, might style themselves Wine Company, Cotton Company, or Grain Company, but by such description they would in no respect impair the equal right of others engaged in similar business to use similar designations, for the obvious reason that all persons have a right to deal in such articles, and to publish the fact to the world. Names of such articles cannot be adopted as trademarks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name. * * * The designation Goodyear Rubber Company not being subject to exclusive appropriation, any use of terms of similar import, or any abbreviation of them,

them take a broad and liberal view of the right of corporations to protect their names and hold, in effect, that where a corporation, entitled to use the generic term which is the distinguishing feature of its corporate name has built up, under such name, a business, commercial or otherwise, which is identified, in the public mind, with such name, another corporation cannot enter the field and, on the plea that generic terms are available for use in business to all who come within their description, use a similar name which it has adopted when, by using it, it advantages itself at the expense of its competitor.⁷⁶ Thus it has been said that "where one manufacturer or dealer has adopted and acquired the right to use, as a trade name, a combination of words which indicates his place of business and also is descriptive of his product, if another, although engaged in the same line of business in

must be alike free to all persons." See also *Glucose Sugar Refining Co. v. American Glucose Sugar Refining Co.*, (N. J. Eq.), 56 Atl. 861.

In *Industrial Mut. Deposit Co. v. Central Mut. Deposit Co.*, 112 Ky. 937, 66 S. W. 1032, it was held that the "Industrial Mutual Deposit Co." was not entitled to an injunction against the "Central Mutual Deposit Company" since the words "Mutual Deposit" are generic terms descriptive of the business conducted by each of the companies.

⁷⁶ "Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trade-marks. * * * But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity to the same extent as those of any other terms or symbols." *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. 41, 47.

"It must be conceded that, while the general rule debars a party from protection in the use of descriptive words as a trade-mark, the tendency of the more recent decisions seems to be to hold that the fact that the words

are descriptive will not prevent the issuance of an injunction where there is conclusive evidence of a fraudulent design and sufficient reason to presume that the public will be misled." *Merchants' Detective Ass'n v. Detective Mercantile Agency*, 25 Ill. App. 250.

Where two corporations are each entitled to the same or to a similar name, and no fraud or deceit is alleged and proven, the doing of business by one of the corporations under the name adopted will not be enjoined although the identity or similarity of names ipso facto results in confusion, and all that the other corporation is entitled to is an injunction against the defendant's use of its name in a manner which produces confusion that would not otherwise exist. *Employers' Liability Assur. Corporation v. Employers' Liability Ins. Co.*, 10 N. Y. Supp. 845, 24 Abb. N. C. 368, rev'd 61 Hun 552, 16 N. Y. Supp. 397, 41 N. Y. St. Rep. 390.

As to the effect of the fact that the distinguishing feature of the name, for which protection is sought, is a generic term on the question of the necessity, in a suit for an injunction, of proving fraudulent intent, see § 733, *infra*.

the same town, and having the right to use the same words to indicate his location and the nature of his business, thereafter combines such words into a trade name for himself which is, in form, so nearly like that previously adopted by his competitor as to mislead the public, it constitutes unfair competition. While his competitor cannot acquire the exclusive right to use the name of the town in which both do business, nor the exclusive right to use the descriptive words ordinarily used to indicate the nature of such business, yet, if the one second in point of time desires to incorporate such words in his own trade name, he must use them in such form, or combine them with other words in such manner, that his trade name will be fairly distinguishable from that of his competitor. He is not permitted to simulate the prior trade name to such an extent that purchasers will be led to deal with him under the belief that they are dealing with his competitor." 77 In the same case, it is said that "a person may lose the right to use his own name as a trade name, except in such form, or in such combination with other words, as will distinguish his business and product from that of a competitor whose business or product are already generally known by such name. * * * The same rule applies with greater force to corporations. * * * 78 Again, in another case, it

77 *Rodseth v. Northwestern Marble Works*, 129 Minn. 472, Ann. Cas. 1917 A 257, 152 N. W. 885, 887.

"A word indicating the locality of manufacture * * * may be used by any one who can truthfully do so * * * unless by long-continued use by another such word has gained a secondary meaning." *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93.

"The rule [that the fact that a trade name or some part of it is a geographical name does not exclude it from the operation of the rule prohibiting the infringement of trade names] is not rested on the principle that the user has a property in a name; but on the principle that it is a fraud on both the person who has established a trade, which he carries on under a given name, and the public who trade with the person on the faith of the name, to allow another to assume the same or a similar name

for the purpose of selling his own goods or inducing people to trade with him under the belief that they are purchasing the goods of or trading with the person who established the name." *Rosenburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886.

"It is doubtless true that no exclusive right can be obtained to the use of the words 'United States,' or any other general geographical designation; but the use of these words in connection with others already appropriated as the title of another corporation may be unlawful." In re *United States Mercantile Reporting & Collecting Ass'n*, 52 Hun 611, 4 N. Y. Supp. 916, 22 N. Y. St. Rep. 494, appeal dismissed (N. Y.), 21 N. E. 1034.

78 *Rodseth v. Northwestern Marble Works*, 129 Minn. 472, Ann. Cas. 1917 A 257, 152 N. W. 885.

Even in the early case of *Holmes, Booth & Haydens v. Holmes, Booth &*

is said, "There may be found many cases which say, in substance, that

Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324, it was held that a corporation, the name of which included the names of certain of its stockholders, might have injunctive relief against a corporation, subsequently organized and transacting the same business in the same localities, the name of which likewise included the names of such stockholders who have withdrawn from the former and become stockholders in the latter. Said the court: "It is contended, conceding that if John Doe and Richard Roe had formed the defendant corporation, they would have had no right to use the petitioners' name; that the petitioners, by incorporating into their name the names of some of the principal corporators, have forfeited their right to this protection [of their corporate name], for the reason that they could not thereby so absorb the names of Israel Holmes and John C. Booth as to prevent them from imparting the right to use their names to any other corporation or business firm with which they might become connected. We state the claim in this form, because, as it seems to us, in this form only has it any application to the present case. We do not wish to be understood as deciding that the respondents may not, in any legitimate way, indicate to the trade that their business had the benefit of the experience, skill and reputation of these gentlemen. But the simple question is, have they a right to do it by a substantial use of the petitioners' name? In answering this question we shall answer that Mr. Holmes and Mr. Booth, in the first instance, had a perfect right to prohibit the use of their names by the petitioners. If so, presumptively at least, they assented to such use. They subscribed to the capital stock with the knowledge, if

not upon the condition, that the corporation would thus hold out to the world that their skill and experience were involved in the enterprise. The same consideration may have influenced others to subscribe to the stock originally or to purchase stock subsequently. The value of the stock may have depended upon it. There is involved in the case, therefore, the element of a contract or an estoppel. If these parties allowed the use of their names, thereby receiving, as they might have done, and probably did, a consideration in the enhanced value of their stock, why does not the law imply an agreement that the name shall continue so long as the corporation shall exist? Or, if they, in connection with others, held out to the world, by the use of their names, that the corporation was entitled to the benefit of their skill and experience, what moral, equitable or legal right have they now to withdraw, or otherwise impair, the right to the use of their names?"

"The trend of the later cases is to extend the limitation upon the right [to use a family name in business] whenever it is necessary to do justice and prevent unfair competition in trade. Upon principle and authority we hold that every person is entitled honestly to use his own name in business, either alone or associated with others in a partnership or corporation. He may not, however, use his name as an artifice to mislead the public as to the identity of the business or corporation, or the article produced, and thereby unfairly divert the business of another person, partnership, or corporation, who first lawfully selected the trade-name, established a business, and produced an article which is identified by the name. Such a use of one's own name,

a man cannot be deprived of the right to use his name in a lawful business by reason of the fact that the same name has become a trade name owned by another, and this is undoubtedly true, but this does not mean that it may be used at all times or on all surfaces or in all possible ways; in a word, it does not mean that the use may not be subjected to such conditions as are adequate to protect the public against deception and business competitors against unfair competition. It does mean, of course, that the right to use a proper name is not to be interfered with except so far as it may be necessary to accomplish the purposes mentioned.”⁷⁹

unaccompanied by a caution or explanation so specific as to prevent any confusion as to the identity of the corporation or its product, may be enjoined.” *Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co.*, 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447.

⁷⁹*J. I. Case Plow Works v. J. I. Case Threshing Mach. Co.*, 162 Wis. 185, 155 N. W. 128.

A family name cannot be used for purposes of deception. *Williams Soap Co. v. J. B. Williams Soap Co.*, 193 Fed. 384, 386, writ of certiorari denied 225 U. S. 712, 56 L. Ed. 1268 (mem. dec.). See also *J. & P. Coats, Ltd. v. John Coates Thread Co.*, 135 Fed. 177, 179; *Garrett v. T. H. Garrett & Co.*, 78 Fed. 472, 478; *International Silver Co. v. William H. Rogers Corporation*, 66 N. J. Eq. 119, 2 Ann. Cas. 407, 57 Atl. 1037, reversed for entry of decree enlarging extent of injunctive relief awarded, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 3 Ann. Cas. 804, 60 Atl. 187; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, 83 L. T. R. (N. S.) 259.

“A body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such name has been intentionally selected in order to com-

pete with an established concern of the same name, engaged in similar business, and divert the latter’s trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. No person is permitted to use his own in such manner as to inflict an unnecessary injury upon another.” *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 1019, by Wallace, J., specially concurring. See also *International Silver Co. v. William H. Rogers Corporation*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 3 Ann. Cas. 804, 60 Atl. 187.

“It is now settled beyond controversy that a family surname is incapable of exclusive appropriation in trade. The right of every man to use his own name in his business was declared in the law before the modern doctrine of unfair trade competition had arisen. It is part of the law of trade-mark. The subject may therefore be properly approached from that side. If, however, the name has previously become well known in trade, the second comer uses it subject to three important restrictions: (1) He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer. (2) He must exercise reasonable care to prevent the public from so believing. (3) He must exercise reasonable care to prevent the

§ 732. — **Competition, deception and damage.** Competition is essential to unfair competition.⁸⁰

One corporation cannot enjoin another corporation from using the same or a similar name when the business of the two corporations is entirely dissimilar,⁸¹ or, it would seem, when their markets are widely separated.⁸²

That a corporation has the power under its charter, and intends, at some future time, to engage in the business which a corporation, adopting an allegedly prejudicial name, was organized to carry on, does not make the latter a competitor of the former within the rule

public from believing that he is the successor in business of the first manufacturer. This duty to warn, however, must not be pressed so far as to make it impracticable for the second comer to use his name in trade. Otherwise we destroy under the law of unfair trade competition the very right which we have saved under the law of trade-mark." *Stix, Baer & Fuller Dry Goods Co. v. American Piano Co.*, 211 Fed. 271, 274, wherein the court defines the right of "Knabe Bros. Company," as against the successor of "William Knabe & Company Manufacturing Company," to use the name "Knabe" in the manufacture and sale of pianos. For other litigation relative to such right, see *Knabe Bros. Co. v. American Piano Co.*, 232 Fed. 140, 229 Fed. 23, making the statement (quoted in *W. F. & John Barnes Co. v. Vandyck-Churchill Co.*, 207 Fed. 855, 859; *Bates Mfg. Co. v. Bates Mach. Co.*, 141 Fed. 213, 214) that "we hold that, in the absence of contract, fraud, or estoppel, any man may use his own name, in all legitimate ways; and as the whole or a part of a corporate name," the court, in *Howe Scale Co. v. Wycoff, Seamans & Benedict*, 198 U. S. 118, 49 L. Ed. 972, held that it is not the mere fact of use, but, rather, dishonesty in the use of the name of a natural person in a corporate name that renders the corporation adopting

the name liable to injunction, and, further, that necessity is not the test by which to determine the right of a corporation to use such a name but that the right will depend upon the determination of the question whether such is reasonable and honest.

⁸⁰ *Eastern Outfitting Co. v. Mannheim*, 59 Wash. 428, 433, 35 L. R. A. (N. S.) 251, 110 Pac. 23.

"The phrase 'unfair competition' presupposes competition of some sort. In the absence of competition the doctrine cannot be invoked." *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 514, rev'g 194 Fed. 554.

A corporation, formally dissolved but which still exists, under a statute so providing, for the payment of outstanding bonds has sufficient interest to sue to enjoin the use of its name by a corporation organized after the formal dissolution. *Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co.*, 156 N. Y. App. Div. 577, 141 N. Y. Supp. 598.

⁸¹ *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co.*, 1 N. Y. Supp. 44, 21 Abb. N. C. 104. See also *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449.

⁸² See the cases cited *infra*, this section.

that there must be "competition" before there can be "unfair competition."⁸³ Where, however, there is certain competition between the plaintiff and the defendant, at the time at which an injunction is sought, in one line of business, it may be that the fact that the defendant has power under its charter to engage in other lines of business, the actual engaging in which will make it still more a competitor of the plaintiff, will weigh in favor of the latter in determining whether an injunction shall issue. It may be, however, where the junior corporation has the power under its charter to engage in lines of business other than the one that it is carrying on at the time at which an injunction is sought, the actual engaging in which lines of business will make it a competitor of the plaintiff to an even greater extent than it is at such time, that such fact will weigh in favor of the plaintiff in determining whether an injunction shall issue.⁸⁴ So, again, where two corporations are engaged in manufacturing the same class of goods and in selling such goods in the same open market, the right of one of such corporations to enjoin the other from using a similar name is not affected by the fact that the manufacturing establishment of the former is located in a different community from that of the latter.⁸⁵

⁸³ *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 514, rev'g 194 Fed. 554.

Although a corporation, owing to financial difficulties, has sold its visible property and is not in active business, it still has a right to its name and to have that right protected from violation. *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 79 Am. St. Rep. 786, 42 Atl. 308.

Although the defendant may not at the time be competing with the plaintiff for business of the character each was authorized to carry on, its use of plaintiff's name may constitute unfair competition when it has issued and is attempting to dispose of its mortgage bonds and plaintiff, although formally dissolved, has a large number of its own bonds outstanding. *Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co.*, 156 N. Y. App. Div. 577, 141 N. Y. Supp. 598.

⁸⁴ *German-American Button Co. v. A. Heymsfeld, Inc.*, 170 N. Y. App. Div. 416, 156 N. Y. Supp. 223.

⁸⁵ *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 371.

The fact that a corporation is located in one part of the state and those using a name similar to the one adopted by it are conducting their business in another part of the state may be sufficient to preclude the results which would entitle the corporation to injunctive relief. See *Bingham School v. Gray*, 122 N. C. 699, 41 L. R. A. 243, 30 S. E. 304.

In *Nebraska Loan & Trust Co. v. Nine*, 27 Neb. 507, 20 Am. St. Rep. 686, 43 N. W. 348, it was held that a loan and trust company which had adopted the name of the state as part of its corporate name, as in the above citation, was not entitled to an injunction restraining a similar use of the name of the state

The right to the exclusive use of a trade name is coextensive with the market of the trade name's owner, and in a suit, based on unfair competition, to enjoin the use of such name the question to be determined is, what is the owner's market.⁸⁶

While it has been said that neither deception nor damage need actually have resulted from the use of a similar corporate name, in order for an injunction to lie against the use of such name,⁸⁷ it would seem that an injunction should not be granted when the deception and consequent damage which it is alleged will result in the future are merely speculative and not reasonably sure and certain.⁸⁸

by another such company. doing business at a point one hundred miles distant, where the proof did not show any conflict of interest, or that the plaintiff's business would be materially interfered with.

⁸⁶ *Eastern Outfitting Co. v. Mannheim*, 59 Wash. 428, 35 L. R. A. (N. S.) 251, 110 Pac. 23.

⁸⁷ *Material Men's Mercantile Ass'n v. New York Material Men's Mercantile Ass'n*, 169 N. Y. App. Div. 843, 155 N. Y. Supp. 706.

"The exclusive right of a corporation to its name is one that of itself carries the presumption of injury by interference, and will therefore be protected." *American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey*, 198 Pa. 189, 47 Atl. 936. See also *In re Charter of Iron City Lodge*, etc., 39 Pa. Super. Ct. 365; *New Method Steam Laundry Co. v. Tomlinson*, 35 Pa. Co. Ct. 296, 298.

"Proof that confusion has already resulted is merely evidence of the liability to deception." *German-American Button Co. v. A. Heymsfeld, Inc.*, 170 N. Y. App. Div. 416, 156 N. Y. Supp. 223. But see *Original LaTosca Social Club v. LaTosca Social Club*, 23 App. Cas. (D. C.) 96, in which the court said: "It is only in plain cases of wrong and mischief that the court will be disposed to apply the strong remedy by injunction to re-

strain the use of a name. The business operations of a party or corporation should not be restrained upon mere speculative or possible injury, because of the use of a particular name claimed by another. The injury must be shown to be real, and such as a court of equity, upon principles of justice, will interpose to prevent. * * * There is no right to the injunction, merely from the similarity of names; there must be injury shown to result therefrom."

Under the express provisions of the New York statutes, an injunction will lie in case of the threatened violation of the statute making it a misdemeanor to assume, adopt or use the name of a domestic benevolent, humane or charitable corporation, or a name so nearly resembling it as to be calculated to deceive the public, with intent to acquire or obtain for personal or business purposes a benefit or advantage, and if it appears that the defendant is in fact using such a name an injunction may issue without proof that any person has actually been misled or deceived thereby. See *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of the World*, 205 N. Y. 459, L. R. A. 1915 B 1074, Ann. Cas. 1913 E 639, 98 N. E. 756.

⁸⁸ See, generally, § 729, *supra*.

§ 733. — **Intent.** While the intent with which one corporation adopts a name identical with, or similar to that of another corporation may be material in an action at law, by the latter against the former, for damages,⁸⁹ and even in a suit in equity for an injunction when the distinguishing feature of both names is a certain generic term,⁹⁰ the

⁸⁹ See *German-American Button Co. v. A. Heymsfeld, Inc.*, 170 N. Y. App. Div. 416, 156 N. Y. Supp. 223.

⁹⁰ It has been said that the application of the rule denying the necessity of proving fraudulent intent "is brought into question where the name used by the defendant is either his own or a name which is part of the common stock of the language, such names being both classes of words which *prima facie* he is entitled to use, subject, however, to the qualification that he must so use them as not to represent (either intentionally or otherwise) his goods to be those of another whom he knows to be using the name. In such cases proof of other facts than the mere choice of the name may be necessary to justify either the presumption or conclusion that the use of the name by defendant is for the purpose of representing his goods to be the goods of complainant, and therefore unfair competition." *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 69 N. J. Eq. 159, 60 Atl. 561. Before making the statement, above quoted, Emery, V. C., said: "Where the use complained of is that of the use of defendant's own name, either individually or as part of a corporate title, courts have differed upon the question whether fraudulent intent in the use of the name must be shown in order to entitle complainant to an injunction, and the status of the authorities on this important question is thoroughly examined by Vice Chancellor Stevens, before whom the Rogers Case was heard, in his opinion * * * [*infra*, note 91]. He concluded that the whole

question of unfair competition by the use of names or words, of which complainant claimed a benefit, by reason of trade reputation given to them exclusively by it, was reduced to the single substantial inquiry whether the defendant was in fact, by the use of the name or word, representing his goods as the goods of the complainant, and that, if he was so representing his goods, then by the weight of authority fraudulent intent in the use need not be proved to obtain an injunction, although it might be necessary in an action for damages for the false representation." As far, however, as the point, on which *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.* is quoted, is concerned, the value of such case is somewhat minimized by the fact that the determination of the question recognized was not essential to the solution of the question at issue. Moreover, the introduction in the quoted statement, itself, of the parenthetical phrase "either intentionally or otherwise" would seem to nullify whatever qualifying effect such statement might otherwise have, and make it but a reiteration of the proposition that misrepresentation, without regard to intent or to the words forming the objectionable name, is the basis of injunctive relief. For a later case from the same jurisdiction in which a name containing a generic term is awarded injunctive protection, see *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972. See also in connection with the proposition contained in the first quotation above, § 731, *supra*.

rule which generally applies is that invasion of rights⁹¹ and not intent is the test by which the right to an injunction is to be determined.⁹²

⁹¹ *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

"The test is: Is the resemblance calculated to mislead or confuse, to the complainant's damage?" *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972.

⁹² The probable and ordinary consequences of the act of adopting a name similar to one already lawfully appropriated by others rather than the specific intent or motive with which such name was adopted constitutes the test of the right to an injunction against the use of such name. *Nesue v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439, 3 Ann. Cas. 30, 101 N. W. 490. See also in this connection:

United States. *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 371.

Iowa. *Red Polled Cattle Club of America v. Red Polled Cattle Club of America*, 108 Iowa 105, 78 N. W. 803.

Pennsylvania. *American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey*, 198 Pa. 189, 47 Atl. 936.

Rhode Island. *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 79 Am. St. Rep. 786, 42 Atl. 308.

England: *North Cheshire, etc., Brewery Co. v. Manchester Brewing Co., Ltd.*, [1899] App. Cas. 83.

That fraudulent intent is not necessary to injunctive relief, see the following cases:

United States. *Bates Mfg. Co. v. Bates Numbering Mach. Co.*, 172 Fed. 892, 895; *J. & P. Coats, Ltd. v. John Coates Thread Co.*, 185 Fed. 177, 180; *Van Houten v. Hooton Cocoa & Chocolate Co.*, 130 Fed. 600, 603; *Fuller v. Huff*, 104 Fed. 141, 145, 51 L. R. A. 332.

Connecticut. *Holmes, Booth & Hay-*

dens v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

Illinois. *Koebel v. Chicago Landlords' Protective-Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154, 71 N. E. 362, aff'g 112 Ill. App. 21.

New Jersey. *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972; *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 69 N. J. Eq. 159, 60 Atl. 561.

New York. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *German-American Button Co. v. A. Heymsfeld, Inc.*, 170 App. Div. 416, 156 N. Y. Supp. 223.

"When such unfair name is selected by a corporation for the purpose of deceiving the public into the belief that its goods are the goods of another, the use of that name for that means will be enjoined. * * * We think the rule goes even further and is that when the use of a name results in the palming off of one's goods on the public as the goods of another, the use of such name will be enjoined." *Bender v. Bender Store & Office Fixture Co.*, 178 Ill. App. 203.

Even in a case in which the court regarded the name of a corporation as a trade-mark and declared it subject to protection as such, it was said that "the motives of the persons attempting the wrongful appropriation [of such a name] are not material. They neither aggravate or extenuate the injury caused by such appropriation. The act is an illegal one and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it." *Newby v. Oregon Cent. Ry. Co.*, *Deady* (U. S.) 609, Fed. Cas. No. 10,144.

"It is not necessary * * * in cases of unfair competition to show

"The vital question, in cases of this kind, is not, what did the defendant mean? but what has he done. The legal quality of an act, resulting in injury, must be decided, not by the motive with which it was done, but by the consequences which have necessarily resulted from it. The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges of its legal quality solely by the consequences which have naturally and necessarily proceeded from it. It is no less a dictate of justice than of sound reason that every person must be understood to have intended to do just what is the natural consequence of his act deliberately done."⁹³

by direct evidence the existence of an intention to defraud. Where there is no such proof, fraud may be inferred in many cases from the fact of imitation alone." *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 15 L. B. A. (N. S.) 625, 128 Am. St. Rep. 189, 114 N. W. 609, 112 N. W. 232.

If actual fraud be essential to injunctive relief against the use of a certain name, it may be presumed from the adoption, with knowledge, of the name of another corporation or a name so similar as to cause actual or probable loss or damage to the other, i. e., if the adoption of such name would have the natural and necessary tendency to cause such loss or damage to the other party. *Grand Lodge, K. P. of North & South America, etc. v. Grand Lodge, K. P.*, 174 Ala. 395, 56 So. 963.

In a suit for an injunction against defendant's use of its corporate name on the ground that such use constitutes an infringement of plaintiff's trade-mark, it is not necessary to prove wrongful intent nor to show facts justifying an inference of such an intent. *Oneida Community v. Oneida Game Trap Co.*, 168 N. Y. App. Div. 769, 154 N. Y. Supp. 391, modifying 150 N. Y. Supp. 918.

⁹³ *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658, which, while it differs from *International Silver*

Co. v. Wm. H. Rogers Corporation, 66 N. J. Eq. 119, 2 Ann. Cas. 407, 57 Atl. 1037 (reversed for entry of decree enlarging extent of injunctive relief awarded, 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 3 Ann. Cas. 504, 60 Atl. 157), a suit to enjoin, inter alia, defendant's use of its corporate name in certain connections, in being a suit to enjoin the counterfeiting of bottle labels, is quoted approvingly therein. Treating of this matter, *Stevens, V. C.*, in *International Silver Co. v. Wm. H. Rogers Corporation*, supra, said: "I now come to a question as to which there seems to have been considerable contrariety of judicial opinion. Is it necessary to prove fraudulent intent? Must it be shown not only that the representation is false in fact, but that it is intentionally false? Some dicta, especially in the earlier cases, do go to the length of so asserting, but the weight of judicial opinion is the other way. In some of the cases confusion may have resulted from a failure to distinguish between the legal and the equitable rule on the subject of false representation. In an action of deceit to recover damages, says Judge Depue, in *Cowley v. Smyth*, 46 N. J. Law, 350, 50 Am. Rep. 432, 'a false representation without a fraudulent design is insufficient. There must be moral fraud in the misrepresentation to support the ac-

On the other hand, it has been held that fraudulent intent on the part of a corporation in adopting and using a certain name is not ground for enjoining, at the suit of another corporation bearing a similar name, the use of such name, unless the property rights of the latter corporation are jeopardized by such use.⁹⁴

tion.' The rule, as he pointed out, is different in equity. *Eibel v. Von Fell*, 55 N. J. Eq. 670, 38 Atl. 201, is to the same effect. Lord Cairus, in *Singer Machine Manufac. Co. v. Wilson*, 3 A. C. 392, adverts to this subject. He said: 'In *Nullington v. Fox*, 3 N. Y. & Cr. 338, Lord Cottenham felt satisfied that in using the plaintiffs' trademarks the defendants had no intention to mislead the public, yet, inasmuch as the public were in fact misled, he held that the plaintiffs were entitled to a perpetual injunction. It was not sufficient for the defendants to say that they used the marks in ignorance of their being the plaintiffs' trademarks. How far that doctrine is capable of being reconciled with cases at law in which the scienter has been held to be essential in order to enable the plaintiff to recover (that is, to recover damages), it is not material to consider. In this court the rule is clear as laid down in *Nullington v. Fox*.' In the subsequent case of *Singer Manufac. Co. v. Loog*, 7 App. Cas. 15, 31, Lord Blackburn seems to have doubted whether, even at law, in trade-mark cases, it was necessary to show actual fraudulent intention."

"Where a corporation has appropriated and used a name for such length of time as to become identified by the name, and had [has] established a character and reputation under it, it is a fraud upon the corporation and the public if this name be assumed by others under such circumstances as would lead the public to believe that they constitute the original corporation, and, where injury will result to the corporation on

account thereof, courts of equity will, at the suit of the injured parties, by injunction restrain the further perpetration of the wrong. It is the special injury to the party aggrieved and the imposition upon the public that constitute the wrong which the courts will redress. It is not necessary that the wrong should be intentionally committed. It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation." *Supreme Lodge, Knights of Pythias v. Improved Order of Knights of Pythias*, 113 Mich. 133, 38 L. R. A. 658, 71 N. W. 470, quoting from *St. George Lodge, K. of P. v. Rosenthal* (Superior Court of Vanderburgh County, Ind.), not reported. See also *Free & Accepted Masons of the State of Texas v. Ancient Free & Accepted Masons, Colored*, — Tex. Civ. App. —, 179 S. W. 265.

⁹⁴*Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 514, rev'g 194 Fed. 554. Said the court: "Doubtless it is morally wrong for a person to proclaim, or even intimate, that his goods are manufactured by some other and well-known concern; but this does not give rise to a private right of action, unless the property rights of that concern are interfered with. * * * Nothing else being shown, a court of equity cannot punish an unorthodox or immoral, or even dishonest, trader; it cannot enforce as such the police power of the state."

§ 734. — **Appropriation and user.** It has been said that "the right to use a particular name as a trade name belongs to the one who is first to appropriate it and use it in connection with a particular business."⁹⁵ Both prior appropriation of a certain name by a corporation and its prior use of such name are therefore essential to its right to an injunction against the use of an identical or a similar name by another corporation. Mere incorporation under a particular name does not create the right to have such name protected against use by another.⁹⁶ "The right to exclude another from using a particular name as a trade name depends upon whether the one asserting such right has made actual prior use of such name as his own trade name. The intent to appropriate a name as a trade name, not followed by actual user, is not sufficient."⁹⁷

§ 735. — **Injunction by domestic corporation against foreign corporation.** All of the other necessary elements being present,⁹⁸ a domestic corporation may enjoin a foreign corporation doing business in the state from using an identical or a similar name in carrying on such business.⁹⁹

⁹⁵ *Rosenburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886.

In *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq. 595, 71 Atl. 383, it was held that the complainant, Bear Lithia Springs Company, a domestic corporation which had succeeded to the corporate rights of the Bear Lithia Water Company, a foreign corporation, but which was not incorporated until some four months after the defendant, Great Bear Spring Company, also a domestic corporation, would have been entitled to injunctive relief against defendant's use of its corporate name if it were not for the fact that it did not come into court with clean hands.

⁹⁶ "The property right in the name of a corporation, as in a trade-mark, is acquired not simply by adoption, but by using it. The interference of courts is based upon the principle that the use of the name, or a trade-mark already acquired and used by another, is a fraud upon the person or cor-

poration, whose property it has become. * * * It cannot be the law that three or more persons may, either under our general corporation law or by special act of the legislature, become incorporated by any name which they may select for the purpose of engaging in some branch of trade or manufacture, and thereby, without engaging in the business of buying, selling, or manufacturing the article or product named in its charter, acquire a perpetual monopoly in the corporate name. This would be to create a monopoly in a corporate name without ever using it by legislative enactment and violation of our fundamental law and the well-settled policy of the state." *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 123, 59 S. E. 123.

⁹⁷ *Rodseth v. Northwestern Marble Works*, 129 Minn. 472, Ann. Cas. 1917 A 257, 152 N. W. 885.

⁹⁸ See §§ 729-734, *supra*.

⁹⁹ See, generally, to this proposition,

Foreign corporations, it has been held, are not privileged over domestic ones in the matter of the use of names similar to those of existing corporations even though the statute, while preventing the creation of a corporation under a name prejudicial to the rights of an existing corporation, makes no reference to the rights in the state of a foreign corporation bearing such a name, and the mere absence of such reference will not oust a court of equity of its general jurisdiction, which it possesses independently of statute, over the subject.¹

While it may be that a foreign corporation, having a name the same as that under which a natural person is doing a local business of the same character in the state, may have the right to carry on its business under its corporate name in a different locality, it cannot, by reason of its compliance with the state laws relative to foreign corporations, go into the same locality and there do business under such name.

In other words, compliance by a foreign corporation with the state laws, applying, does not entitle such corporation to go into any part of the state that it may choose and there do business under its corporate name to the injury of the owner of a local business conducted under the same or a similar name.²

But the right of a foreign corporation to do business in the state under its corporate name cannot be attacked by another foreign corporation of similar name or by a domestic corporation, likewise, of similar name, where the first-mentioned corporation was doing business in the state for several years before either of the other two corporations was organized.³

Daughters of Isabella No. 1 v. National Order Daughters of Isabella, 83 Conn. 679, Ann. Cas. 1912 A 822, 78 Atl. 333; Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co., 156 N. Y. App. Div. 577, 141 N. Y. Supp. 598; American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey, 198 Pa. 189, 47 Atl. 936.

Equity will enjoin a foreign corporation from using a corporate name identical with that of a domestic corporation "where the evidence shows that correspondence was impeded in the post-office and that great confu-

sion arose in the matter of telephone address and in the making of drafts and checks." Akron Tire Co. v. Akron Tire Co., 24 Pa. Dist. 676, 678.

¹ American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey, 198 Pa. 189, 47 Atl. 936.

² Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 35 L. R. A. (N. S.) 251, 110 Pac. 23.

³ High Court of Wisconsin Independent Order of Foresters v. Commissioner of Insurance, 98 Wis. 94, 73 N. W. 326.

"If * * * the defendant [a foreign corporation] had, before the creation of the plaintiff [domestic] corporation, obtained its charter under its corporate name, acquired its cor-

It has been held, however, that a domestic corporation organized, under a name identical, for all practical purposes, with that of a foreign corporation, after the latter has come into the state and has been doing business therein but without complying with the foreign corporations act will be deemed to have a prior right to the use of the common name.⁴

porate powers, organized and commenced to exercise them in this state, and in the town * * *, it would seem that it was the folly of the incorporators of plaintiff to take the same corporate name as that of the defendant, and that if any annoyance, inconvenience, or injury was occasioned by reason of the similarity of names, no relief could be had in a court of equity." *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 123, 59 S. E. 123.

A domestic corporation, organized under the same name as that of a foreign corporation doing business in the state at the time, cannot enjoin the use of such name by the successors of such foreign corporation. *Ottoman Cahvey Co. v. Dane*, 95 Ill. 203. Said the court: "We perceive no ground upon which the bill can be maintained. If the Michigan corporation was dissolved by decree of court, as claimed by the complainant, or if the Michigan corporation made an assignment, as contended, and no longer acted in the capacity of an incorporated company, still the defendants had the clear right to continue the business in which they were engaged, as partners, and, if they saw proper to conduct their business under the firm name of the 'Ottoman Cahvey Company,' no reason is perceived why they could not do so. The fact that a corporation was organized under the laws of this state, subsequent in date to the time defendants commenced business, which assumed the same name under which defendants were carrying on their business, could

confer no right upon complainant to invoke the aid of a court of equity to restrain the defendants from the use of the name. So far as the complainant was concerned the defendants had the prior right to the use of the name, as they had conducted their business under the name assumed continuously, from the date of the organization of the Michigan corporation. If the Michigan corporation was not legally organized, or if it was dissolved by decree of court, the defendants who carried on the business did so as co-partners, and they had the right, as such, to assume any name they saw proper; and they could use the name 'Ottoman Cahvey Company' as well without a legal organization, as they could had they been legally organized under the laws of Michigan."

⁴ *Central Trust Co. v. Central Trust Co. of Illinois*, 149 Fed. 789. See also, *Mutual Export & Import Corp. v. Mutual Export & Import Corp. of America*, 241 Fed. 137.

When it is neither expressly nor impliedly provided by statute to the contrary, a corporation doing business in a foreign state without having complied with the laws thereof is not, for that reason alone and without regard to other facts in the case, liable to an injunction at the suit of a domestic corporation because of its using a name similar to that of the latter. *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 123, 59 S. E. 123.

A domestic corporation adopting, with fraudulent intent, a name similar

§ 736. — Injunction by foreign corporation against domestic corporation. As to the right of a foreign corporation doing business in the state to enjoin a domestic corporation from using an identical or a similar name, the courts are not in agreement. Some of them take the position that the mere fact that a foreign corporation has no inherent right to do business in the state and is in the state by comity only does not preclude it from obtaining the injunctive relief sought. Such a view has found favor with both federal⁵ and state

to that of an existing foreign corporation, engaged in the same business, which carries on an interchange of business with a second domestic corporation, under the "open order" system, although not licensed to do business in the state held not entitled to an injunction against the foreign corporation's use of its corporate name. *Great Western Live Stock Commission Co. v. Great Western Commission Co.*, 187 Ill. App. 196.

⁵ In *Peck Bros. & Co. v. Peck Bros. Co.*, 113 Fed. 291, 62 L. R. A. 81, the court, in refusing to follow *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, 30 N. E. 339, aff'g 40 Ill. App. 430, said: "We are compelled, with deference, to differ with the learned court, if it intended to hold that incorporation under the laws of the state of Illinois protects one from the consequences of his own wrong. In a certain limited sense the sovereignty of the state had conferred the name. There is, however, in the term 'sovereignty,' no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the state of Illinois sought to do that. It has a general law of incorporation, by which any body of men combining for the purpose of business may incorporate under any name they may select. The name is not imposed by the law, but is chosen by the incorporators. With that selection the sovereignty of the

state has nothing to do. The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereignty by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him in invitum so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of a great state impugned by the denial to incorporators of a right to perpetrate such a wrong? Is it possible that a sovereignty of a state can be thus invoked to perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice. Then could one who, in connection with a business to which his name had been attached and had given value to it, having disposed of the right to use that name to another, and so by the law prohibited from using it in connection with a like business under circumstances that would work a fraud, be enabled to effect the fraud by simply becoming incorporated under that name under the sov-

courts.⁶ So also it would seem that in a proper case a corporation

ereignty of the state of Illinois. We cannot bend our judgment to the conclusion that a sovereign state designed thus to confer immunity for wrong. * * * With respect to the denial by the supreme court of Illinois of the right of a foreign corporation to contest in the courts of that state the right of a domestic corporation to the corporate name given it by the state in its articles of incorporation, even if that name be selected in fraud and be used to perpetrate a wrong, we are not concerned. The state of Illinois has the undoubted right to regulate its own courts in its own way, and, if it so will, to turn a deaf ear to a demand for justice. A federal court, however, is organized in part to listen to complaints of citizens and corporations of one state against citizens or corporations of another state, and its doors may not be closed by any ruling of a state tribunal. We study the decisions of the highest court of a state with respectful deference, but cannot be concluded thereby in such a case as the present one, when the ruling invoked, in our judgment, works a grievous wrong. We cannot follow the decision in the *Hazelton* case. The doctrine of the Illinois court, as we conceive, is not in accord with the decisions of the federal and of other state courts." See also *Modern Woodmen of America v. Hatfield*, 199 Fed. 270; *Investor Pub. Co. of Massachusetts v. Dobinson*, 72 Fed. 603.

Again, in a later federal case, *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, 181 Fed. 182, 184, 185, the court said: "The distinction made in the Illinois decision [*Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.*, 142 Ill. 494, 30 N. E. 339, aff'g 40 Ill. App. 430] is that a

foreign corporation, which comes into the state by sufferance, cannot prevent the state from naming its own corporations as it will. However, this proves too much, because a court is as much bound by the act of a state government in giving a corporate name, when complaint is made by a domestic corporation, as when by a foreign corporation. The question is not who complains. If it were true that, in giving a corporation a name, the executive of a state licensed it to use that name in any way it chose, of course no court would have power to interfere at all with the use of the name, and the charter would become a general license to use that name, whether or not the use proved tortious. The sounder view—and, indeed, the only possible view, which can justify the interference of courts in such cases between domestic corporations—is that the corporate name is given merely as the name which the entity may use so long as it acts in accordance with law. By that name so chosen it gets no license to commit what would otherwise be a tort. * * * I confess I cannot see why a foreign corporation should be obliged to submit to a tort which the state has not legalized, and which, if committed against a domestic corporation, or an alien individual, could be remedied. Of course the state might make a foreign corporation wholly an outlaw and exclude it from all tribunals, but, in so far as it has the general right to appear and complain of torts, it must be presumed to stand upon the same basis as this kind of tort, as it does as to others."

⁶ *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 15 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189, 114 N. W. 609, 112 N. W. 232; *Red Polled Cattle Club of America v. Red Polled Cattle Club*

created by one of the states of the Union may obtain, in England, an injunction against an English corporation.⁷

On the other hand, there is both federal⁸ and state authority⁹ for of America, 108 Iowa 105, 78 N. W. 503; *Hoevel Sandblast Mach. Co. v. Hoevel*, 167 N. Y. App. Div. 548, 153 N. Y. Supp. 35.

Where a corporation of one state has been transacting business in another state, with its consent, express or implied, under a certain name, it has a right, in the absence of fraud and misrepresentation, to continue using such name, notwithstanding the subsequent creation of a domestic corporation in such state with the same name. *Reed v. Wilmington Steamboat Co.*, 1 Marv. (Del.) 193.

Under the Georgia statutes, a foreign benevolent, fraternal, social, humane or charitable corporation existing in the state may enjoin the use, by a domestic corporation subsequently created, of a name so nearly resembling that of the former as to be a colorable imitation thereof. See, as involving the statutes thus providing, *Faisan v. Adair*, 144 Ga. 797, 87 S. E. 1080; *Emory v. Grand United Order of Odd Fellows*, 140 Ga. 423, 78 S. E. 922; *Independent Order of Good Samaritans & Daughters of Samaria v. Mack*, 139 Ga. 835, 78 S. E. 336.

⁷ See *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, 83 L. T. R. (N. S.) 259.

⁸ *Continental Ins. Co. v. Continental Fire Ass'n*, 101 Fed. 255, in which the court, although it finds it unnecessary to base its decision on this ground, observes that a corporation created, under and in accordance with the laws of a certain state, under a specific name certainly has a prima facie right to carry on its business under that name in such state, and that it would seem that a foreign corporation "with no such franchise," and doing business in the state only by license is

without standing to question the right of the domestic corporation to use the name authorized and granted. See *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875, as to the "franchise" character of the right to bear a certain name.

⁹ *Hazeltan Boiler Co. v. Hazeltan Tripod Boiler Co.*, 142 Ill. 494, 505, 30 N. E. 339, aff'g 40 Ill. App. 430. Said the court: "The complainant is in the attitude of a foreign corporation coming into this state and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own public policy and in the exercise of its own sovereignty has seen fit to bestow upon one of its own corporations. For such a purpose, a foreign corporation can have no standing in our courts. Such corporations do not come into this state as a matter of legal right but only by comity, and they cannot be permitted to come for the purpose of asserting rights in contravention of our laws or public policy. It is competent for this state, whenever it sees fit to do so, to debar any or all foreign corporations from doing business here, and whatever it may do by way of chartering corporations of its own, cannot be called in question by corporations which are here only by a species of legal sufferance." See also *Council of Jewish Women v. Boston Section Council of Jewish Women*, 212 Mass. 219, 98 N. E. 862.

A statute, providing that no domestic corporation shall adopt a name identical with, or closely resembling the name of any other organization "of this state," does not preclude a domestic corporation from adopting a name similar to that of a foreign corporation doing business in the

the proposition that a foreign corporation has no standing to question the right of a domestic corporation to use the name given it by the state.

As illustrative of the rule first stated, it has been held that a statute, providing that no foreign corporation doing business in the state, shall maintain any action in the state on any contract, made by it in the state, unless prior to the making of the contract it shall have procured the certificate prescribed does not preclude a foreign corporation which has been doing business in the state for some time but which does not apply for a certificate until a domestic corporation, organized with fraudulent intent, is formed under a prejudicial name from suing to enjoin the use of such name by the corporation adopting it.¹⁰

state, such foreign corporation not being an organization "of this state" within the meaning of the statute. *People v. Home Life Assur. Co.*, 111 Mich. 405, 69 N. W. 653, construing *How. Ann. St.* (2nd ed.), § 7602. Said the court: "The relator is a foreign corporation. Its domicile is in another state. By comity alone it is permitted to do business in this state. This state may at any time say to it, 'Go!' and it must go. It may at any time voluntarily withdraw from the state. * * * 1 *How. Ann. St.* § 2 [*How. Ann. St.* (2nd ed.), § 2], provides that 'all words and phrases shall be construed and understood according to the common and approved usage of the language.' The term 'corporation [organization] of this state,' used in the statute, means a corporation organized under the laws of this state, and not a foreign corporation, which may at any time remove from the state, or, by the action of the proper state authorities, be compelled to go."

¹⁰ *Hoewel Sandblast Mach. Co. v. Hoevel*, 167 N. Y. App. Div. 548, 153 N. Y. Supp. 35, 37, holding, further, that the nonpayment of the tax due only after the issuance of the certificate is no defense to a suit for an injunction.

A foreign corporation, succeeding to

the right of another foreign corporation to a certain corporate name, held not precluded from suing in a New York federal court to enjoin a domestic corporation from using a similar name by reason of the fact either that the corporation from which it derived its right to such name had not taken out a license to do business in New York as required by the New York statute which penalizes the failure of a foreign corporation to take out a license by depriving it of the right to sue on any contract made in the state, or that it, itself, has not taken out such a license, a thing impossible to it on account of the domestic corporation's having obtained registration of its similar name. *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, 181 Fed. 182, 185.

But see, contra, *American Tartar Co. v. American Tartar Co.*, 57 N. Y. App. Div. 411, 68 N. Y. Supp. 236, which denied an injunction, pendente lite, to a foreign corporation, which had not taken out a license nor complied with the laws relating to foreign corporations, against a domestic corporation, but denied it, as suggested in *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, supra, more upon the equities of the case than for

Again, it has been held that the failure of a foreign corporation to pay taxes owing by it to the state of its creation is no defense to a suit by it in a federal court to enjoin the use of a similar name by a domestic corporation.¹¹

§ 737. Necessity that name be in English language. Unless otherwise provided by statute, it is not necessary that the name of a corporation be in the English language.¹²

want of capacity in the foreign corporation to sue. Said the court: "The equities are so overwhelmingly against the plaintiff upon the facts as they appear in the affidavits that the conclusion of its being without right, on the presentation of the case as now made, to interrupt, and perhaps ruin, a legitimate business of the defendant, is not open to debate. * * * We have a very simple case of a corporation (the plaintiff) having no right to transact the business it carries on as a manufacturing corporation within the state of New York, seeking to enjoin a corporation of the state of New York from using the corporate name which it has honestly adopted, and which fairly belongs to it, and which it did not assume until after full inquiry made as to its right to do so; and this in the absence of any proof whatever that there was any fraudulent purpose or intent on the part of the defendant in adopting its name. It seems quite unnecessary to say anything further than that under such circumstances, and with such a case, the court will not grant a preliminary injunction with all the disastrous consequences that might result to the defendant therefrom."

¹¹ *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, 181 Fed. 182, 187.

¹² *In re Deutsch-Amerikanischer Volksfest-Verein*, 200 Pa. 143, 49 Atl. 949, in which the court said:

"Nor * * * is the expression of the title in a foreign language a valid rea-

son for the refusal of a charter. There is no requirement in the statute that the title shall be in English. Courts, under the common law, though their official language is English, have always administered rights under contracts, deeds, or wills in foreign languages. And in no state has the usage been more liberal than in Pennsylvania, where for many years, and until quite recent times, the laws and public advertisements were officially printed in German as well as in English. The charter, when approved, is directed by the act of 1874 to be recorded in the office for the recording of deeds, and may, therefore, fairly come within the act of May 31, 1893 (P. L. 188), requiring that every will, deed, mortgage, agreement, or any other written or printed instrument, presented for record in any other than the English language, shall be accompanied by a sworn translation in English, which shall be filed or recorded, as the law may require, with the original. This is a statutory recognition, if not a sanction, of the use of a foreign language in charters as well as other legal instruments. The court, of course, has power to require a translation for its own information in the inquiry into the lawfulness or injuriousness to the community of the submitted instrument, but that is the extent of its authority in this requirement."

A charter granted to an organization, the name of which as set out in a foreign language in the charter is incorrectly translated therein, will be

§ 738. **Legal name—In general.** Strictly speaking, a corporation has but one legal name and that one is the name under which it came into existence,¹³ unless, of course, such name is subsequently changed by the state or under authority from the state.¹⁴ Says one of the early English authorities: "An ancient corporation, by use, may have a special name differing in substance, but otherwise of a corporation created within memory; for this regularly can only have the name by which it is instituted."¹⁵

It is true that a corporation may be known to the public by more than one name,¹⁶ or by a single erroneous name, and that it may intentionally assume or unintentionally acquire a trade or colloquial name,¹⁷ but since the public cannot give a corporation a name, other than that conferred by the state, by which it can be recognized in judicial proceedings,¹⁸ and "a corporation cannot, except as authorized by law, change its own name, either directly or by user,"¹⁹ such facts do not affect the rule above stated.

the property of such organization and not that of a related organization subsequently coming into being under the name appearing in the charter as the equivalent of the one in the foreign language. *Com. v. Greek Catholic Church*, 245 Pa. 411, 91 Atl. 850.

That a corporation does not have the right, under the Illinois statute, to use the foreign equivalent of its corporate name as against a corporation the legal name of which is such foreign equivalent, see *Svenska National Forbundet I Chicago v. Swedish National Ass'n*, 205 Ill. App. —.

When the corporate name composed of words in the English language is used in the granting clause of an assignment under the corporate seal, the fact that a part of such name as signed to the instrument appears in its equivalent in a foreign tongue is immaterial. *Woronieki v. Pairskiog*, 74 Conn. 224, 50 Atl. 562.

¹³ *Liggett v. Ladd*, 17 Ore. 89, 21 Pac. 133.

¹⁴ See §§ 744-747, *infra*.

¹⁵ 2 Bacon Abr. 444.

¹⁶ *Walrath v. Campbell*, 28 Mich. 111, 121. See also *Grafton Grocery*

Co. v. Home Brewing Co. of Grafton, 60 W. Va. 281, 54 S. E. 349.

¹⁷ *McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090.

"A corporation may acquire a right to the exclusive use of another name than its corporate name as a trade name." *Boston Rubber-Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875.

¹⁸ *McGary v. People*, 45 N. Y. 153, 160; *Scarsdale Pub. Co. v. Carter*, 63 N. Y. Misc. 271, 161 N. Y. Supp. 731. *Contra*, *Thomas v. Dakin*, 22 Wend. (N. Y.) 9.

A trade name, acquired by a corporation, by user, in connection with and as descriptive of goods manufactured and sold by it, is not a corporate name. *Rome Machine & Foundry Co. v. Davis Foundry & Machine Works*, 135 Ga. 17, 68 S. E. 800. See also, in connection with the text, §§ 739, 743, *infra*.

¹⁹ *McGary v. People*, 45 N. Y. 153, 160. On this subject the court further said: "A distinction may exist between an ancient corporation, one existing by prescription, and a modern corporation, one created by charter.

§ 739. — Name under which corporation may sue and be sued.

Unless otherwise provided by statute,²⁰ actions by and against a corporation are properly brought in its corporate name.²¹

“It is a rule as old, perhaps, as the earliest laws forming or authorizing the formation of corporations, that a corporation must sue and be

It is possible that the former may have a special name by user; but, in this state [New York], we have no corporations save those created by law, and a corporation created within memory can regularly have but one name * * * and, in all legal proceedings, the true name of the corporation must be used.” See also *Sykes v. People*, 132 Ill. 32, 46, 23 N. E. 391; *Boston Rubber-Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875; *Scarsdale Pub. Co. v. Carter*, 63 N. Y. Misc. 271, 116 N. Y. Supp. 731. And compare *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, in which the court said: “A corporation may have more than one name; it may have one in which to contract, grant, etc., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. * * * The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation.” See also, in connection with the text, § 744, *infra*.

²⁰ Plaintiff in error, in *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. Ed. 1029, an English association which, although acts of Parliament relating to it expressly declared that they should not be construed to make it a corporation, was held to be one for purposes of taxation by the state of Massachusetts, was, by act of Parliament, authorized to sue and made liable to be sued in

the name of the chairman or deputy-chairman of its board of directors.

²¹ *Western Ry. of America v. McCall*, 89 Ala. 375, 7 So. 650; *Saunders v. Adams Exp. Co.*, 71 N. J. L. 270, 57 Atl. 899; *Culpeper Agricultural & Mfg. Society v. Digges*, 6 Rand. (Va.) 165, 18 Am. Dec. 708; *Varney & Evans v. Hutchinson Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 203; *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W. Va. 281, 54 S. E. 349; *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792; *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

A corporation may sue in its own name without naming its president or any other of its officers in the petition. *Southern Sawmill Co. v. Ducate*, 120 La. 1052, 46 So. 20; *New Orleans Term. Co. v. Teller*, 113 La. 733, 2 Ann. Cas. 127, 37 So. 624. See, in connection with these two cases, *State v. Banking Dept. of Citizens' Bank*, 113 La. 150, 36 So. 921.

A corporation may sue in its corporate name on a contract made by it in its trade or colloquial name. *McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090. See also *McGary v. People*, 45 N. Y. 153, 160.

But see *Ferry v. Cincinnati Underwriters*, 111 Mich. 261, 69 N. W. 483, wherein it was held that two insurance companies which, acting together, issued a certain policy of insurance under a single assumed name, following which their separate corporate names were set out, might be garnished under such assumed name by a creditor of the insured. See also, in

sued by its corporate name. Indeed, one of the powers and capacities, 'necessarily and inseparably incident to every corporation,' is that of suing and being sued by its corporate name. A corporation, like a person, is recognized in law only by its name."²² Moreover, while this rule may have had a common-law origin, it now, in a number of the states, has a statutory basis, the statutes of the several states very generally providing, in effect, that the corporation suing or being sued shall be designated by its corporate name.²³

§ 740. — Use of assumed name. The rule that a corporation has but one legal name and that that one is the name formally conferred upon it by the state²⁴ does not mean that the corporation can never act under a different name, nor require that such legal name be used *ipsissimis verbis* in order for the corporation to be bound. While it may be desirable that a corporation act only by its legal name, there being no statutory provision that it must do so²⁵ a statement that it is only by such name that the corporation can ever be bound would not have the support of the authorities generally.²⁶ Opposed to any such idea is the rule that a corporation may assume a name, just as a natural person may, for the purpose of carrying on its business,²⁷

connection with the text, § 738, *supra*, and § 742, *infra*.

²² *Curtiss v. Murry*, 26 Cal. 633, 634.

Where it is not shown that there are other corporations of the same name, special proof of the identity of a corporation bringing suit on a written instrument with a corporation of the same name to whom the instrument was executed is not required. *Campbell & Zell Co. v. American Surety Co.*, 129 Fed. 491, 492.

²³ See generally, in this connection, the chapter on Actions by and Against Corporations, *infra*.

²⁴ See § 738, *supra*.

²⁵ See *Svenska National Forbundet I Chicago v. Swedish National Ass'n*, 205 Ill. App. —; *Mioton v. Del Corral*, 132 La. 730, 61 So. 771.

²⁶ It has been said, however, that when a certain name is given to a corporation by its charter and adopted, the corporation can, in general, act by no other name. *Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind. 376.

In its business dealings and contracts, a corporation must use the name given it by the law of its existence. *Scarsdale Pub. Co. v. Carter*, 63 N. Y. Misc. 271, 116 N. Y. Supp. 731.

The fact that a corporation came into being as the result of the consolidation of two other corporations does not warrant the use by such corporation of the name of either of the original corporations as a substitute for its corporate name. *Scarsdale Pub. Co. v. Carter*, 63 N. Y. Misc. 271, 116 N. Y. Supp. 731.

²⁷ "When a corporation * * * elects to carry on a branch of its * * * business in an assumed name, it * * * is liable for the acts of agents, acting within the scope of their authority, who contract in the assumed name with relation to such branch of the business, in all cases where the contract would have been binding if made in the actual name of the corpora-

entering into a contract or executing or receiving a conveyance, unless there is some statutory provision to the contrary. If a note or deed is executed by a corporation under an assumed name, it is just as much bound as if it had used its proper name, and the same is true of any other contract. A contract entered into by or with a corporation under an assumed name may be enforced by either of the parties, if the identity of the corporation is established by the proof.²⁸

A corporation may be permitted by statute to contract, and to take, hold, and convey property, in its regular corporate name, and to sue and be sued in some other name, as in the name of its president.²⁹

tion." *Phillips v. International Text Book Co.*, 26 Pa. Super. Ct. 230, 232.

Illinois. *Mt. Palatine Academy v. Kleinschnitz*, 28 Ill. 133.

Indiana. *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180.

Kentucky. *Neff v. Covington Stone & Sand Co. (Ky.)*, 55 S. W. 697, rev'd on another point, 56 S. W. 723.

Massachusetts. *Melledge v. Boston Iron Co.*, 5 Cush. 158, 51 Am. Dec. 59.

Michigan. *Ferry v. Cincinnati Underwriters*, 111 Mich. 261, 69 N. W. 483.

Utah. *North Point Consolidated Irr. Co. v. Utah & S. L. Canal Co.*, 16 Utah 246, 40 L. R. A. 851, 67 Am. St. Rep. 607, 52 Pac. 168.

Virginia. *Culpeper Agricultural & Manufacturing Co. v. Digges*, 6 Rand. 165, 18 Am. Dec. 708.

West Virginia. *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W. Va. 281, 54 S. E. 349; *Marmet v. Archibald*, 37 W. Va. 778.

Wisconsin. *Woodrough & Hanchett Co. v. Witte*, 89 Wis. 537, 62 N. W. 518.

"A corporation may, very likely, so adopt a name, in the transaction of its business, as to be made liable in its true name upon transactions in its assumed name; but it must then be sued by its true name." *McGary v. People*, 45 N. Y. 153, 160. See also *McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090.

A "corporation may assume or be

known by different names, and contract accordingly, and * * * contracts so entered into will be valid and binding if unaffected by fraud. * * * The validity, so far as third parties are concerned, of contracts entered into by a * * * corporation under a name other than * * * its own proper name does not depend upon whether * * * it is as well known by that name as by * * * its true name, but upon whether quoad the particular transaction, the name is used in good faith by the party adopting it as a descriptio personae." *William Gilligan Co. v. Casey*, 205 Mass. 26, 91 N. E. 124.

The identity of a corporation entering into a contract under an assumed name may be established by the ordinary methods of proof. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299. See also *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W. Va. 281, 54 S. E. 349.

A corporation will not be denied relief in equity by reason of the fact that it was doing business and made the contract involved in a name other than its corporate name in the absence of a showing that the adverse party sustained injury or loss thereby. *Standard Distilling & Distributing Co. v. Springfield Coal Mining & Tile Co.*, 146 Ill. App. 144, aff'd 239 Ill. 600, 88 N. E. 236.

²⁹ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. Ed.

So again, it would seem that in signing an instrument the corporation may abbreviate one or more of the words in its legal name without prejudice to any one concerned. Thus, where the name of a corporation embraces in part the word "Manufacturing," it is sufficient if in the corporation's signature the abbreviation "Mfg." appears in lieu thereof.³⁰

§ 741. Statutory requirement of use of "Incorporated" in connection with name. Under a Kentucky statute,³¹ "every corporation organized under the laws of this state, and every corporation doing business in this state, shall, in a conspicuous place on its principal place or places of business, in letters sufficiently large to be easily read, have painted or printed the corporate name of such corporation, and immediately under the same in like manner shall be printed or painted the word 'Incorporated.' And immediately under the name of such corporation upon all printed or advertising matter used by such corporation, except railroad companies, trust companies, insurance companies, banks, and building and loan associations, shall appear in letters sufficiently large to be easily read, the word 'Incorporated.' Any corporation which shall fail or refuse to comply with the provisions of this section shall be subject to a fine of not less than one hundred nor more than five hundred dollars."³²

1029; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9. See also, in this connection, *Hardr.* 504; *Anon.*, 3 Salk. 102; *Minot v. Curtis*, 7 Mass. 441; *Ferry v. Cincinnati Underwriters*, 111 Mich. 261, 69 N. W. 483; *Walrath v. Campbell*, 28 Mich. 111; *Society for Propagating the Gospel v. Young*, 2 N. H. 310; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Woodrough & Hanchett Co. v. Witte*, 89 Wis. 537, 62 N. W. 518.

"A corporation may be incorporated by one name, and power given them to sue and purchase lands by another name." 2 Bacon Abr. 441.

³⁰*Seiberling v. Miller*, 207 Ill. 443, 69 N. E. 800, aff'g 106 Ill. App. 190, holding that such abbreviation is "no more subject to criticism than the use of the abbreviation 'Co.' for the word 'Company.'"

The fact that the officers of a cor-

poration organized under a particular name use an abbreviation of that name in the exercise of the corporation's franchises does not constitute a usurpation nor ground for a proceeding by quo warranto to oust the corporation from the enjoyment of its franchises. *People v. Bogart*, 45 Cal. 73, 74.

³¹Kentucky St. 1903, § 576.

³²"The purpose of the statute was to inform the public generally as well as individuals whether or not the concern they were dealing with was a person, partnership, or corporation so that they might know what property they could look to for the collection of debts or the enforcement of contract rights." *Com. v. Remington Typewriter Co.*, 32 Ky. L. Rep. 189, 105 S. W. 399. See also *Com. v. Nebo Consol. Coal & Coking Co.*, 141 Ky. 493, 133 S. W. 221; *Mechanics' &*

As far as the validity of this statute is concerned, it has been held that the exemption of railroad companies, banks, trust companies, insurance companies, and building and loan associations therein contained, does not make the provision discriminatory, unequal or partial legislation within the meaning of either the state or federal constitution.³³

Construing the statute, it has been held that corporations of the classes mentioned are excepted from the operation of the entire section and not merely from the portion thereof which requires the use of the word "Incorporated" on printed or advertising matter.³⁴ But as to corporations which come within the provisions of the statute, the use of the letters "Inc." in connection with the corporate name is not sufficient, the requirements of the statute being satisfied only by the use of the word "Incorporated" spelled out.³⁵

Farmers' Sav. Bank v. Com., 128 Ky. 190, 108 S. W. 263; *Com. v. American Snuff Co.*, 125 Ky. 350, 101 S. W. 364; *Jung Brewing Co. v. Com.*, 29 Ky. L. Rep. 821, 96 S. W. 476.

"It was to protect the public that the statute was enacted." *Com. v. Nebo Consol. Coal & Coking Co.*, 141 Ky. 493, 133 S. W. 221. See also *Com. v. Remington Typewriter Co.*, 32 Ky. L. Rep. 189, 105 S. W. 399.

³³ *Com. v. Remington Typewriter Co.*, 32 Ky. L. Rep. 189, 105 S. W. 399.

³⁴ *Mechanics' & Farmers' Sav. Bank v. Com.*, 128 Ky. 190, 108 S. W. 263.

³⁵ *Com. v. American Snuff Co.*, 125 Ky. 350, 101 S. W. 364. Said the court: "The purpose of the statute is to give notice to persons dealing with incorporated companies of the fact that they are incorporated. It is well known that the individual property of the stockholder of a corporation is not liable for the corporate debts; the corporate property only being liable. Persons dealing with the managers of a corporation (not knowing that it was a corporation) might give credit, believing that the managers were individually liable, when, if they had known the truth, they would not have extended the credit. So it was for the purpose of protecting the public

that this statute was enacted; and the general assembly by the statute enacted the particular way and manner in which this notice should be given; i. e., by having 'printed or printed the corporate name of such corporation and immediately under the same, in like manner, shall be printed or painted the word "Incorporated"'—and that the letters should be sufficiently large to be easily read. The word 'Incorporated' is used twice in the same section. It is certain that the general assembly intended that the notice of its corporate existence should be given in the manner prescribed. The appellee contends that 'Inc.' is an abbreviation of the word 'Incorporated'; that it is well understood, and is in common use by the public as an abbreviation of that word, and is well understood by the masses of the people to stand for and to mean 'Incorporated.' It cannot be inferred from anything in the statute that the legislature intended that an abbreviation would suffice for the word 'Incorporated'; but, on the contrary, it clearly appears that its intention in enacting the statute was to give all persons dealing with the corporation, or at least all persons who can read, notice of the

Construing the first part of the statute, emphasis has been laid on the word "principal" and emphasizing such word, it has been held that the statute does not require the use of the word "Incorporated" at every place where business of the corporation is carried on. "If a corporation is to be regarded as having a principal place of business at every place where it has an agent who may make contracts for it, then practically the statute would be made to apply to all offices opened by corporations in the state for the transaction of business. To so hold would be to deny the word 'principal' its ordinary meaning."³⁶ Where, however, a corporation has more than one principal place of business, as apparently in the mind of the legislature it might have, a compliance with the statute at only one of its principal places of business is not sufficient.³⁷

corporate existence; not leaving the public to guess at what the letters 'Inc.' mean. We have not been referred to, nor have we been able to find, any authority showing that 'Inc.' is an abbreviation of the word 'Incorporated' (except the Standard Dictionary, which abbreviates it, 'Inc., Incor., and Incorp.'). It is true that in the answer it is alleged to be an abbreviation, and so understood by the masses of men. But this is an admission that there are some men, or a portion of the public, who do not so understand it. The 'masses of men' means the principal or main body. When the general assembly has said by law that a thing shall be done in a particular way or manner, we are constrained to hold that the statute should be complied with in that way or manner, or at least in such a way that there can be no doubt that the intention and purpose of the statute has been completely fulfilled. We are of the opinion that the facts alleged in the answer of appellee do not meet the requirement of the statute."

³⁶ *Com. v. Cumberland Telegraph & Telephone Co.*, 32 Ky. L. Rep. 978, 108 S. W. 262, holding that a telephone exchange at which the defendant kept an assistant manager was not a "prin-

cipal place of business," and quoting approvingly from *Standard Oil Co. v. Com.*, 110 Ky. 821, 62 S. W. 897, wherein the court said, *arguendo*: "The legislature must be credited with a knowledge of the meaning of words. Section 460, Ky. St., furnishes us with a rule for construing words, as follows: 'All words and phrases shall be construed and understood according to the common and approved usage of language.' When the legislature used the word 'principal' it did not mean 'every' place of business. It meant just what it said,—principal place or places of business. The word 'principal' is an adjective qualifying each of the words 'place' and 'places.' An incorporated company could have one or more principal places of business, depending entirely upon the method of conducting its business."

³⁷ *Com. v. Nebo Consol. Coal & Coking Co.*, 141 Ky. 493, 133 S. W. 221, holding further that an indictment against a corporation for its failure to use the word "Incorporated," as required, at one of its principal places of business is properly brought in the county in which such place of business is located, distinguishing, in this connection, *Com. v. Remington Typewriter Co.*, — Ky. —, 105 S. W. 399.

An indictment, for a violation of

Construing the second part of the section, it has been held that neither labels on goods manufactured or merchandise sold³⁸ nor letterheads, or billheads are "advertising matter" within the meaning of the statute, and hence the word "Incorporated" need not be used in connection with the corporate name thereon.³⁹

this statute, which alleges that the defendant failed to have its corporate name with the word "Incorporated" painted or printed "on its principal place of business in the city" and county named, but does not allege that the defendant's principal place of business or one of its principal places of business was in such city and county, is bad on demurrer. *Standard Oil Co. v. Com.*, 110 Ky. 821, 62 S. W. 897.

³⁸ *Jung Brewing Co. v. Com.*, 123 Ky. 389, 96 S. W. 476. Said the court: "We are of opinion that this statute does not require corporations to place the word 'incorporated' under the corporate name printed on the label of goods which it manufactures and sells. The object of the statute is to inform the public whether or not the commercial or manufacturing concern with which it is doing business is a corporation or not; and it would be going very far beyond the necessity or intention of the statute to require the word 'incorporated' to be placed upon all of the goods or merchandise manufactured and sold by the corporation. Every benefit intended by the statute is effectuated by limiting the expression 'printed or advertising matter' to billheads or advertisements in the newspapers, and other similar matter. The legislature clearly did not intend to place so useless a burden upon the business done in the state by corporations as would be entailed by construing the expression 'printed or advertising matter' as was done in this case. This, as all other statutes, should be given a reasonable construction, so that in spirit the purpose of the legislature shall be effectuated; but

to construe it so as to require each article of merchandise bearing a label with the corporate name on it to also have the word 'incorporated' thereon, would be to make what was intended as a useful and beneficial statute unduly harsh and oppressive. Such construction is never indulged in by the courts unless pressed thereto by the very rigor of the legislative language; and to this we are not forced by the words of the statute under consideration. Primarily, the object of labeling goods or merchandise is to tell what it is, or, as in the case at bar, also to enable the consumer to know where to return the empty bottles. In a qualified sense these labels are used for advertising purposes, and frequently contain words of commendation as to the quality of the articles upon which they are placed; but they are not advertising matter within the meaning of the statute. * * * The large fine provided in the statute for each offense precludes the idea that its meaning should be extended beyond the point where advertising is the primary object."

³⁹ *Com. v. National Biscuit Co.*, 32 Ky. L. Rep. 592, 106 S. W. 799. See also *T. J. Moss Tie Co. v. Com.*, 32 Ky. L. Rep. 41, 105 S. W. 163.

A corporation cannot be prosecuted, for a violation of the portion of this statute which requires that the word "Incorporated" appear on advertising matter, in any county in which the advertising matter may happen to have been circulated, but only, in the case of a domestic corporation, in the county in which it has its principal office or place of business, or, in the case of a foreign corporation, in the

§ 742. Effect of misnomer—In grants, conveyances, contracts, wills, etc. While a corporation must have a name in which to contract, to grant and receive property, and to sue and be sued, it does not follow that misnomer of a corporation in a contract, grant, will, or pleading will be fatal. On the contrary, it is well settled that, in the absence of statutory provision to the contrary, misnomer of a corporation is no more fatal than misnomer of an individual would be under the same circumstances.⁴⁰ Indeed, provision may be made by statute that the misnomer of a corporation in an instrument shall not render the instrument invalid, if from the instrument the corporation intended may be reasonably ascertained.⁴¹

But, aside from any such statutory provision, it is the general rule that misnomer will not invalidate a grant or conveyance to or by a corporation or a contract with it, if it appears therefrom or can be established by parol evidence that the corporation claiming the benefit thereof or denying liability thereunder, as the case may be, was the corporation intended.⁴²

county in which it has an officer or agent designated by it upon whom process may be served. *Com. v. Remington Typewriter Co.*, 32 Ky. L. Rep. 189, 105 S. W. 399, distinguished in *Com. v. Nebo Consol. Coal & Coking Co.*, 141 Ky. 493, 133 S. W. 221. See also *Paracamp Co. v. Com.*, 33 Ky. L. Rep. 981, 112 S. W. 587; *Com. v. National Biscuit Co.*, 32 Ky. L. Rep. 592, 106 S. W. 799; *Com. v. Montenegro-Reihm Music Co.*, 32 Ky. L. Rep. 546, 106 S. W. 812.

⁴⁰ See cases cited *passim* this section.

⁴¹ *Nisbet v. Clio Min. Co.*, 2 Cal. App. 436, 83 Pac. 1077. See also *Mioton v. Del Corral*, 132 La. 730, 61 So. 771.

⁴² **United States.** In re Goldville Mfg. Co. of Goldville, South Carolina, 118 Fed. 892, 896; *Clement v. Lathrop*, 18 Fed. 885.

Alabama. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650; *Douglass v. Branch Bank at Mobile*, 19 Ala. 659.

Connecticut. See *Woronieki v. Pairskiog*, 74 Conn. 224, 50 Atl. 562.

Illinois. *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Dec. 631; *Chadsey v. McCreery*, 27 Ill. 253.

Indiana. *Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind. 376; *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180.

Kentucky. *Kentucky Seminary v. Wallace*, 15 B. Mon. 35.

Maryland. *Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868; *Coulter v. Western Theological Seminary*, 29 Md. 69; *Hagerstown Turnpike Road Co. v. Creeger*, 5 Harr. & J. 122, 9 Am. Dec. 495.

Massachusetts. *Melledge v. Boston Iron Co.*, 5 Cush. 158, 51 Am. Dec. 59; *Commercial Bank v. French*, 21 Pick. 486, 32 Am. Dec. 280.

Michigan. *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

Minnesota. *Clarke v. Milligan*, 58 Minn. 413, 59 N. W. 955.

Missouri. *Adler v. Kansas City, S. & M. R. Co.*, 92 Mo. 242, 4 S. W. 917.

New Hampshire. *Newport Mechanics' Mfg. Co. v. Starbird*, 10 N. H. 123, 34 Am. Dec. 145.

“Contracts may be made by and with * * * [a corporation]

New Jersey. Hoboken Bldg. Ass'n v. Martin, 13 N. J. Eq. 427.

New York. New York African Society v. Varick, 13 Johns. 38.

North Carolina. Ashville Division No. 15 v. Aston, 92 N. C. 578.

Ohio. Milford & C. Turnpike Co. v. Brush, 10 Ohio 111, 36 Am. Dec. 78.

Pennsylvania. Berks & D. Turnpike Road v. Myers, 6 Serg. & R. 12, 9 Am. Dec. 402.

Tennessee. Precious Blood Society v. Elsythe, 102 Tenn. 40, 50 S. W. 759.

Texas. Houston Land & Loan Co. v. Danley, — Tex. Civ. App. —, 131 S. W. 1143.

Virginia. Culpeper Agricultural & Manufacturing Co. v. Digges, 6 Rand. 165, 18 Am. Dec. 708.

West Virginia. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299.

Wisconsin. Woodrough & Hanchett Co. v. Witte, 89 Wis. 537, 62 N. W. 518.

England. Rex v. Haughley, 1 B. & A. 655.

Canada. District of Brock v. Bowen, 7 U. C. Q. B. 471.

“Although the names of corporations are not merely arbitrary sounds, yet if there be enough said to show that there is such an artificial being, and to distinguish it from all others, the body politic is well named, though the words and syllables are varied from; and this the rather in grants, which are to have a favorable construction.” 2 Bacon Abr. 441.

“The omission of a part of the name of a corporation, when the name consists of several words, if the corporation intended can be identified, will not vitiate a grant made to, or an act done by, such incorporation.” People v. Sierra Buttes Quartz Min. Co., 39 Cal. 511, 514.

“It is well settled that corporations may claim the benefit of contracts,

grants, devises and bequests, although not described and named with entire accuracy, and in ascertaining the intent of the contracting parties and testators, evidence is proper to show by what name the corporation was generally known and called by the parties, and this with a view to ascertain the intent. The evidence is given upon the same principle that evidence is given to show in what sense particular terms are used in a will or other instrument.” McGary v. People, 45 N. Y. 153, 159.

Where a deed is made to a corporation by a name other than its true one, the corporation may sue in its true name and aver in the declaration that the defendant made the deed to it by the name appearing in such deed. Northwestern Distilling Co. v. Brant; 69 Ill. 658, 661, 18 Am. Rep. 631; New York African Soc. v. Varick, 13 Johns. (N. Y.) 38, 39.

The misnomer of the corporation-grantee in a deed to land, the variance between its name and the name used being a slight one only, will not affect the deed as evidence of the corporation's title to the land. Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co., 76 S. C. 76, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780, 56 S. E. 654 (“Sumter Tobacco Warehouse Company” named in deed as “Sumter Tobacco & Cotton Warehouse Company”).

Appellee alleged that a conveyance was made to “Owensboro, Falls of Rough & Green River Railroad Co.” The conveyance itself, when exhibited, showed that the name of the grantee was “Owensboro, Falls of Rough & Green River Branch Railroad Co.” The court declined to deem this a fatal variance, the appellee not having been misled. Chicago, St. L. &

by a mistaken name, if the mistake be only *in syllabis et verbis*, and not *in sensu et re ipsa*.”⁴³ Again, the rule that a bequest or devise will not fail because of a mere inaccuracy in the designation of the beneficiary, where the identity of the latter can be ascertained with reasonable certainty either from the will itself or by extrinsic evidence, applies to corporations as well as to natural persons,⁴⁴ and to corpora-

N. O. R. Co. v. Wilson, 25 Ky. L. Rep. 525, 76 S. W. 138.

⁴³ **Culpeper Agricultural & Mfg. Society v. Digges**, 6 Rand. (Va.) 165, 18 Am. Dec. 708. See also **Grafton Grocery Co. v. Home Brewing Co.** of Grafton, 60 W. Va. 281, 54 S. E. 349.

“To sustain grants to or by corporations some latitude is permitted in the use of their names, it being usually sufficient to use the name in substance, though not the same in exact words and syllables.” **Sykes v. People**, 132 Ill. 32, 47, 23 N. E. 391.

It is no defense to an action on a promissory note by the corporation to which the note was intended to run that the plaintiff was misnamed in the note. **Charitable Ass’n in Middle Parish in Granville v. Baldwin**, 1 Metc. (Mass.) 359.

“**Houston Loan & Land Company**” is liable on notes executed by it as the “**Houston Land & Loan Company**.” **Houston Land & Loan Co. v. Danley**, — Tex. Civ. App. —, 131 S. W. 1143.

Parol evidence is competent to overcome a slight variance between the name of the mortgagor as it appears in a mortgage and the name of the corporation actually executing such mortgage. **Walrath v. Campbell**, 28 Mich. 111, 121.

⁴⁴ **Maine. Preachers’ Aid Society v. Rich**, 45 Me. 552.

Maryland. Doan v. Vestry of Parish of Ascension of Carroll County, 103 Md. 662, 7 L. R. A. (N. S.) 1119, 115 Am. St. Rep. 379, 64 Atl. 314; **Vansant v. Roberts**, 3 Md. 119.

Massachusetts. Minot v. Boston

Asylum, 7 Metc. 416; **First Parish in Sutton v. Cole**, 3 Pick. 232.

Missouri. St. Louis Hospital Ass’n v. Williams, 19 Mo. 609.

New York. New York Inst. v. How, 10 N. Y. 84.

North Carolina. Ryan v. Martin, 91 N. C. 464; **North Carolina Institute v. Norwood**, Busb. Eq. 65.

Pennsylvania. In re Washington & Lee University’s Appeal, 111 Pa. St. 572, 3 Atl. 664; **In re Newell’s Appeal**, 24 Pa. St. 197.

Vermont. Button v. American Tract Society, 23 Vt. 336.

England. In re Killert’s Trusts, L. R. 7 Ch. App. 170; **Attorney General v. Rye**, 7 Taunt. 546.

“Thus Church of the Lady of the Lake, Cooperstown, N. Y.” was held entitled to devise to “**St. Mary Roman Catholic Church of Coopers-town, N. Y.**” **In re Foley’s Estate**, 27 N. Y. Misc. 77, 58 N. Y. Supp. 201. And “**Convent of the Sisters of Mercy at Ft. Smith, known as St. Anne’s Convent**” was held to mean and refer to “**Sisters of Mercy of the Female Academy of Ft. Smith.**” **McDonald v. Shaw**, 81 Ark. 235, 98 S. W. 952. And “**Richmond Home for Ladies**” was held entitled to a bequest made to “**the Trustees of the Presbyterian Home for Old Ladies situated in Richmond, Va.**” **Jordan’s Adm’x v. Richmond Home for Ladies**, 106 Va. 710, 56 S. E. 730. So too, “**Sisters of the Poor of St. Francis**” was held entitled to the proceeds of a devise directed to be paid over to “**the trustees of St. Francis Hospital in the city of New York,**” there being no

tions taking as trustees equally with those taking for their own benefit.⁴⁵ Thus it has been said that "a corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any other name or description by which it can be distinguished from every other corporation; and, when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will, may, in all cases, be proved by parol."⁴⁶

Where it appears that it was the charter of a certain corporation which the legislature intended to amend by an act passed by it, such act will not be inoperative because of the fact that the corporation was misnamed therein.⁴⁷

corporation named "St. Francis Hospital" in such city; the act, incorporating the "Sisters of the Poor of St. Francis" which owned and conducted a hospital commonly known as "St. Francis Hospital," providing that no misnomer of the corporation should defeat any devise to it provided the intent that an estate or interest was made to be vested in it should sufficiently appear, and it being conceded that the testator intended that the proceeds of the devise should be paid over to the trustees of such corporation. *Johnston v. Hughes*, 187 N. Y. 446, 80 N. E. 373. In like manner "The Vestry of the Parish of the Ascension of Carroll County" was held entitled to a devise made to "The Vestry of Ascension Church, Ascension Parish, in Westminster, in Carroll county, Md." *Doan v. Vestry*, etc., 103 Md. 662, 7 L. R. A. (N. S.) 1119, 115 Am. St. Rep. 379, 64 Atl. 314. Property bequeathed to "Georgetown University, in the District of Columbia" was permitted to go to "The President and Directors of Georgetown College," in such district where there was therein no university incorporated under the name used, and it appeared that it was the intention that the property should pass to an

incorporated institution, it being expressly provided by the act incorporating Georgetown College that no misnomer thereof should defeat or annul any donation, etc., thereto. *Speer v. Colbert*, 200 U. S. 130, 141, 50 L. Ed. 403.

⁴⁵ *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952.

⁴⁶ *Lefevre v. Lefevre*, 59 N. Y. 434, 440, 442. See also *Jordan's Adm'r v. Richmond Home for Ladies*, 106 Va. 710, 56 S. E. 730.

"To sustain a devise to a corporation it has been held sufficient if the words used show that the testator could only mean a particular corporation, though the name be entirely mistaken." *Sykes v. People*, 132 Ill. 32, 47, 23 N. E. 391.

⁴⁷ *Cotton v. Mississippi & R. River Boom Co.*, 22 Minn. 372; *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

A corporation, designated "St. Vincent College" in the title of the incorporating act, and "President and Faculty of St. Vincent's College" in the body thereof, is entitled to a tax exemption running in favor of "St. Vincent College." *St. Vincent's College v. Schaefer*, 104 Mo. 261, 16 S. W. 395.

Again, an assessment against a corporation will not be invalid because of a slight discrepancy in the corporate name, where the name in which the assessment was made is sufficiently accurate to identify the corporation, especially where the error was occasioned by the representation of the corporation's agent who had actual possession of the property assessed and was therefore the person to whom the assessor should apply for information on the subject.⁴⁸

§ 743. — In pleadings, process, etc. The legal effect of the misnomer of a corporation in a pleading is the same as that of the misnomer of a natural person,⁴⁹ and when the name of a natural person might be amended, so may also the name of a corporation.⁵⁰

"The name of a corporation is not the only means of identity. If some words be added, omitted, or changed in the spelling, in the true name of the corporation, this is not a fatal variance, if there be enough to distinguish it from other corporations, and show that the corporation suing or being sued was the one intended."⁵¹

⁴⁸ *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511, 514. See also *Souhegan Nail, Cotton & Woolen Factory v. McConihe*, 7 N. H. 309.

⁴⁹ *Nisbet v. Clio Min. Co.*, 2 Cal. App. 436, 83 Pac. 1077.

⁵⁰ "*Singer Sewing Machine Company*" amended to read "*Singer Manufacturing Company*." *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272, 14 So. 109.

"*Clio Mining and Milling Co.*" amended by striking out words "and Milling." *Nisbet v. Clio Min. Co.*, 2 Cal. App. 436, 83 Pac. 1077.

"*American Savings Bank*" amended by prefixing "The." *Wilcox v. American Sav. Bank*, 21 Cal. 358, 40 Pac. 881.

"*Chattanooga, Rome & Carrollton Railroad Company*" amended by substituting "*Columbus*" for "*Carrollton*." *Chattanooga, R. & C. R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109.

"*Interstate Switch Co. of Missouri*" amended by striking out "of Missouri." *Maher v. Interstate Switch Co.*, 58 Kan. 817, 51 Pac. 286.

"*Southern Pacific Railway Com-*

pany" amended to read "*Southern Pacific Company*." *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135.

⁵¹ *First Nat. Bank of Credo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792 (syllabus by the court). See also *Western Railway of Alabama v. McCall*, 89 Ala. 375, 7 So. 650; *Mioton v. Del Corral*, 132 La. 730, 61 So. 771 (slight misnomer made immaterial by statute); *State v. Banking Department of Citizens Bank*, 113 La. 150, 36 So. 921; *Varner & Evans v. Hutchinson Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 203; *Grafton Grocery Co. of Grafton v. Home Brewing Co.*, 60 W. Va. 281, 54 S. E. 349.

A petition against the "*Underwriters' Fire Association of Dallas*" is not vitiated by the designation of the defendant as the "*Underwriters' Fire Association at Dallas*." *Underwriters' Fire Ass'n of Dallas, Tex. v. Henry* (Tex. Civ. App.), 79 S. W. 1072.

A corporation, sued as the "*Merchants' Bank of Jefferson City, Missouri*" on a back-tax bill made out

The general rule which has found its way into the statutes of some of the states is that the misnomer of a corporation in a pleading can be taken advantage of only by plea in abatement, and when not thus objected to will be deemed to have been waived.⁵² It cannot be

against the "Merchants' Bank" held not entitled to predicate error on the admission of such bill in evidence, the words "of Jefferson City, Missouri" in the title of the suit being merely descriptive and not part of the corporation's name. *State v. Merchants' Bank of Jefferson City*, 160 Mo. 640, 61 S. W. 676.

Prefixing the word "The" to the name of a corporation defendant does not change such name in a manner that can mislead, and the misnomer will not be noticed by the courts. *Western Bank & Trust Co. v. Ogden*, 42 Tex. Civ. App. 465, 93 S. W. 1102.

"The plea of misnomer, as to the name of the defendant corporation, 'Southern Railway Company,' and 'the Southern Railway Company,' is both too frivolous and too technical to be noticed." *Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874.

A copy of the charter of the "Texas & New Orleans Railroad Company" held admissible as evidence of the corporate existence of the plaintiff which sued as the "Texas & New Orleans Railroad Company of 1874," the word and figures "of 1874" being deemed surplusage. *Texas & N. O. R. Co. v. Barber*, 31 Tex. Civ. App. 84, 71 S. W. 393.

In the absence of proof to the contrary, it will be presumed that the "Kansas City, Ft. Scott & Memphis Railroad Company," which was alleged to have breached the contract sued on, was the "Kansas City, Ft. Scott & Memphis Railway Company" which it was alleged had become merged in the defendant. *Black v. St. Louis & S. F. R. Co.*, 110 Mo. App. 198, 85 S. W. 96.

In *Brassfield v. Quiney, O. & K. C.*

R. Co., 109 Mo. App. 710, 83 S. W. 1032, the court held that the omission of the word "Company" from the name of the corporation sued would be deemed such an imperfection as was curable under the statute.

It is not necessary, in an action by a corporation upon an instrument executed to it, that the corporation's name as it appears in the declaration should be identical with the name by which it made the contract; if a question of variance is raised upon the trial, the issue is whether the action is by the corporation with which the contract was made. *Riemann v. Tyrolear & Vorarlberger Verein*, 104 Ill. App. 413, 417. See also *West Side Auction House Co. v. Connecticut Mut. Life Ins. Co.*, 186 Ill. 156, 57 N. E. 839.

The fact that the "Home Brewing Company of Grafton" was designated as the "Home Brewing Company" by the claimant of a mechanic's lien in taking the steps necessary to the perfecting and enforcing of such lien, held not fatal to his right to the lien. *Grafton Grocery Co. v. Home Brewing Co. of Grafton*, 60 W. Va. 281, 54 S. E. 349.

⁵² *United States*. *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 137 U. S. 568, 34 L. Ed. 784; *Bute Refrigerating Co. v. Gillett*, 31 Fed. 809; *Virginia & M. Steam Nav. Co. v. United States*, Taney 418, Fed. Cas. No. 16,973.

Illinois. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37; *Riemann v. Tyrolear & Vorarlberger Verein*, 104 Ill. App. 413, 417.

Iowa. *Wilson v. Baker*, 52 Iowa 423, 3 N. W. 481.

Kansas. *School Dist. v. Griver*, 8 Kan. 224.

pleaded in bar, nor made the ground of a motion in arrest of judg-

Kentucky. Wilhite v. Convent of Good Shepherd, 117 Ky. 251, 78 S. W. 138.

Maryland. Coulter v. Western Theological Seminary, 29 Md. 69.

Massachusetts. Medway Cotton Manufactory v. Adams, 10 Mass. 360; Gilbert v. Nantucket Bank, 5 Mass. 97.

Michigan. Lake Superior Bldg. Ass'n v. Thompson, 32 Mich. 293.

Mississippi. Gillespie v. Planters Oil-Mill Manufacturing Co., 76 Miss. 406, 24 So. 900.

Nebraska. Grand Lodge O. U. W. v. Bartes, 64 Neb. 800, 90 N. W. 901.

New Hampshire. Wheeler v. Contoocook Mills Corporation, 77 N. H. 551, 94 Atl. 265; Brunham v. Strafford County Sav. Bank, 5 N. H. 446.

New Mexico. El Capitan Land & Cattle Co. of New Mexico v. Lees, 13 N. M. 407, 86 Pac. 924.

New York. Whittlesey v. Frantz, 74 N. Y. 456; Bank of Utica v. Smalley, 2 Cow. 770, 14 Am. Dec. 526; Methodist Episcopal Church v. Tryon, 1 Den. 451.

Ohio. State v. Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

Pennsylvania. Northumberland County Bank v. Eyer, 60 Pa. St. 436.

Texas. Houston Land, etc., Co. v. Danley (Tex. Civ. App.), 131 S. W. 1143; McCord-Collins Co. v. Pritchard, 37 Tex. Civ. App. 418, 84 S. W. 388.

The Michigan statute (Comp. Laws of 1897, § 10473; How Ann. St. [2nd ed.], § 13518), which provides that "in suits or proceedings by or against any corporation, a mistake in the naming of such corporation shall be pleaded in abatement; and if not so pleaded, shall be deemed to have been waived," is mandatory. Hoben v. Citizens' Tel. Co., 176 Mich. 596, 142 N. W. 1070.

Prefixing the article "The" to the

name of the corporation defendant is a misnomer to which a plea in abatement will lie. Lapham v. Philadelphia, B. & W. R. Co., 4 Pennew. (Del.) 421, 56 Atl. 366.

Under a statute providing that the defendant in an action by a corporation will be "deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer," the answer must plead the misnomer in so unequivocal a manner that the plaintiff will be clearly apprised of the mistake and thus led to correct it, and this the answer does not do when, in an action by a corporation to recover possession of premises conveyed and to secure cancellation of the record of the deed, it "alleges on information and belief that the plaintiff is not a corporation, and then alleges the correct corporate name of the plaintiff as being the true and correct name of the grantee to which the grantors of the corporation conveyed certain premises, of which the premises in question are a portion." Associate Presbyterian Congregation v. Hanna, 98 N. Y. Supp. 1082, 1083, 1084

In order that a corporation make a plea in abatement good, it must give its true name so that plaintiff may correct the error by amendment. Wilhite v. Convent of Good Shepherd, 117 Ky. 251, 78 S. W. 138.

A corporation, sued under the mechanic's lien law by the wrong name, may enter a special appearance under its true name and file an affidavit of defense provided such affidavit be made to show, all necessary facts being set out, how it is that the corporation is using a different name from that under which it was sued. Montello Brick Co. v. Pullman's Palace-Car Co., 4 Pennew. (Del.) 90, 54 Atl. 687.

ment, or for a nonsuit. Nor is it ground for opening a judgment or decree.⁵³ So it has been held that a corporation-defendant waives a

Under the West Virginia statutes, a plea in abatement will not lie for a misnomer, but the defect may be reached by amendment on the motion and affidavit of either party. *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792, recognizing, however, the general rule to be as stated in the text.

⁵³ Failure of a corporation to plead a misnomer by plea in abatement or otherwise, or to disclose its true name, is a waiver of such misnomer, and a judgment rendered in the name under which the corporation is sued will be as valid as if rendered against it in its true name. *American Surety Co. of New York v. Maryland Casualty Co.*, 97 Kan. 275, 155 Pac. 59.

Variance, in the documentary evidence in an action against a corporation, as to the word "The" in its corporate name held not to justify the reversal of a judgment against it. *Carlson v. White Star S. S. Co.*, 39 Wash. 394, 81 Pac. 838.

A decree foreclosing a tax lien is not void by reason of the fact that the corporation defendant was summoned as "The Globe Investment Company" when its real name was "Globe Investment Company," the variance being so slight as to leave no doubt as to the identity of the corporation. *Clifford v. Thun*, 74 Neb. 831, 104 N. W. 1052.

But see *Scarsdale Pub. Co. v. Carter*, 63 N. Y. Misc. 271, 116 N. Y. Supp. 731, holding that dismissal on motion of defendant, sued by the "Scarsdale Publishing Company—The Colonial Press" on a check made by him to "The Colonial Press" on which he had stopped payment, held erroneously refused.

Under a statute providing that a variance between the indictment and the evidence in the matter of name or description shall not be ground for acquittal unless the trial court shall find that such variance is material to the merits of the case and prejudicial to the defense of the defendant, held that the mere fact that the indictment referred to the "Wabash Western Railroad" as the "Wabash Railroad" (*State v. Sharp*, 106 Mo. 106, 17 S. W. 225), or to the "St. Louis & Suburban Railway Company" as the "St. Louis & Suburban Railroad Company" (*State v. Decker*, 217 Mo. 315, 116 S. W. 1096) did not entitle defendant to an acquittal.

On the trial of a defendant, indicted for making false entries in the books of a named banking corporation, the name of the corporation as alleged in the indictment may be proved by evidence that it was known by such name. *Mears v. State*, 84 Ark. 136, 104 S. W. 1095.

But see *McGary v. People*, 45 N. Y. 153, in which the court, considering the validity of an indictment for arson in which the corporation owning the property which was the subject of the arson was misnamed, said: "A difference is recognized between a misnomer of a corporation in judicial proceedings, and in obligations, grants, etc.; and while in the former it will be fatal, effect may be given to the latter, notwithstanding the misnomer. * * * The accused had no opportunity to object to the misnomer upon the trial. He could not plead it in abatement or otherwise; but, upon the traverse of the indictment, the proof of the corporation, as alleged, was upon the prosecution, and the variance was fatal." See, as supporting the position taken by the

mistake in its name by its general appearance and answer on the merits.⁵⁴ Likewise, a defect in the name of the corporation suing is waived when the defendant pleads to the merits.⁵⁵ And a corporation cannot object to a misnomer for the first time after judgment,⁵⁶ or on appeal.⁵⁷ Moreover, it has been held, under a statute providing that a mistake in the naming of a corporation in a suit or proceeding by or against it shall be pleaded in abatement, and, if not so pleaded, shall be deemed to have been waived, that a corporation-defendant waives a mistake in its name as well when it defaults as when it appears and answers but does not plead as provided.⁵⁸

Although the statute provides that where a writ of certiorari is brought "to review the determination of a board or body other than a court, if an action would lie against the board or body in its associate or official name, it must be directed to the board or body by that name; otherwise it must be directed to the members by their names," the direction of a writ to a corporation whose name is "The Trustees of the New York and Brooklyn Bridge" under the name "The Board of Trustees of the New York and Brooklyn Bridge" is not such an error as will defeat the proceeding, especially when the corporation is correctly named in the petition.⁵⁹

The fact that the word "Company" is omitted from the name of

court in this case, *Sykes v. People*, 132 Ill. 32, 23 N. E. 391.

⁵⁴ *Burlington & M. R. R. Co. v. Burch*, 17 Colo. App. 491, 69 Pac. 6; *Grand Lodge, A. O. U. W. v. Bartes*, 64 Neb. 800, 90 N. W. 901; *Wheeler v. Contoocook Mills Corporation*, 77 N. H. 551, 94 Atl. 265; *McCord-Collins Co. v. Prichard*, 37 Tex. Civ. App. 418, 84 S. W. 388.

A corporation, sued and summoned by, and appearing and answering to the merits under other than its correct name, cannot make the fact that it did not appear in the record under its true name, until after limitations had run, the basis of a plea of limitations as a defense to the action. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37. See also *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135.

⁵⁵ *Riemann v. Tyrolea & Vorarlberger Verein*, 104 Ill. App. 413, 417.

⁵⁶ *American Surety Co. of New York v. Maryland Casualty Co.*, 97 Kan. 275, 155 Pac. 59.

⁵⁷ *Grand Lodge, A. O. U. W. v. Bartes*, 64 Neb. 800, 90 N. W. 901.

⁵⁸ *Whittlesey v. Frantz*, 74 N. Y. 456, 461. The holding of the above case is disapproved in *Grossman v. Loeber Hair Co.*, 155 N. Y. Supp. 1012, except "where the name stated in the summons is sufficiently similar to its [the corporation's] correct name to fairly apprise it that it is the defendant intended." When the name is of such character, the plaintiff is entitled, the court in the latter case held, to an order amending the summons, complaint and judgment so that they will stand in the corporation's correct name.

⁵⁹ *People v. Trustees of New York and Brooklyn Bridge*, 1 N. Y. App. Div. 186, 37 N. Y. Supp. 168.

the corporate garnishee in the sheriff's return of the summons in garnishment proceedings is a defect which may be reached by amendment.⁶⁰ So also, it has been held that the omission of the word "Company" from the name of a codefendant corporation by reason of a purely clerical error did not invalidate defendant's appeal bond which was regular in other respects.⁶¹

A return of service on the president of "the within-named defendant corporation, to-wit, the Ellis and Young Company" has been held not bad as to the "Ellis-Young Company, a corporation," to which the writ was directed.⁶²

§ 744. Change of name—Right in general. In the absence of authority from the state, a corporation, although it may upon occasion act in an assumed or a trade name,⁶³ cannot abandon the name given it at its creation and adopt another in its stead.⁶⁴ But the state may, with the consent of the corporation, change the latter's name,⁶⁵ or may authorize the corporation itself to take action having such effect.⁶⁶

⁶⁰ *Albany & Northern R. Co. v. Dunlap Hardware Co.*, 8 Ga. App. 171, 68 S. E. 868.

Thus where the "Teutonia Insurance Company" appeared to a citation in garnishment and answered, the fact that it was cited as the "Teutonia Fire Insurance Company" was immaterial. *Commercial Nat. Bank v. Jackson Bros.*, 111 La. 795, 35 So. 910.

The misnomer of a corporation in writs served upon it does not render the writs void. *Lyon v. Crew Levick Co.*, 63 Ill. App. 329, 330.

⁶¹ *Jesse French Piano & Organ Co. v. Mears*, 37 Tex. Civ. App. 179, 83 S. W. 401.

⁶² *Ellis-Young Co. v. Putnam Lumber Co.*, 50 Fla. 217, 39 So. 198; *Ellis-Young Co. v. East Coast Lumber Co.*, 50 Fla. 217, 39 So. 198; *East Coast Lumber Co. v. Ellis-Young Co.*, 50 Fla. 215, 39 So. 197; *Putnam Lumber Co. v. Ellis-Young Co.*, 50 Fla. 215, 39 So. 193.

Where suit is brought against one railway company and service is made

upon another, the question is not one of misnomer but of service upon the proper party. *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944.

⁶³ See § 740, *supra*.

⁶⁴ *Bellows v. Hallowell & A. Bank*, 2 Mason (U. S.) 31, Fed. Cas. No. 1,279; *Sykes v. People*, 132 Ill. 32, 23 N. E. 391; *Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind. 376; *Shackleford v. Dangerfield*, L. R. 3 C. P. 407; *Reg. v. Registrar*, 10 Q. B. 839.

If a corporation changes its name and place of business under an unconstitutional law, and afterwards exercises corporate powers under the new name, it is at least a *de facto*, if not a *de jure*, corporation. *Richards v. Minnesota Sav. Bank*, 75 Minn. 196, 77 N. W. 822.

⁶⁵ A change of name is authorized under a reservation of power to alter or amend the corporate charter. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336.

⁶⁶ See cases cited *infra*, this section. The words "or other corporation"

"Legislation authorizing the change belongs to that class of legislation which has uniformly been recognized as valid, for the reason that it affects no rights of those who deal with the corporation, does not change the relations of the shareholders to each or to the corporation, and does not impair the corporate franchises."⁶⁷

But before an application for a change in the corporate name can be granted, it must appear that such application is the act of the corporation in its corporate capacity and not the act of individual members of the corporation.⁶⁸ In the absence of fraud, however, a change of name is a matter of business management, and regardless of whether the name be valuable or merely designative and ornamental, a change therein, under and pursuant to law, does not require the unanimous consent of the stockholders where there is no statutory provision to the contrary.⁶⁹

A change of name will not be granted when the effect thereof would be to entirely change the purpose for which the corporation was created.⁷⁰ Moreover, a change will be enjoined in a suit to foreclose a trust deed securing bonds issued by the corporation when it appears

in the California statute providing that "any religious, benevolent, literary, scientific or other corporation * * * may apply to the superior court * * * for a change of its corporate name" held not to include only such corporations as come within classes ejusdem generis with those enumerated, but also corporations formed for private gain. *In re La Société Française d'Epargnes Et De Prévoyance Mutuelle*, 123 Cal. 525, 56 Pac. 458, 787.

Under the National Banking Act, "any national banking association may change its name * * * with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name * * * shall be sent to the office of the Comptroller of the Currency; but no change of name * * * shall be valid until the Comptroller shall have issued his cer-

tificate of approval of the same." 5 Fed. St. Ann. p. 90.

A statute requiring the certificate of reincorporation to state "the proposed name of the new corporation" as well as "the former name of said corporation" indicates that it was the legislative purpose to permit a modification of the corporate name to be made in the process of reincorporation. *Erb v. Grimes*, 94 Md. 92, 50 Atl. 397, and see further on questions, relating to the name of a corporation, arising as a result of the latter's reincorporation, the chapter on Reorganization, *infra*.

⁶⁷ *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670.

⁶⁸ *In re Liberty Bell Lodge*, No. 42, 231 Pa. 112, 80 Atl. 532.

⁶⁹ *Thomas & Barton Co. v. Thomas*, 165 Fed. 29, 33. See also, *In re Hinds, Noble & Eldredge*, 158 N. Y. Supp. 249.

⁷⁰ *In re Liberty Bell Lodge*, No. 42, 231 Pa. 112, 80 Atl. 532.

that the sole purpose in making the change was to further the interests of a rival corporation.⁷¹

§ 745. — Name which may be adopted. In selecting the name for which it proposes to exchange the one under which it was created, a corporation must, of course, be governed by the statute touching the matter,⁷² and is, generally speaking, subject to the same limitations and restrictions that confronted it when selecting the name in which its charter was granted.⁷³

Unfair competition resulting from the use of a similar corporate name will meet the condemnation of a court of equity without regard to whether such name is the one under which the offending corporation was created or is one which it has formally substituted for its original name. The governing statute frequently provides, in effect, that the new name shall not be identical with that of another corporation or so similar thereto as to result in confusion.⁷⁴

⁷¹ Ramsey v. W. M. Welch Co., 163 Iowa 324, 144 N. W. 323.

⁷² Where the statute provides that no corporation thereafter organized under other than the Trust Company Act shall use the word "trust" as part of its name, a corporation existing under a different act at the time of the enactment of the statute cannot thereafter change its name to one containing the word "trust," such change of name being to that extent the creation of a new corporation. *State v. Nichols*, 38 Wash. 309, 80 Pac. 462.

Corporation held not entitled to change its name to "Electric Cigar Lighter Company" where the statute requires that the new name shall have "such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate" that the concern is a corporation, the word "company" not necessarily importing a corporation in law although, colloquially used, it means a corporation. In *re American Cigar Lighter Co.*, 77 N. Y. Misc. 643, 138 N. Y. Supp. 455.

⁷³ See §§ 722-725, *supra*.

⁷⁴ In Illinois it is expressly provided by statute that "in changing

the name of any corporation, * * * no name shall be assumed or adopted * * * similar to * * * the name of any other corporation organized under the laws" of the state. Act March 26, 1872, § 1 (*J. & A. ¶ 2495*). Under this provision, a corporation cannot change its name so as to adopt a name used by a corporation which, although not fully organized, has received its license for incorporation, even though such license was obtained after the directors of the former company had called and published notice of a meeting to vote on the proposed change of name. *Illinois Watch-Case Co. v. Pearson*, 140 Ill. 423, 16 L. R. A. 429, 31 N. E. 400.

Where the statute provides that the proposed new name must not be the name of any other corporation or resemble such a name so nearly as to be calculated to deceive, each application for a change of name must be determined on its own facts. In *re United States Mortg. Co.*, 83 Hun (N. Y.) 572, 32 N. Y. Supp. 11.

In determining whether a proposed new name, which is but the old name with a general and descriptive term, abstractedly available to the peti-

If a corporation does change its name to one prejudicing the rights

tioner, inserted, is the name of another corporation or so nearly resembles it as to be calculated to deceive, within the meaning of the statute proscribing such a name, the proposed new name must be considered as a whole. In re United States Mortg. Co., 83 Hun (N. Y.) 572, 32 N. Y. Supp. 11.

"Michigan Savings Bank of Detroit, Mich." held not entitled to an injunction against "The Dime Savings Bank of Detroit, Mich." prohibiting it from changing its name to "The Bank of Michigan." Michigan Sav. Bank v. Dime Sav. Bank, 162 Mich. 297, 139 Am. St. Rep. 558, 127 N. W. 364.

Order of court at special term, permitting the "United States Mercantile Reporting & Collecting Association, Limited," which had been enjoined from using its corporate name at the suit of the "United States Mercantile Reporting Company," to change its name to "United States Commercial Agency & Collecting Company" held, at general term, to have been erroneous in view of the facts in the case. In re United States Mercantile Reporting & Collecting Co., 52 Hun (N. Y.) 611, 4 N. Y. Supp. 916, appeal dismissed on the ground that the statute placed the matter of the granting of the application in the discretion of the court below and that no abuse of its discretion appeared, 115 N. Y. 176, 21 N. E. 1034.

Los Angeles Savings Bank which was no longer actively engaged in the savings bank business, having transferred practically all of its business to another savings bank and not taking any new business and having on deposit at the time only about twenty-one thousand dollars, held not entitled to object to the granting of the application of a corporation, which proposed to add a savings bank depart-

ment to its business, for authority to change its name from "Los Angeles Trust Company" to "Los Angeles Trust & Savings Bank," on the ground that the new name was prejudicially similar to its own. In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56. Said the court: "It is apparent that until appellant does engage in active business again, a matter as to which there appears to be no certainty, there can be no probability of confusion existing or the identity of the two corporations being destroyed. If it ever does re-engage in active business along the lines specified in its articles of incorporation, being according to such articles strictly a savings and loan corporation, we are satisfied that the lower court was warranted in holding that the presence of the word 'trust' in the proposed name of respondent, which has been a part of its name ever since its incorporation in 1902, will sufficiently serve to characterize it and distinguish it from appellant to prevent injury to appellant, and imposition or deceit upon the public. As said in Re U. S. Mortgage Co. [83 Hun (N. Y.) 572, 32 N. Y. Supp. 11] * * * 'A mere possibility by the suggestion of extreme instances that might never occur should never be the basis of the court's action, the duty being to determine what with reasonable certainty would be the natural consequences of granting the application.' "

A statutory provision that the proposed new name must not be the name of any other corporation or so nearly resemble such a name as to be calculated to deceive does not preclude the "United States Mortgage Company" from changing its name, upon its acquisition of the rights and powers of a trust company, to

of another company, the use by it of the new name may be enjoined.⁷⁵

§ 746. — Mode of changing name. The name of a corporation may be changed either by special legislation or under a general law. The fact that the constitution prohibits the legislature from creating a corporation, or from granting corporate powers and privileges, by special act, does not, it has been held, render void a special act merely changing the name of a corporation, or authorizing it to be changed by the corporation.⁷⁶

In many jurisdictions, however, there are provisions in the general

“United States Mortgage & Trust Company” notwithstanding the existence of the “United States Trust Company of New York,” which is doing a trust business in the same locality, and which is commonly known as the “United States Trust Company.” In *re* United States Mortg. Co., 83 Hun (N. Y.) 572, 32 N. Y. Supp. 11.

Where the new name is one which the corporation is, by statute, precluded from adopting, mandamus will not issue to compel the secretary of state to file the certificate of the amendment to the articles of incorporation whereby the name was sought to be changed, there being no duty devolving upon the secretary of state in the premises within the meaning of the statute providing that mandamus may issue to compel the performance of an act especially enjoined as a duty resulting from an office, trust or station. *State v. Nichols*, 38 Wash. 309, 80 Pac. 462.

⁷⁵ *Illinois Watch-Case Co. v. Pearson*, 140 Ill. 423, 16 L. R. A. 429, 31 N. E. 400. See also *In re* United States Mortg. Co., 83 Hun (N. Y.) 572, 32 N. Y. Supp. 11; *In re* Manhattan Dispensary, 7 N. Y. St. Rep. 871.

An injunction will lie against a corporation, which has been authorized as a result of void proceedings to change its name to one identical with

that of another corporation, to restrain it from using its new name. *Ft. Pitt Building & Loan Ass'n v. Model Plan Building & Loan Ass'n*, 159 Pa. St. 308, 28 Atl. 215.

If, however, the corporation takes a conveyance of land in the new name, the conveyance does not vest the title in the other company. Thus, a corporation changed its name to the K. Iron Co., and took and recorded a deed to land in that name, being ignorant at the time that there was another corporation of the same name. The plaintiffs saw the record, and, supposing that the property belonged to the original corporation of that name, transferred property to it and took shares of its stock in payment. It was held that title to the land did not vest in the original company. *Clarke v. Milligan*, 58 Minn. 413, 59 N. W. 955.

⁷⁶ *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Hazelett v. Butler University*, 84 Ind. 230; *Attorney General v. Joy*, 55 Mich. 94, 20 N. W. 806. See also *Pacific Bank v. De Ro*, 37 Cal. 538, 540.

A change in the name of a corporation by a special act is an amendment of its charter, and, like other amendments, must be accepted by the corporation. *Alexander v. Berney*, 28 N. J. Eq. 90. Compare *Hazelett v. Butler University*, 34 Ind. 230.

laws under which a corporation may change its name upon certain conditions, or upon complying with certain formalities.⁷⁷

When the general law thus deals with the subject, a corporation can change its name only in the manner provided.⁷⁸

⁷⁷ As to the construction of such statutes, see *Wells v. Oregon Ry. & Nav. Co.*, 15 Fed. 516; *Anthony v. International Bank*, 93 Ill. 225; *Hazelett v. Butler University*, 84 Ind. 230; *Chicago, D. & M. R. Co. v. Keisel*, 43 Iowa 39; *In re United States Mercantile Reporting & Collecting Agency*, 115 N. Y. 176, 21 N. E. 1034; *In re First Presbyterian Church of Bloomfield*, 111 Pa. St. 156, 2 Atl. 574, 107 Pa. St. 543; *In re Bank of North America*, 2 Pa. Co. Ct. 97.

When the statute confers upon the governor the power "to improve, amend or alter the articles and conditions of any charter," it impliedly vests him with power to change the corporate name: *Ft. Pitt Building & Loan Ass'n v. Model Plan Building & Loan Ass'n*, 159 Pa. St. 308, 28 Atl. 215.

Under the Pennsylvania statute (Act of May 2, 1899, P. L. 160), a change in the name of a corporation of the first class is to be regarded as an amendment of the corporate charter, and the proceedings to accomplish such change are the same as those looking to the improvement, amendment or alteration of such charter in any other respect. *In re Liberty Bell Lodge*, No. 42, 231 Pa. 112, 80 Atl. 532.

The California statute providing that the superior court may change the name of a corporation, upon application made, held not to permit the exercise of a legislative power by the court in violation of the state constitution. *In re La Société Française d'Epargne, Et De Prévoyance Mutuelle*, 123 Cal. 525, 56 Pac. 458, 787.

⁷⁸ *Cincinnati Cooperage Co. v. Bate*,

96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538.

Under the Pennsylvania statute (Act of May 2, 1899, P. L. 160), it is not necessary for a corporation of the first class, before presenting a petition for a change in its name to the court of common pleas, to serve notice of the purposed change upon the auditor general. *In re Liberty Bell Lodge*, No. 42, 231 Pa. 112, 80 Atl. 532, distinguishing *In re Application of First Presbyterian Church*, 107 Pa. St. 543, as decided prior to the passage of the Act of 1899.

A statute requiring publication of notice of a change of the corporate organization does not, it seems, require publication of notice of a change in the corporate name, a change of the latter character not being a "change of organization" within the meaning of the statute. *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238.

A petition by a corporation, for authority to change its name from "Los Angeles Trust Company" to "Los Angeles Trust & Savings Bank," which stated "that as the applicant proposed to conduct a savings bank department as well as a trust department, it believed that it would be to its advantage to have its name indicate that fact, so that its customers and the general public might be informed by its name that it had a savings bank department, and not be led to believe thereby that it conducted only a trust department," held to comply with that portion of the California statute which requires that the petition specify the reason for the change of name, and to state a rea-

While it has been held, on the one hand, that the effect of an attempt to change the corporate name in a manner other than that provided by law is an abandonment, not only of such name, but of the corporation itself,⁷⁹ it has been held, on the other, that a corporation is not deprived of its corporate existence by such an attempt, but continues to exist under its original name.⁸⁰ However this may be, third persons contracting with a corporation have no rights or interests involved in a change in the corporation's name, and cannot inquire into nor collaterally attack the mode of procedure by which the change was effected.⁸¹ Moreover, it has been held that, where a corporation

son which, considered alone, was sufficient to justify the granting of the application. In *re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

Proof that change was made in accordance with statute, requiring the consent of two-thirds of the stockholders present at a regular meeting, the recording of the change in two public offices, and the publication in a certain newspaper, the affidavit of publication being thereafter filed, held sufficient. *Hamilton v. Simon*, 178 Fed. 130, 135.

Where the statutes of the state under which a foreign corporation was organized provide that a corporation can change its name and that a change made "shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the secretary of state an affidavit setting forth the name adopted, * * * together with the date at which such change was voted by the stockholders of such corporation," a properly authenticated copy of the original certificate filed in the office of the secretary of state is, until its truthfulness is successfully attacked, sufficient proof of a change of name by such foreign corporation. *Whitman v. National Bank of Oxford*, 83 Fed. 288, 296, *aff'd* 176 U. S. 559, 44 L. Ed. 587.

As to proof of change, and presumption of regularity, generally, see *Wells*

v. Oregon Ry. & Nav. Co., 15 Fed. 561; *Anthony v. International Bank*, 93 Ill. 225; *Chicago, D. & M. R. Co. v. Keisel*, 43 Iowa 39; *King v. Ilwaco Ry. & Nav. Co.*, 1 Wash. 127, 23 Pac. 924.

⁷⁹ *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538. "The identity of the creature authorized by the statute to do business is destroyed. It is in no sense like the case where an individual changes his name. The very being of its constitution is destroyed by an abandonment of its name, and an attempted substitution of a new name, without authority of law." *Cincinnati Cooperage Co. v. Bate*, *supra*.

Where persons, acquiring the entire stock of a corporation, attempt, by an informal method, to change the corporation's name, they will be liable as partners for debts incurred in the conduct of the corporation's business under the new name. *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538.

⁸⁰ *O'Donnell v. C. R. Johns & Co.*, 76 Tex. 362, 13 S. W. 376.

⁸¹ *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670. See also *International Savings & Trust Co. v. Stenger*, 31 Pa. Super. Ct. 294.

In *Greenville & P. R. Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332, the rule that a person who deals with a corporation after a proceeding by which it has changed

attempts to change its name, but fails by reason of noncompliance with the statute, and afterwards sues and obtains a judgment in the new name, the judgment is good if the complaint identifies the corporation.⁸²

§ 747. — Effect of change. A mere change in the name of a corporation, either by the legislature or by the incorporators or stockholders under legislative authority, does not, generally speaking, affect the identity of the corporation, or in any way affect the rights, privileges, or obligations previously acquired or incurred by it.⁸³

its name will be estopped, in an action based upon such dealing, to deny the validity of the proceeding and the change of name, was applied to a subscriber to the stock of a corporation, in an action on the subscription, although the subscription recognized the old name of the corporation.

It has been held that the maker of a note to a corporation cannot defend against an action thereon by a receiver of the corporation on the ground that the name of the corporation was changed after the note was executed, and the receiver was appointed in proceedings brought against it in the new name, and that the proceedings for changing the name were void, where the complaint showed the identity of the corporation for which the receiver was appointed, and the one named as payee in the note. *Hyatt v. McMahon*, 25 Barb. (N. Y.) 457.

⁸² *King v. Ilwaco Ry. & Nav. Co.*, 1 Wash. 127, 23 Pac. 924.

⁸³ 1 Rolle, Abr. 513, 572; 4 Coke 87b.

United States. *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53.

Alabama. *North Birmingham Lumber Co. v. Sims & White*, 157 Ala. 595, 48 So. 84; *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670; *Trustees of University v. Moody*, 62 Ala. 389.

Arkansas. *West v. Carolina Life Ins. Co.*, 31 Ark. 476.

California. *Higgins v. California Petroleum & Asphalt Co.*, 122 Cal. 373, 55 Pac. 155.

Connecticut. *Trinity Church v. Hall*, 22 Conn. 125.

Indiana. *Miles Lamp Chimney Co. v. Erie Fire Ins. Co.*, 164 Ind. 181, 73 N. E. 107; *Hazelett v. Butler University*, 84 Ind. 230; *Rosenthal v. Madison & I. Plankroad Co.*, 10 Ind. 358; *State Exch. Bank v. Paul*, 58 Ind. App. 487, 108 N. E. 532; *Philapy v. Aukerman-Bright Lumber Co.*, 56 Ind. App. 266, 105 N. E. 161.

Kentucky. *McCloskey v. Doherty*, 97 Ky. 300, 30 S. W. 649; *Cahill v. Bigger*, 8 B. Mon. 211.

Massachusetts. *Episcopal Charitable Society v. Episcopal Church*, 1 Pick. 372.

Missouri. *Dean v. La Motte Lead Co.*, 59 Mo. 523.

Nebraska. See *Carlon v. City Sav. Bank*, 82 Neb. 582, 118 N. W. 334.

New York. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *First Soc. of M. E. Church v. Brownell*, 5 Hun 464.

South Carolina. *South Carolina Mut. Ins. Co. v. Price*, 67 S. C. 207, 45 S. E. 173.

South Dakota. *Peever Mercantile Co. v. State Mut. Fire Ass'n of Canton*, 23 S. D. 1, 19 Ann. Cas. 1236, 119 N. W. 1008.

Texas. *Acres v. Moyne*, 59 Tex. 623.

Virginia. *Welfley v. Shenandoah*,

Indeed, it has been said that a change of name by a corporation has no more effect upon the identity of the corporation than a change of name by a natural person has upon the identity of such person.⁸⁴ So it has been held that a slight change in the corporate name made by amended articles of incorporation which confer no new rights or powers does not constitute the creation of a new corporation, requiring the payment of a second organization fee,⁸⁵ and again, that a member of a corporation does not become any the less such because of a change, effected by an act of the general assembly, in the corporation's name.⁸⁶

I., L., M. & M. Co., 83 Va. 768, 3 S. E. 376.

England. Shackelford v. Dangerfield, L. R. 3 C. P. 407.

It has been held in New Jersey that, although the name of a corporation has been changed by an act of the legislature, if the corporation continues to conduct its business in its original name, and otherwise exclusively uses that name after the passage of the act, it may regain such name by usage, and sue and be sued thereby. *Alexander v. Berney*, 28 N. J. Eq. 90.

Under the express provision of the National Banking Act, "all debts, liabilities, rights, provisions, and powers of the [national banking] association under its old name shall devolve upon and inure to the association under its new name"; and "nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name * * * from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested." 5 Fed. St. Ann., p. 90.

⁸⁴*North Birmingham Lumber Co. v. Sims & White*, 157 Ala. 595, 48 So. 84; *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670.

⁸⁵*Bruner v. Louisville Packing Co.*, 144 Ky. 471, 139 S. W. 764. Said the court: "It may be that, where there

has been a change in the name of the corporation, accompanied by a substantial change in the scope, rights, and powers of the corporation, the amended articles of incorporation have the effect of creating a new corporation. * * * No such case is here presented. No new rights or powers were conferred by the amended articles. The change in the name itself was slight. It was authorized and made in the manner pointed out by the statute. No new corporation was created. It is simply a case where the old corporation is continued under a slightly changed name, for exactly the same length of time, and with precisely the same rights and powers as were provided in the original articles of incorporation." See also *Avery Bldg. Ass'n v. Com.*, 166 Ky. 199, 179 S. W. 39.

A permit granted to a foreign corporation bearing a certain name to do business in the state inures to its benefit under a legally substituted name when it does not appear that in changing the name there has been any change in the corporate charter, the character of the corporation's business or the management thereof, etc. *St. Louis Expanded Metal Fireproofing Co. v. Beilharz* (Tex. Civ. App.), 88 S. W. 512.

⁸⁶*South Carolina Mut. Ins. Co. v. Price*, 67 S. C. 207, 45 S. E. 173.

That a subscriber to the stock of a proposed corporation will not be dis-

A change of name subsequently to the creation of a debt does not affect the corporation's liability thereon.⁸⁷

A corporation, after its name has been changed, may sue and be sued in the new name on contracts made before the change.⁸⁸

An objection that the corporation, suing, under a mortgage, to recover the possession of land covered thereby, is not, *eo nomine*, the grantee named, fails when plaintiff proves that it is the corporation—but with its name changed—to which the mortgage was executed.⁸⁹

charged from his contract by a mere change in the corporate name unless he shows facts making the change material, especially when such contract expressly provides that the name may be changed, see Chap. 17, § 524.

⁸⁷ State Exch. Bank v. Paul, 58 Ind. App. 487, 108 N. E. 532.

A change of name pursuant to contract and under a resolution of the board of directors ratified by the stockholders does not *ipso facto* change the identity of the corporation so as to prevent an obligation incurred by it under its original name from being enforced against it in its new name. Wright-Caesar Tobacco Co. v. A. Hoen & Co., 105 Va. 327, 54 S. E. 309.

⁸⁸ *Indiana*. Rosenthal v. Madison & I. Plankroad Co., 10 Ind. 358.

Iowa. Trustees of Northwestern College v. Schuyler, 37 Iowa 577.

Kentucky. Cahill v. Bigger, 8 B. Mon. 211.

Massachusetts. Episcopal Charitable Society v. Episcopal Church, 1 Pick. 372.

Missouri. Dean v. La Motte Lead Co., 59 Mo. 523.

New Jersey. Delaware & Atlantic R. Co. v. Quick, 23 N. J. L. 321.

A corporation suing on a certain bond alleged that the name of the obligee therein had been lawfully changed to that used by the plaintiff, and that the two corporations were one and the same. Held, that these allegations were sufficient to show that the right to maintain the action

existed in the plaintiff. French, Finch & Co. v. Hicks (Tex. Civ. App.), 92 S. W. 1034.

Where action has been begun by a corporation, and thereafter its corporate name is changed, it may amend its petition and pray that the suit may continue under the amended name. In order to recover in the action under the new name, however, it is essential that the allegations of the amendment with reference to the new name be proven upon the trial. Atlantic Coast Line R. Co. v. Waycross Elec. Light & Power Co., 123 Ga. 613, 51 S. E. 621.

A corporation will, on appeal, be held to have had the right to sue in its new name on a debt owing to it under its old name, especially when no question in regard to the evidence, showing the identity of the two corporations, is presented. Philapy v. Aukerman-Bright Lumber Co., 56 Ind. App. 266, 105 N. E. 161.

⁸⁹ Lomb v. Pioneer Savings & Loan Co., 106 Ala. 591, 17 So. 670.

Where an association incorporated under the name "Orphans' Home" later prefixed thereto the word "Protestant," it was unnecessary that a transfer of property under the original name be made to the corporation under its name as amended. Palfrey v. Association for Relief of Jewish Widows & Orphans, 110 La. 452, 34 So. 600. Nor, where the title to land was vested in a corporation sole by the name of "The Right Reverend M., Bishop of L., and his suc

A change, *pendente lite*, in the name of the defendant corporation, sued for specific performance, without any change in the corporation's membership or composition, does not affect the complainant's right to the relief prayed.⁹⁰

The fact that a renewal fire insurance policy is issued and addressed to a corporation, after it has changed its corporate name, in its original name does not preclude the corporation, it having retained the policy, from suing thereon.⁹¹

Where after a change in its corporate name, a corporation is sued in its old name, which was the one under which it entered into the contract in suit, the court may, upon plaintiff's motion, made when the case is called for trial, and proof in support of such motion of a legal change in the name, order that the cause proceed against the defendant in its new or changed name.⁹²

Somewhat opposed to this line of cases, however, is a Nebraska case wherein, applying the rule that a contract of guaranty must be strictly construed in favor of the guarantor, it is held that a corporation cannot recover against the guarantor in a continuing contract of guaranty, executed to it in its original name, on debts contracted by the one whose account was guaranteed, after a change in the corporate name.⁹³

§ 748. Use of corporate names by natural persons and unincorporated organizations—In general. The doing of business by natural

cessors in office," does an act of the legislature changing the name by omitting the words "and his successors in office" divest the title or require a conveyance from the corporation under the old name to the corporation under the new. *McCloskey v. Doherty*, 97 Ky. 300, 30 S. W. 649.

⁹⁰ *Welfley v. Shenandoah, I., L., M. & M. Co.*, 83 Va. 768, 3 S. E. 376. See also *State Exch. Bank v. Paul*, 58 Ind. App. 487, 108 N. E. 532.

Under the Alabama statutes, the original record from the probate office is admissible in evidence to show that the corporation defendant has changed its name since the rendition of the foreign judgment in suit, and that it is the same corporation as the one against which such judgment was

rendered. *Christian & Craft Co. v. Coleman*, 125 Ala. 158, 27 So. 786.

⁹¹ *Peever Mercantile Co. v. State Mut. Fire Ass'n of Canton*, 23 S. D. 1, 19 Ann. Cas. 1236, 119 N. W. 1008.

⁹² *North Birmingham Lumber Co. v. Sims & White*, 137 Ala. 595, 48 So. 84.

⁹³ *Crane Co. v. Specht*, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015, distinguished in *Springfield Lighting Co. v. Hobart*, 98 Mo. App. 227, 68 S. W. 942. See also *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776, in which it was held that a change of name in the manner provided by the new corporation law made the corporation a creature of such law and rendered the double-liability clause operative as to the corporation's stockholders.

persons and unincorporated organizations under names such as are usually associated with corporations⁹⁴ is common and, in the absence of a statutory provision to the contrary, legitimate.⁹⁵

The evidentiary effect of the use of such a name is a matter upon which the courts differ, some of them holding that no presumption of incorporation arises from the use of a name appropriate to a corporation and others that the use of such a name is *prima facie* evidence of corporate existence.⁹⁶

In line with these differences of opinion, some of the courts take the position that the fact that the name of the promisor, as it appears in the contract, is one which would ordinarily be regarded as importing a corporation does not even *prima facie* estop the promisee from denying the corporate existence of the promisor, especially when there is no recital in the contract that the latter is a corporation, while others hold that where such name is of the character indicated, the promisee is confronted with a *prima facie* estoppel to claim that the promisor is other than a corporation.⁹⁷

So again the courts divide on the question whether an estoppel to deny corporate existence operates against unincorporated persons doing business under a name indicating a corporate organization, there being authority, on the one hand, for the proposition that no estoppel is created thereby, and, on the other, for the proposition that the persons using such name will be estopped to deny their incorporation or, at least, that their use of the name will be regarded as *prima facie* evidence that they are incorporated.⁹⁸

§ 749. — Statutory prohibition. The “purpose of soliciting business” is the essential element of the offense defined by the Illinois statute imposing a fine upon any unincorporated company or association which, or person who puts forth any sign or advertisement and therein assumes, for the purpose of soliciting business, a corporate name. “What the statute denounces is not merely the assuming of a corporate name, but the putting forth a sign or advertisement, and therein assuming a corporate name for a particular purpose, namely, for the purpose of soliciting business. The mere assumption of a name appropriate for a corporation would be no violation of the statute; nor would the putting forth of a sign or advertisement in which a

⁹⁴ On the question of what names import corporations, see §§ 336, 345, 423, *supra*.

⁹⁵ *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525, 527.

⁹⁶ See § 423, *supra*.

⁹⁷ See § 336, *supra*.

⁹⁸ See § 345, *supra*.

corporate name is assumed, if not done for the purpose of soliciting business, constitute such violation. It is the purpose for which the act is done that gives character to the act. What the legislature had in view in enacting this section of the Criminal Code manifestly was to prevent persons from obtaining a fictitious credit by advertising themselves as being a corporation when they were not incorporated.”⁹⁹ Moreover, the penalty for a violation of such statute will not be extended so as to invalidate the contracts of the offender.¹

⁹⁹ *Edgerton v. Preston*, 15 Ill. App. 23, 26. See also *Turnes v. Johnson*, 179 Ill. App. 32, 39; *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525, 527; *Best Brewing Co. v. United States Showcase Co.*, 67 Ill. App. 555, 559.

“The fraud, which the criminal statute in question seeks to punish or to prevent, is the use of a name in such a way as to deceive the public, and it is the deception or improper use of the name, and not the name itself, which constitutes such fraud.” *People v. Rose*, 219 Ill. 46, 76 N. E. 42.

In *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525, 528, the court said: “We are referred by appellant’s counsel to the original opinion in *Hazelton Boiler Company v. Hazelton Tripod Boiler Company*, 30 Northwestern [Northeastern] Reporter, 339-344, where it was said, in substance, that the assumption and use of a corporate name by persons not incorporated was in violation of law. But the same case is reported in 142 Ill. 494, and it appears that upon more mature consideration the Supreme Court abandoned the view at first taken and omitted from their final opinion the language above referred to.”

The fact that the final opinion in *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* was not filed until Oct. 14, 1892 (142 Ill. 494), whereas the original opinion was filed on March 24, 1892 (30 N. E. 339) and the opinion in *Clark v. Aetna Iron Works*, 44

Ill. App. 510, was filed on June 7, 1892, accounts for the statement in the last-cited case that “under the recent decision of the Supreme Court in *Hazelton, etc. v. Hazelton, etc.*, 30 N. E. Rep. 339, the appellants, a co-partnership only, could have no property in a name importing a corporation, as a trade-name.”

It will be a question for the jury whether partners doing business under a corporate name put forth a sign or advertisement in such name “for the purpose of soliciting business.” *Edgerton v. Preston*, 15 Ill. App. 23, 26.

In a prosecution for using a corporate name, without being a regularly licensed corporation, for the purpose of obtaining business and influence in trade, advertisements displayed by the defendants are admissible in evidence and if the same were such as to give the general public the impression that the defendants were incorporated, a verdict of guilty will be sustained on appeal. *People v. Carp*, 180 Ill. App. 673.

¹ *Edgerton v. Preston*, 15 Ill. App. 23, 26. See also *People v. Rose*, 219 Ill. 46, 76 N. E. 42; *Turnes v. Johnson*, 179 Ill. App. 32, 39.

“Section 18 of the Corporation Act [J. & A. ¶2435] provides the only penalty (which would exist indeed without it) for doing business without warrant under a corporate name, namely—that the person or persons doing so are ‘jointly and severally liable for all debts and liabilities

§ 750. Judicial notice of name. Since the courts take judicial notice of all public acts, they will take judicial notice of the name of a corporation created and named by a public act.² It is otherwise, however, when a corporation has been created and named by a private or a foreign act.³ And where the name of a corporation has not been given it by an act of the legislature, but has been selected and adopted by the incorporators in organizing under a general law, the court cannot take judicial notice of it. In such a case it must be proved.⁴

made by them and contracted in the name of such corporation or pretended corporation.''' *Turnes v. Johnson*, *supra*.

The fact that the name of the unincorporated payee in a promissory note is such as might be regarded as denoting a corporation will not invalidate the note in the hands of a

remote indorsee. *First Nat. Bank of Litchfield v. Cox*, 140 Ill. App. 98.

² *Jackson v. State*, 72 Ga. 28.

³ See § 429, *supra*.

⁴ *Johnson v. Indianapolis*, 16 Ind. 227; *Holloway v. Memphis, E. P. & P. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68. Compare *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171.

CHAPTER 19

SEAL

- § 751. In general.
- § 752. Under charter or statute.
- § 753. Adoption and form.
- § 754. Simple contracts.
- § 755. Implied and quasi contracts.
- § 756. Deeds and mortgages.
- § 757. Power to affix.
- § 758. Proof.
- § 759. Effect.

§ 751. In general. Among the "incidents tacitly annexed to a corporation as soon as it is duly erected," Blackstone includes the having of a corporate seal. "For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consent to any acts, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."¹

¹ 1 Bl. Com. * 475.

Kyd states the matter thus: "A corporation aggregate, being considered as an invisible body, cannot manifest its intentions by any personal act or oral discourse; and though the particular members may express their private consent to any act, by words, or by signing their names, this does not bind the corporation; the law, therefore, has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. This is by fixing the common seal, which, therefore, it is incident to every corporation to have, without any clause in the

charter of incorporation expressly empowering them to use one; for when they are incorporated, they may make or use what seal they will." 1 Kyd on Corporations, 267.

"His signet or seal was the pledge of identity and fidelity, exacted by Tamar of Lord Judah, one of the twelve Princes of Israel. Moses' Reports, Book Genesis, c. 38, v. 18. See also, Esther, c. 8, v. 8. and 10. It would seem from this last case, that even at this early period Monarchs as well as Courts at this day, could only act through their official seal. And the reason given is, that the precept issued in the King's name and sealed with his ring, by his Clerk Mordecai

To-day, even in the absence of the common statutory provision that a corporation has the power to make and use a common seal and to alter and renew it at its pleasure, the courts generally would recognize such a power as inherent in a corporation.²

The further rule that a corporation can be bound in any and every case only by an act under its common seal must, however, be regarded as obsolete, in this country at least, and as worthy of preservation only as a curiosity in the storehouse of legal antiquities.³

the Jew, may no man reverse. * * * Once the seal was every thing, and the signature was nothing. Now the very reverse is true: the signature is everything, and the seal nothing. * * * So long as seals distinguished identity, there was propriety in preserving them. And as a striking illustration, see the signatures and seals to the death warrant of Charles the First, as late as January, 1648. They are 49 in number, and no two of them alike. But to recognize the waving, oval circumflex of a pen, with those mystic letters to the uninitiated, L. S. imprisoned in its serpentine folds, as equipotent with the coats of arms taken from the devices engraven on the shields of knights and noblemen; shades of Eustace, Roger de Beaumont, and Geoffry Gifford, what a desecration! The reason of the usage has ceased; let the custom be dispensed with altogether. In *Jones & Temple v. Logwood* (1 Washington's Rep. 56), President Pendleton states, that there was a period, when the impression was made with the eye-tooth, and thinks there was some utility in the custom, since the tooth's impression was the man's own, and presented a test in case of forgery. But this reason, however applicable in Virginia in 1791, does not hold true in this epoch of dentistry, when no man's tooth is his own, but teeth, like almost everything else, are artificial. Another learned judge, advertng to this same fact, traces to it the phrase, 'I will prove it to your teeth, or by

your teeth.' He also supposes that 'the cutting of the eye-tooth' had an allusion to this, whether the eye-tooth being cut at a certain age, it might denote the being of the age of discretion, so as to be capable of contracting, or whether it related to the impression of that tooth as a mark, being a tooth of signal and singular impression.'" *Lowe v. Morris*, 13 Ga. 147, 150, 153 (by Lumpkin, J., specially concurring).

² The power to make a common seal attaches to a corporation however created even though not expressly conferred. *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

It is an inseparable incident of every corporation, it was said in a New Jersey case, not only that it may have a corporate seal, but also that it may make, alter, and renew the same at pleasure. *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212.

A corporation may always contract under the corporate seal, so as to make the contract a deed or specialty. *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

A person forging a corporate seal is subject to prosecution under a statute penalizing the forgery of, inter alia, a "character." *United States v. Andem*, 158 Fed. 996, 999.

³ "The old doctrine that corporations can only be bound by act under their corporate seal, has been long exploded." *Chicago, B. & Q. R. Co. v.*

"In ancient times it was held that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably in its origin applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now, as a general proposition, be supported. Mr. Justice Bayley * * * said:⁴ 'A corporation can only grant by deed; yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature.' And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal."⁵

Coleman, 18 Ill. 297, 299, 68 Am. Dec. 544. See also Board of Education of Illinois v. Greenebaum & Sons, 39 Ill. 609, 612.

⁴Harper v. Charlesworth, 4 B. & C. 575.

⁵Bank of United States v. Danbridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

"Anciently it seems to have been held that corporations could not do anything without deed. * * * Afterwards the rule seems to have been relaxed, and they were, for convenience's sake, permitted to act in ordinary matters without deed * * * at length it seems to have been established that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation." Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351.

"It is well settled that the acts of a corporation evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises might as well be implied from its acts and the acts of its agents, as if it had been an individual." Board of Education of Illinois v. Greenebaum & Sons, 39 Ill. 609, 612. See also Church v. Imperial Gas Light & Coke Co., 6 A. & E. 846; Beverley v. Lincoln Gas Light & Coke Co., 6 Adol. & El. 829; Diggle v. London & B. Ry. Co., 5 Exch. 442, 450. And compare East London Water Works Co. v. Bailey, 4 Bing. 283; Diggle v. London & B. Ry. Co., 5 Exch. 442; Paine v. Strand Union Guardians of the Poor, 8 Q. B. 326; Garland Mfg. Co. v. Northumberland Paper & Electric Co., 31 Ont. 40.

Certainly no stronger rule obtains to-day than when this statement was made some ninety years ago. On the contrary, the rule in the matter has been, if anything, still further relaxed and it is now firmly established that unless its charter or the governing statute provides otherwise, a corporation may contract without the use of its corporate seal in all cases in which natural persons can bind themselves without the use of a seal.⁶

§ 752. Under charter or statute. If the charter of a corporation, or any statute which is applicable to it, provides that it shall enter into contracts in any particular manner, or with certain formalities, and the provision is mandatory and not merely directory,⁷ the provision must be complied with, for the legislature, in giving a corporation the power to contract, may prescribe the manner in which the power shall be exercised.⁸

⁶ *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 43 So. 687. See also:

California. *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

Connecticut. *In re Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675.

Georgia. *Charles Lippincott & Co. v. Behre*, 122 Ga. 543, 50 S. E. 467.

Illinois. *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172, aff'g 119 Ill. App. 546; *Seiberling v. Miller*, 207 Ill. 443, 69 N. E. 800, aff'g 106 Ill. App. 190; *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 50 Am. St. Rep. 146, 42 N. E. 176, aff'g 55 Ill. App. 556.

Massachusetts. *Henderson v. Raymond Syndicate*, 183 Mass. 443, 67 N. E. 427.

New Jersey. *Groel v. United Elec. Co.*, 69 N. J. Eq. 397, 60 Atl. 822.

Oregon. *Allen v. Portland*, 35 Ore. 420, 58 Pac. 509.

South Dakota. *Magowan v. Groneweg*, 14 S. D. 543, 86 N. W. 626.

See also § 754, *infra*.

A statute providing that any corporation may have a common seal and that a seal affixed to any instrument

purporting to be executed by the corporation shall be prima facie proof of the due adoption of the seal and that it was affixed by due authority and that the instrument was lawfully executed by the corporation does not require the use of the corporate seal on each instrument executed by the corporation, but merely makes it prima facie proof of due authority whenever it is attached. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

In Delaware, absence of the corporate seal on the copy of a note annexed to an affidavit of demand or payment thereof will preclude an action on the note against the corporation sued as the maker thereof, no corporate obligation being shown. *St. Joseph's Polish Catholic Beneficial Society v. St. Hedwig's Church*, 3 Pennw. (Del.) 229, 50 Atl. 535.

⁷ See § 756, *infra*.

⁸ *United States.* *Head v. Providence Ins. Co.*, 2 Cranch 127, 2 L. Ed. 229.

California. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

A corporation, said Chief Justice Marshall, "may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."⁹ So, if the charter of a corporation or any other statute requires contracts or conveyances by the corporation, or particular contracts, to be under the corporate seal, the seal is necessary.¹⁰

§ 753. Adoption and form. In the absence of a charter or statutory provision to the contrary, a corporation, like an individual, may adopt any seal which is convenient for the occasion, and may alter or renew the same at pleasure.¹¹

A seal differing from the common seal of the corporation but adopted by the latter for a special occasion is the corporate seal for such occasion.¹²

Connecticut. Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375.

North Carolina. Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 16 S. E. 415.

Ohio. Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

England. Homersham v. Wolverhampton Waterworks Co., 6 Exch. 137.

⁹ Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 167, 2 L. Ed. 229.

¹⁰ Lindauer v. Delaware Mutual Safety Ins. Co., 13 Ark. 461; Allen v. Brown, 6 Kan. App. 704; Frend v. Dennett, 4 C. B. (N. S.) 576, 27 L. J. C. P. 314; Crampton v. Varna Ry. Co., 7 Ch. App. 562. And see this section, *supra*, and § 756, *infra*.

¹¹ Danville Seminary v. Mott, 136 Ill. 289, 28 N. E. 54. And see:

United States. Eureka Co. v. Bailey Co., 11 Wall. 488, 491, 20 L. Ed. 209.

California. Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

Georgia. Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173.

Massachusetts. Stebbins v. Merritt, 10 Cush. 27.

Michigan. Sarmiento v. Davis Boat & Oar Co., 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

Nebraska. Board of Directors of

Alfalfa Irrigation Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086.

New Hampshire. Tenney v. East Warren Lumber Co., 43 N. H. 343.

New Jersey. Ransom v. Stonington Sav. Bank, 13 N. J. Eq. 212.

New York. Albany South Bapt. Society v. Clapp, 18 Barb. 35.

North Carolina. Taylor v. Heggie, 83 N. C. 244.

Pennsylvania. Crossman v. Hilltown Turnpike Co., 3 Grant 225.

South Carolina. St. Phillip's Church v. Zion Presb. Church, 23 S. C. 297.

Vermont. Bank of Middlebury v. Rutland & W. R. Co., 30 Vt. 159.

Under the Nevada statutes (Rev. Laws § 1206) the corporate seal must contain the corporate name and the date of incorporation, but "a departure from this provision shall not invalidate any corporate act otherwise valid."

Although the secretary of a corporation is, under the law, the custodian of the corporate seal, an action to recover possession of the latter need not be brought by him but may be brought by the corporation. Stovell v. Alert Gold Min. Co., 38 Colo. 80, 87 Pac. 1071.

¹² New York Life Ins. Co. v. Rhodes,

If a corporation has not adopted a common seal, and if there is no charter or statutory provision to the contrary, the individual seal or seals of the officers or agents executing a deed on behalf of the corporation may be adopted by it as the corporate seal,¹³ but merely the private seal of the officer or agent executing the instrument is insufficient unless there be a *pro hac vice* adoption.¹⁴

4 Ga. App. 25, 60 S. E. 828. See also *Johnson v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173; *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

It has been held that, although a corporation may have adopted a particular seal, a deed sealed with any other seal, if it is adopted by the corporation for the occasion is valid. *Tenney v. East Warren Lumber Co.*, 43 N. H. 343.

"As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation, is enough though some other seal than the ordinary common seal of the company should be used." *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. Ed. 948.

A lease executed by a corporation is not invalid because the corporate seal used in its execution does not tally exactly with the lessor's corporate name. *Chicago Title & Trust Co. v. Kemler Lumber Co.*, 151 Ill. App. 579, 581.

The fact that a seal with a particular device has been used by a corporation on several occasions does not make it the exclusive seal of the corporation, if no particular seal has ever been adopted by vote of the company. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

Where a seal which had not been formally adopted by a corporation was used for the first time in the execution of instruments which afterwards came in question, it was held

that a finding that it had become the common seal of the corporation by use was sustained by proof that it had afterwards been used as the corporate seal in all transactions requiring its seal. *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 45 Pac. 252, 41 Pac. 1017.

13 California. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

Kentucky. *Reynolds v. Glasgow Academy*, 6 Dana 37.

Minnesota. *Wiley v. Board of Education of Minneapolis*, 11 Minn. 371.

New Hampshire. *Tenney v. East Warren Lumber Co.*, 43 N. H. 343.

New York. *Albany South Bapt. Society v. Clapp*, 18 Barb. 35; *Jackson v. Walsh*, 3 Johns. 226.

North Carolina. *Taylor v. Heggie*, 83 N. C. 244.

14 United States. *Bank of Metropolis v. Guttchlick*, 14 Pet. 19, 10 L. Ed. 335.

Arkansas. *State v. Allis*, 18 Ark. 269.

Florida. *Mitchell v. St. Andrew's Bay Land Co.*, 4 Fla. 200.

Massachusetts. *Brinley v. Mann*, 2 Cush. 337, 48 Am. Dec. 669.

Michigan. *University of Michigan v. Detroit Young Men's Society*, 12 Mich. 138.

New Mexico. *Saxton v. Texas, S. F. & N. R. Co.*, 4 N. M. 378.

New York. *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280.

When the officer executing a contract for a corporation uses his private seal instead of the corporate seal,

Formerly a seal was affixed to a deed by making an impression on wax, but this is no longer necessary.¹⁵ It may be affixed by making an impression, intended as a seal, on the paper itself on which the deed is written, or on a wafer attached to the paper.¹⁶

the contract is binding on the corporation as a simple contract. *Eureka Co. v. Bailey Co.*, 11 Wall. (U. S.) 488, 20 L. Ed. 209; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

Where, under the law of the particular state, the board of directors only can alter the common seal of a corporation, and adopt a new one, the scroll or private seal of an officer of a corporation affixed to a contract is not the seal of the company. *Saxton v. Texas, S. F. & N. R. Co.*, 4 N. M. 378.

¹⁵ "But it is a curious fact, that there is neither an Act of Parliament nor an adjudged case, up to Lord Coke's day, to bind the courts as to what constitutes a seal. His opinion was probably founded upon the practice of the country in his day." *Lowe v. Morris*, 13 Ga. 147 (by Lumpkin J., specially concurring).

"According to Lord Coke, a seal is wax with an impression, because wax without an impression is not a seal. '*Sigillum est cera impressa, quia cera sine impressione non est sigillum.*' It is clear that by this definition the impression makes the seal. It is true that if this definition is strictly taken, there must not only be an impression, but that impression must be made on wax. But the impression is the sine qua non of Lord Coke's seal; the wax is only auxiliary; it adheres to the paper and receives the impression, and is the material which annexes the impression to the instrument. But we have long since grown out of the substance or essence of Lord Coke's definition, the impression; the question is, are we yet fast in the wax? We have said by long practice, that both these

are not necessary. With which of them would Lord Coke have been the better satisfied? Clearly with the impression; nay, he would not have dispensed with that at all. What proportion of the seals used on private papers now-a-days would fall within his definition? A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal; and by the same rule or reasoning or absence of reasoning, a drop of sealing-wax dropped in proper position in relation to the name, and without impression, or bit of paper upon it, would be a seal; provided the writing called for a seal. Lord Coke's definition has been entirely departed from, and the mere wax or wafer, put on to receive the seal, is recognized as the seal." *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52, 55.

¹⁶ *Royal Bank of Liverpool v. Grand Junct. Railroad & Depot Co.*, 100 Mass. 444. And see *Pierce v. Indsath*, 106 U. S. 546, 27 L. Ed. 254; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Tasler v. Bartlett*, 5 Cush. (Mass.) 359; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52; *Farmers' & Manufacturers' Bank v. Haight*, 3 Hill (N. Y.) 493; *Warren v. Lynch*, 5 Johns. (N. Y.) 239. See also the statutes of the several states for provisions bearing on this subject.

A statutory provision that the mere impression of the seal of a corporation upon any legal instrument executed by the corporation shall be valid does not operate retrospectively. *Bates v. Boston & N. Y. Cent. R. Co.*, 10 Allen (Mass.) 251.

In some jurisdictions an impression is necessary, and a facsimile of the corporate seal merely written or printed on the paper is not enough,¹⁷ while in other jurisdictions, either by express statutory provision or by judicial decision, a written or printed facsimile of the corporate seal or a scroll is sufficient, if adopted and intended as the seal of the corporation when the instrument is executed.¹⁸

Where the charter or other statute does not state what form the corporate seal shall take but the statute does provide generally that a scroll shall be sufficient to give to an instrument a sealed character, a corporation may adopt a scroll either as a common seal or as a seal for a special purpose.¹⁹

¹⁷ *Bates v. Boston & N. Y. Cent. R. Co.*, 10 Allen (Mass.) 251. And see *Mitchell v. Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529; *McCarthy v. Metropolitan Life Ins. Co.*, 162 Mass. 254, 38 N. E. 435; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381. Compare *Royal Bank of Liverpool v. Grand Junct. Railroad & Depot Co.*, 100 Mass. 444, 97 Am. Dec. 115.

¹⁸ *United States*. *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515.

Alabama. *Lee v. Adkins*, 1 Minor 87.

Arkansas. *Bertrand v. Byrd*, 4 Ark. 195.

Kentucky. *Reynolds v. Glasgow Academy*, 6 Dana 37.

Michigan. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

Pennsylvania. *In re Hacker's Appeal*, 121 Pa. St. 192, 1 L. R. A. 861, 15 Atl. 500.

A statute providing that corporations "may have a common seal" is merely declaratory of the common law, and does not require it to adopt a fixed seal, so as to prevent it from executing a bond with a scroll for the seal. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

¹⁹ *Johnston v. Crowley*, 25 Ga. 316, 71 Am. Dec. 173. See also *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037; *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25, 60 S. E. 828; *W. B. Conkey Co. v. Goldman*, 125 Ill. App. 161, 166.

Under a statute declaring that a scroll affixed to an instrument in lieu of a seal should have the same force as a seal, it was held that, in a deed by a corporation executed by its directors, a scroll attached to the name of each director would be deemed the seal of the corporation, in the absence of proof that it had a regular seal, or that the scrolls were intended as the individual seals of the directors. *Reynolds v. Glasgow Academy*, 6 Dana (Ky.) 37. See also *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357.

Where an association is not required to have a seal, the word "seal" put after the signature of the officers signing an instrument may be held to have the effect of a corporate seal under a statute giving to a scroll or device the same effect as the usual seal attached or impressed. *Ismon v. Loder*, 135 Mich. 345, 97 N. W. 769.

Indicating seal of corporation in record of deed, executed by latter, by use of letters "L. S.," see *Altschul v. Casey*, 45 Ore. 182, 76 Pac. 1083.

§ 754. Simple contracts. In some of the early cases the English doctrine as to the necessity for the use of the corporate seal in contracts by corporations was recognized in the United States;²⁰ but it has long since been abandoned, and the rule is now well settled that, in the absence of charter or statutory provisions to the contrary, a corporation may appoint an agent without the use of its seal,²¹ and may, acting by such agent, enter into a simple contract in writing or an oral contract, provided the subject-matter of the contract is within its powers, whenever a natural person could enter into such a contract. In other words, any contract whatever, within the powers of a corporation, if it can be made by a natural person without a seal, may be so made by the corporation, unless a seal is expressly required by the charter of the corporation or some other statute.²²

²⁰ See *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; *Kennedy v. Baltimore Ins. Co.*, 3 Harr. & J. (Md.) 367, 6 Am. Dec. 499.

²¹ See chapters on Execution of Corporate Instruments and on Officers and Agents, *infra*.

²² *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Crawford v. Longstreet*, 43 N. J. L. 325. And see:

United States. *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851; *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. Ed. 631.

Alabama. *McCullough v. Talladega Ins. Co.*, 46 Ala. 376; *Everett v. United States*, 6 Port. 166, 30 Am. Dec. 584.

Connecticut. *Savings Bank of New Haven v. Davis*, 8 Conn. 191.

Illinois. *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 59 Am. St. Rep. 146, 42 N. E. 176, *aff'g* 55 Ill. App. 556; *Racine & M. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 95 Am. Dec. 595; *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334.

Indiana. *Wolcott Christian Church v. Johnson*, 53 Ind. 273.

Iowa. *Muscatine Water Co. v. Muscatine Lumber Co.*, 85 Iowa 112, 39 Am. St. Rep. 284, 52 N. W. 108.

Kentucky. *Commercial Bank of*

New Orleans v. Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171.

Maryland. *Cahill v. Maryland Life Ins. Co.*, 90 Md. 333, 47 L. R. A. 614, 45 Atl. 180.

Massachusetts. *Speirs v. Union Drop-Forge Co.*, 174 Mass. 175, 54 N. E. 497; *Sanborn v. Fireman's Ins. Co.*, 16 Gray 448.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. *Buckley v. Briggs*, 30 Mo. 452.

New Hampshire. *Goodwin v. Union Screw Co.*, 34 N. H. 378.

New Jersey. *Antipoeda Bapt. Church v. Mulford*, 8 N. J. L. 185.

New Mexico. *Western Homestead & Irrigation Co. v. First Nat. Bank*, 9 N. M. 1, 47 Pac. 721.

New York. *Leinkauf v. Calman*, 110 N. Y. 50, 17 N. E. 389; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Hoag v. Lamont*, 60 N. Y. 96; *Moss v. Averell*, 10 N. Y. 449; *Randall v. VanVechten*, 19 Johns. 60, 10 Am. Dec. 193.

Pennsylvania. *Hand v. Clearfield Coal Co.*, 143 Pa. St. 408, 22 Atl. 709; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & R. 16.

Virginia. *Grubbs v. National Life*

“The technical doctrine,” said Mr. Justice Story in a leading case in the Supreme Court of the United States, “that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agents could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purpose of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action may well lie.”²³

§ 755. Implied and quasi contracts. As was said by Mr. Justice Story in an early case,²⁴ all duties imposed upon corporations by law and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. In other words, a corporation, like a natural person, may incur implied and quasi contractual obligations—as for services rendered or other benefits conferred at its request, for money had and received by it for the use of another, for money paid to its use, etc. This doctrine is well settled both in England²⁵ and in the United States.²⁶

Maturity Ins. Co., 94 Va. 589, 27 S. E. 464.

Wisconsin. Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

²³ Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351.

²⁴ Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351.

²⁵ Beverley v. Lincoln Gas Light & Coke Co., 6 A. & E. 829; East London Water Works Co. v. Bailey, 4 Bing. 283.

²⁶ Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351; White v. Franklin Bank, 22 Pick. (Mass.) 181; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep.

352, 23 N. W. 628; Goodwin v. Union Screw Co., 34 N. H. 378. And see further:

United States. Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. Ed. 107.

Connecticut. Philadelphia Loan Co. v. Towner, 13 Conn. 249.

Illinois. Town of New Athens v. Thomas, 82 Ill. 259; Gowen Marble Co. v. Tarrant, 73 Ill. 608.

Kentucky. Underwood v. Newport Lyceum, 5 B. Mon. 129, 42 Am. Dec. 260.

Maryland. Maryland Hospital v. Foreman, 29 Md. 524.

Massachusetts. Hayden v. Middlesex Turnpike Corporation, 10 Mass. 397, 6 Am. Dec. 143.

As will appear in another portion of this work, contracts implied by law or quasi contracts are not within a charter or statutory requirement that the contracts of the corporation shall be entered into in a certain manner or form, or by certain officers, and, a fortiori, are not under seal.²⁷

§ 756. Deeds and mortgages. At common law a private corporation could not convey its real estate except under its corporate seal,²⁸ and this rule still applies in the absence of statutory modification.²⁹

Michigan. *Cicotte v. St. Anne's Catholic, A. & R. Church*, 60 Mich. 552, 27 N. W. 682.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

New York. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Danforth v. Schoharie & D. Turnpike Road*, 12 Johns. 227.

²⁷ See generally the chapter on Execution of Corporate Instruments, *infra*, and see also the following:

United States. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326, 5 L. Ed. 100.

California. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

Georgia. *Carey v. McDougald*, 7 Ga. 84.

North Carolina. *Roberts v. P. A. Denning Woodworking Co.*, 111 N. C. 432.

Tennessee. *Northern Bank of Kentucky v. Johnson*, 5 Coldw. 88.

²⁸ *Littelle v. Creek Lumber Co.*, 99 Miss. 241, 54 So. 841. See also *Bank of Metropolis v. Guttschlick*, 14 Pet. (U. S.) 19, 10 L. Ed. 335; *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. 54; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; *University of Michigan v. Detroit Young Men's Society*, 12 Mich. 138; *Osborne v. Tunis*, 25 N. J. L. 633; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017; *Hatch v. Barr*,

1 Ohio 390; *Eagle Woolen Mills Co. v. Monteith*, 2 Ore. 277.

²⁹ "The tendency of modern litigation and the trend of more recent decisions is towards the abolition of the strict rules formerly prevailing as to sealed instruments, and in many states statutes have been passed doing away, in whole or in part, with the distinction between sealed and unsealed instruments, and in most of the states the use of the seal is now regulated by statute. There is a difference kept up, however, in many of the states between the use of seals by corporations and by individuals. While it is laid down broadly that corporations may enter into contracts, to the same extent as individuals, without using a seal, this clearly has reference to other contracts than the conveyance of lands, and none of the cases to which we have been cited hold that the use of a seal is not required in conveyances of land." *Garrett v. Belmont Land Co.*, 94 Tenn. 459, 29 S. W. 726.

Where there is a statutory provision that no deed of conveyance or other contract in writing signed by the party or his agent shall be deemed invalid for want of a seal, a mortgage by the officers of a private corporation is not invalidated because the corporate seal is not affixed. *Ismon v. Loder*, 135 Mich. 345, 97 N. W. 769.

In Tennessee, under a statute by which the use of seals in written contracts, except the seals of corporations

But where the distinction between sealed and unsealed instruments in contracts between individuals has been abolished by a constitutional provision and the statute which authorizes corporations to have and alter a common seal contains no requirements as to its use in business transactions, and deeds and mortgages between individuals are not required to be sealed, a deed of trust and mortgage given by a corporation are not rendered invalid by reason of not bearing the corporate seal.³⁰

Where by statute it is required that deeds of conveyance and mortgages be under seal, a deed or mortgage by a corporation must be under seal.³¹

is abolished, the corporate seal is essential to a conveyance of real estate by a corporation to vest a legal title in the grantee. *Garrett v. Belmont Land Co.*, 94 Tenn. 459, 29 S. W. 726. This is not true, however, of corporations organized under the Tennessee act of 1875 which have no common seal, as that act provides that as to such corporations, the signature of the corporate name, by any duly authorized officer shall be legal and binding. *Turner v. Kingston Lumber & Manufacturing Co.*, 106 Tenn. 1, 58 S. W. 854. See also *Turner v. Kingston Lumber & Manufacturing Co. (Tenn.)*, 59 S. W. 410.

A somewhat similar Missouri act abolishing seals in "written contracts, conveyances of real estate and all other instruments of writing heretofore required by law to be sealed (except the seals of corporations)," is to be construed in connection with other statutes in *pari materia*, especially with the provision which authorizes but does not require a corporation to have a private seal; and, when so construed, abolishes the necessity of a corporate seal on deeds, required by other statutory provisions, where the corporation has no seal and preserves the necessity for the seal in all cases in which the corporation has a seal. *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565, 57 S. W. 1095.

Under a statute which provides that the absence of a seal from a deed does not invalidate the conveyance, the use of a seal on a deed of a private corporation is not essential. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

A contract by a corporation to convey property is not rendered invalid by the fact that it does not bear the corporate seal. *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

It has been held that where a statute provides that a deed to lands "must be in writing, signed by the maker, attested by at least two witnesses," it is not necessary that the seal of the corporation be affixed. *Atlanta, K. & N. Ry. Co. v. McKinney*, 124 Ga. 929, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701.

³⁰ *Fourth Nat. Bank of St. Louis v. Camden Lumber Co.*, 142 Fed. 257.

³¹ *Allen v. Brown*, 6 Kan. App. 704, 50 Pac. 505; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; *Eagle Woolen Mills Co. v. Monteith*, 2 Ore. 277.

Under the laws of Missouri a chattel mortgage need not be under the corporate seal. *Strop v. Hughes*, 123 Mo. App. 547, 101 S. W. 146. See case, same caption, 123 Mo. App. 544, 101 S. W. 149.

Under the California statute regulating conveyances by corporations, to support the deed of a corporation

And where the statute requires the corporate seal to be affixed to a conveyance of corporate realty, an unrecorded conveyance of land, bearing the corporate seal, will take precedence over a recorded conveyance of the same land, subsequently executed without the use of such seal, notwithstanding the grantee in the latter has entered in possession of the land, and such grantee is not entitled to have his title quieted as against the grantee in the sealed conveyance.³²

Authority to execute a deed for a corporation need not be conferred by an instrument under seal.³³

The failure to affix the corporate seal to a conveyance of land affects such conveyance only in so far as the legal title is concerned and does not prevent the vesting in the grantee of an equitable estate.³⁴

§ 757. Power to affix. Although "the mere fact that a deed has the corporate seal attached, does not make it the act of the corporation, unless the seal was placed to it by some one duly authorized,"³⁵ if

which is without a corporate seal, "it is incumbent on the party relying on it to show affirmatively that it was executed by authority of a resolution of the board of directors, entered on the records of the corporation, or that it was ratified by such a resolution." *Barney v. Pforr*, 117 Cal. 56, 48 Pac. 987; *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29, 41 Pac. 1024. See also *Salfield v. Sutter County Land Improvement & Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373.

³² *Allen v. Brown*, 6 Kan. App. 704, 50 Pac. 505.

³³ The common-law doctrine that authority on the part of an agent to contract under seal for his principal must be given by an instrument under seal does not apply to the appointment of an agent by a corporation to execute an instrument under seal. The mere vote of the corporators or directors, as the case may be, is sufficient. *Howe v. Keeler*, 27 Conn. 538; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *Hopkins v. Gallatin Turnpike*

Co., 4 Humph. (Tenn.) 403; *Burr's Ex'r v. McDonald*, 3 Gratt. (Va.) 215.

³⁴ *Precious Blood Society v. Elsythe*, 102 Tenn. 40, 50 S. W. 759. See also *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565, 57 S. W. 1095.

Where the statute requires a conveyance of corporate realty to be under seal, an unsealed conveyance does not pass a legal title and hence will not support an action in ejectment. *Littelle v. Creek Lumber Co.*, 99 Miss. 241, 54 So. 841.

³⁵ *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715, 17 L. Ed. 339. See also:

California. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

Colorado. *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076.

Massachusetts. *Damon v. Inhabitants of Granby*, 2 Pick. 353.

New York. *Quackenboss v. Globe & Rutgers Fire Ins. Co.*, 177 N. Y. 71, 69 N. E. 223; *Hoyt v. Thompson*, 5 N. Y. 320; *People v. Dayoe*, 2 Thomp. & C. 142; *Jackson v. Campbell*, 5 Wend. 72.

an instrument purports to have been executed by a corporation, and the corporate seal is affixed, it will be presumed that it was affixed by an authorized officer or agent, but the presumption may be rebutted by showing that it was not so affixed, and in such a case the instrument is not the deed of the corporation.³⁶

North Carolina. Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

³⁶ Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339. See also:

United States. Kirkpatrick v. Eastern Milling & Export Co., 135 Fed. 144.

Alabama. Collier v. Alexander, 142 Ala. 422, 38 So. 244.

California. Bliss v. Kaweah Canal & Irrigation Co., 65 Cal. 502, 4 Pac. 507.

Colorado. Bliss v. Harris, 38 Colo. 72, 87 Pac. 1076.

Georgia. Long v. Powell, 120 Ga. 621, 48 S. E. 185; Almand v. Equitable Mortg. Co., 113 Ga. 983, 39 S. E. 421; American Inv. Co. v. Cable Co., 4 Ga. App. 106, 60 S. E. 1037; New York Life Ins. Co. v. Rhodes, 4 Ga. App. 25, 60 S. E. 828.

Michigan. Gould v. W. J. Gould & Co., 134 Mich. 515, 2 Ann. Cas. 519, 96 N. W. 576.

Minnesota. Yanish v. Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198.

Nebraska. Gordier v. Plattsmouth Canning Co., 36 Neb. 548, 54 N. W. 830; Wilson v. Neu, 1 Neb. (Unoff.) 42, 95 N. W. 502.

New Jersey. Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York. United Surety Co. v. Meenan, 211 N. Y. 39, 105 N. E. 106; Quackenboss v. Globe & Rutgers Fire Ins. Co., 177 N. Y. 71, 69 N. E. 223; Hoyt v. Thompson, 5 N. Y. 320; Anderson v. Conner, 43 Misc. 384, 87 N. Y. Supp. 449.

North Carolina. Benbow v. Cook,

115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

West Virginia. Deepwater Council v. Renick, 59 W. Va. 343, 53 S. E. 552.

After quoting Lovett v. Steam Saw Mill Ass'n, 6 Paige Ch. (N. Y.) 54, 60, to the effect that "the seal of a corporation aggregate affixed to a deed, is of itself prima facie evidence that it was so affixed by the authority of the corporation; especially if it is proved to have been put to the deed by an officer who was entrusted by the corporation with the custody of such seal. * * * And it lies with the party objecting to the due execution of the deed, to show that the corporate seal was affixed to it surreptitiously or improperly; and that all the preliminary steps to authorize the officer having the legal custody of the seal to affix it to the deed, had not been complied with," the court in Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 598, 99 Am. Dec. 300, says: "The rule must be as stated on principle, independent of authority. Any other would be subversive of the public interests, for no man could deal in safety with corporations, and all business transactions with these institutions would almost necessarily cease, and the end of their creation fail of accomplishment. Confidence is a necessary element in all business transactions. If strangers cannot rely, at least, prima facie upon deeds of private corporations apparently regularly executed in pursuance of the powers conferred by their charters under the corporate seal, and attested by the signatures of the officers, upon whom the control of their affairs is

The seal need not necessarily be affixed to the deed by the hand of the officer executing it, but it may be affixed by his direction. Thus, it was held sufficient when a facsimile of the seal of a corporation was impressed by the printer upon bonds to be issued by the

devolved by law, upon what may they rely? This is the most direct, formal and solemn assurance that can possibly be given by those authorized to give assurances. It is the legally appointed mode in which the corporation speaks to the external world, and manifests its corporate will. Parties dealing with private corporations have no other reliable means of ascertaining the circumstances under which the act is done. The books, records and papers of such corporations are private property, and not open to inspection by strangers. Many, if not in practice most, of their corporate acts are not made matters of record. Besides, it is as easy to make a false statement in some other mode—by a false record—as by a false deed. Whatever is done must be done through agents, and if their most formal and solemn assurances under the corporate seal are not reliable, then none of their acts can be depended on, and those dealing with corporations are absolutely without the means of self-protection. The rule established rests upon a foundation of solid sense. If this is not the rule, then, surely, there is too much truth in the saying that corporations are intangible, impersonal, irresponsible, soulless, artificial beings, endowed with a capacity to accumulate and enjoy property, and exercise most of the functions and privileges pertaining to natural, material persons, but under no moral restraints and subject to few of the implications and responsibilities to which natural persons are liable, and the less men have to do

with them the better it will be for them."

"It is said, that when the common seal appears to be affixed to a deed, it is not necessary that the party producing the deed, should prove by witness the fact of its having been regularly affixed, or that the major part of the corporation agreed; but that, if it be alleged to have been affixed by the hand of a stranger, that shall be proved by the party who alleges it." 1 Kyd on Corporations, 268.

A contract being under the seal of the corporation, and the signature of the corporation and its officers being undenied, it will be presumed that the contract was in fact executed. *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

A promissory "note, signed by the proper officers, and with the seal of the corporation attached, * * * [is] itself prima facie evidence of the authority of the officers, and of its due execution by them." *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122.

An assignment of a claim is prima facie the act of the corporation where it is executed by the president and attested by the secretary, and the corporate seal is attached. *Roth v. Continental Wire Co.*, 94 Mo. App. 236, 68 S. W. 594.

It is expressly provided by a Michigan statute (4 How. Ann. St. § 9597) that the corporate seal on an instrument purporting to have been executed by the corporation shall be prima facie proof "that it was affixed to said instrument by due authority."

corporation, by direction of the officers of the corporation, and the officers subsequently signed and issued the bonds.³⁷

§ 758. Proof. Courts do not take judicial notice of the seals of private corporations³⁸ and; what is more, it would seem that such seals are not evidence of their own authenticity³⁹ or, in other words, that they do not prove themselves;⁴⁰ that is, if the question whether what is claimed purports to be the corporate seal on an instrument purporting to have been executed by a private corporation is in issue,

³⁷ *Royal Bank of Liverpool v. Grand Junct. Railroad & Depot Co.*, 100 Mass. 444. In this case the corporate seal was affixed to the bonds by the printer so as to indent the paper. Judge Foster said: "The corporate seal having been affixed by the printer, by the direction of the officers of the corporation; and they having adopted his act, and subsequently signed and issued the bonds; the sealing was duly made, and the instruments became obligatory upon the corporation. This is no more nor less than constantly takes place when a scrivener prepares and affixes a seal to a deed which the grantor thereupon signs and delivers. The practice is of unquestionable validity, and the authorities for it are abundant. 'If a stranger seal an instrument by the allowance, or the commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient.'" *Citing Cruise Dig. tit. 32, c. 2, § 55.*

Although the corporate seal, affixed to a bond signed in the name of a corporation by its vice president, and attested by the corporation's secretary, is not opposite the signature of the vice president, this fact will not affect the plain intent of the instrument and make the bond other than a sealed instrument. *United States v. Mercantile Trust Co.*, 213 Pa. 411, 62 Atl. 1062.

³⁸ *Malsby v. Gamble*, 61 Fla. 310,

327, 54 So. 766; *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 43 So. 687; *Miller v. Superior Mach. Co.*, 79 Ill. 450, 451; *W. B. Conkey Co. v. Goldman*, 125 Ill. App. 161.

³⁹ See *Tours v. Vreelandt*, 7 N. J. L. 352, 11 Am. Dec. 551; *Jackson v. Pratt*, 10 Johns. (N. Y.) 381; *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *Farmers' & Mechanics' Turnpike Co. v. McCullough*, 25 Pa. St. 303; *Chew v. Keck*, 4 Rawle (Pa.) 163; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Foster v. Shaw*, 7 Serg. & R. (Pa.) 156. *Contra*, *Canandaigua Academy v. McKeechie*, 19 Hun (N. Y.) 62.

"Where it is shown or admitted that the instrument is signed for the corporation by its proper officer, the presumption is that it was duly executed, which presumption includes the authenticity of the seal used in its execution." *Malsby v. Gamble*, 61 Fla. 310, 327, 54 So. 766; *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 43 So. 687.

⁴⁰ *Malsby v. Gamble*, 61 Fla. 310, 327, 54 So. 766; *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 43 So. 687.

"Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper." *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515.

it must be proven that it is the corporate seal, or that it was adopted as the seal of the corporation for the occasion.⁴¹

Notwithstanding this fact, however, the prima facie presumption is in favor of the seal and to the effect that it is the proper and only seal of the corporation.⁴² So, it has been held that, in the absence of evidence to the contrary, a scroll or rectangle, containing the word "Seal," when placed opposite the name of a corporation, will be presumed to be its proper and common seal.⁴³

The identity of a corporate seal may be proved by a witness who is acquainted with its impression.⁴⁴

⁴¹ "The signature of the duly authorized agent of the corporation, executing the instrument in its behalf being proved, the seal, though mere paper and wafer without any specific stamp or mark, will be presumed to be the seal of [the] corporation." *Stebbins v. Merritt*, 10 Cush. (Mass.) 27, 34.

⁴² *Miller v. Superior Mach. Co.*, 79 Ill. 450, 452. See also *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515; *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952; *W. B. Conkey Co. v. Goldman*, 125 Ill. App. 161.

"The signature of the person purporting to be the agent of the corporation executing a certiorari bond in its behalf, being admitted and being under seal, the 'seal,' though an ordinary scroll, will be presumed to be intended as the seal of the corporation until the presumption is rebutted by competent evidence." *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25, 60 S. E. 828.

An instrument purporting to have been executed by a corporation; and reciting that it is sealed with the seal of the corporation, raises a presumption that what purports to be a seal placed after the names of the officers signing the same is the corporate seal. *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

Under the express provisions of the

Michigan statutes (4 How. Ann. St. § 9597), a seal affixed to an instrument purporting to have been executed by a corporation "shall be prima facie proof of the due adoption of said seal."

⁴³ *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515. See also:

Kentucky. *Reynolds v. Trustees of Glasgow Academy*, 6 Dana 37.

Maine. *Woodman v. York & C. R. Co.*, 50 Me. 549.

Maryland. *Susquehanna Bridge & Bank Co. v. General Ins. Co.*, 3 Md. 305, 56 Am. Dec. 740.

New Hampshire. *Tenney v. East Warren Lumber Co.*, 43 N. H. 343.

North Carolina. *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

"The same kind of proof which would establish, if disputed, the authenticity of the genuine common seal, in a particular instance, would equally establish the authenticity of a scroll as a corporate seal; to wit, that it was affixed by authority, express or implied, of the corporation." *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173.

⁴⁴ *City Council v. Moorhead*, 2 Rich. (S. C.) 430.

The affixing of a corporate seal need not be proved by a witness who saw it affixed. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313.

§ 759. Effect. It has been said that "at common law a contract under the seal of a corporation, attested by the signature of its executive officers, was *prima facie* the contract of the corporation. The seal of the corporation was its signature."⁴⁵

In a Massachusetts case it was said that the rule that a sealed instrument conclusively imports a consideration would allow the holder of bonds executed and delivered by a corporation to recover thereon, although they were delivered gratuitously.⁴⁶ This view, however, cannot be sustained unless the action is by a bona fide purchaser for value and without notice, since the delivery of its bond by a corporation without any consideration is *ultra vires*, and payment thereof would be a misapplication of its funds.⁴⁷

The fact that a contract by a corporation is under seal cannot prevent the corporation from showing that it is *ultra vires*, if the

⁴⁵ *United Surety Co. v. Meenan*, 211 N. Y. 39, 105 N. E. 106. See also *Reed v. Bradley*, 17 Ill. 321, 325.

"The seal of a corporation appearing upon an instrument is *prima facie* evidence of the assent of the corporation and of authority to execute the instrument." *Reed v. Fleming*, 209 Ill. 390, 394, 70 N. E. 667, rev'g 102 Ill. App. 668. But see *Morrison v. Wilder Gas Co.*, 91 Me. 492, 64 Am. St. Rep. 257, 40 Atl. 542, in which the court said: "We can see no reason why the presence of a corporate seal, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, should be even *prima facie* evidence that a contract, signed and sealed by a person who, so far as the case shows, had no authority to make or execute this or such a contract, was the contract of the corporation."

In Michigan this matter is taken care of by statute (4 How. Ann. St. § 9597), it being expressly provided that the corporate seal on an instrument purporting to have been executed by the corporation shall be *prima facie* proof "that said instrument was in

fact lawfully executed by such corporation."

That sealing an instrument with the corporate seal is not the equivalent of signing it, see *Hutchins v. Barre Water Co.*, 74 Vt. 36, 52 Atl. 70.

On the face of a power of attorney by a foreign corporation the execution of the power appeared to be the act of the corporation both in the body of the instrument and in the testimonial clause. The latter clause recited that the corporation had no president and that the execution of the instrument was by the chairman and another of the directors and the secretary. The instrument contained the corporate seal which was used as the corporate signature. The court held that the instrument must be deemed to be properly executed irrespective of the fact that apart from the affixing of the seal the name of the corporation had not been signed. *Graham v. Partee*, 139 Ala. 310, 101 Am. St. Rep. 32, 35 So. 1016.

⁴⁶ *Foster, J.*, in *Royal Bank of Liverpool v. Grand Junct. Railroad & Depot Co.*, 100 Mass. 444. See also *Sturtevant v. City of Alton*, 3 McLean (U. S.) 395, Fed. Cas. No. 13,580.

⁴⁷ See Chap. 32, *infra*.

circumstances are such that the defense of ultra vires is available. Strictly speaking, a seal does not raise a presumption of a consideration, but, at common law, merely dispenses with the necessity for any consideration; nor does it exclude evidence that a contract is illegal. It should not, therefore, be held to exclude evidence that the contract is ultra vires.⁴⁸

It was said by Lord Campbell in an English case: "Suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee; and, he being *in pari delicto*, I conceive that the maxim would apply *potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company; and the illegality might be set up as a defense. So, if, without any consideration whatever, the directors of a railway company were to put the company's seal to a deed covenanting to pay a mere stranger 1000 l., this would be ultra vires, to the knowledge of the covenantee, and he could not maintain an action to recover the 1000 l. from the funds of the company in fraud of the shareholders. * * * It has been contended, I am aware, that the deeds of such companies are to be treated like the deeds of individuals or of common partnerships. But there seems to be an essential distinction between them. The individual may do what he likes with his own; and he may bind himself by a deed disposing of his property, however capriciously, and without any consideration, so that no fraud has been practiced upon him. In such a case, want of consideration is immaterial; no one is injured; and there is no illegality to be pleaded."⁴⁹

⁴⁸ See generally the chapter on Ultra Vires, *infra*.

⁴⁹ *City of Norwich v. Norfolk Ry. Co.*, 4 E. & B. 443.

CHAPTER 20

CONSTRUCTION AND INTERPRETATION OF CHARTER

§ 763. General considerations.

§ 764. What constitutes the charter—Where corporation created by special act.

§ 765. — Where corporation created under general laws.

§ 766. — Amendments.

§ 767. — Special charter after incorporation under general law.

§ 768. — By-laws.

§ 769. Charter as contract.

§ 770. General rules as to construction.

§ 771. Intention of legislature.

§ 772. Construction as a whole.

§ 773. Strict construction as to powers of company—In general.

§ 774. — When rule not applicable.

§ 775. Enumeration of certain powers as exclusion of others.

§ 776. Meaning of particular words.

§ 777. Meaning of provisos or exceptions.

§ 778. Construction in aid of validity and effectiveness.

§ 779. As abrogating general laws.

§ 780. Mandatory and directory provisions.

§ 781. Construction as to special franchises.

§ 763. General considerations. It is the intention to include in this chapter only the general rules governing the construction and interpretation of charters of corporations. The applications of these rules will be found for the most part in succeeding chapters relating to the powers of corporations.¹

§ 764. What constitutes the charter—Where corporation created by special act. When a corporation is created by a special act of the legislature, its charter consists of the act itself, construed in the light of, and subject to, any general laws which are applicable to the corporation, and supplemented by the articles of association, if any, executed by the incorporators under and within the authority conferred upon them by the act,² and by other charters or statutes expressly or impliedly made a part of the charter.³

¹ See Chaps. 21-34, *infra*.

² See *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 81 S. W. 927; *Mechanics' & Traders'*

Bank v. Rowly, 2 La. Ann. 372; *Cheraw & S. R. Co. v. Commissioners of Anson*, 88 N. C. 519.

³ See *Mechanics' & Traders' Bank v. Rowly*, 2 La. Ann. 372.

But a provision in a special charter

But the fact that a power granted in a special charter is not sufficient to effect the object for which the corporation was created, will not by implication enlarge the power, unless it appears that the legislature, in granting it, knew that such construction was necessary to effect the object.⁴ For instance, if the charter of a railroad company authorizes it to construct its road "along" a certain river and "outside of and to the east of the present stone wall embankment of the cemetery company," and as a matter of fact there is no space between such embankment and the river, the company cannot construct its road "in" the river.⁵

When an existing association is incorporated, and its constitution is expressly recognized by its charter, such constitution becomes a part of its charter.⁶

§ 765. — Where corporation created under general laws. As already stated in a preceding chapter,⁷ when a corporation is created under a general corporation law authorizing the formation of such corporations, its charter consists of the law under which it is organized, and of the articles or certificate of association or incorporation adopted or issued in pursuance of the law, in so far as they are in compliance with and authorized by the law.⁸

that the corporation shall have all the powers, and be subject to all the liabilities, provided by a general law, does not incorporate into the charter a provision of the general law imposing a penalty on trustees of corporations organized under it for failure to file reports. *National Park Bank of New York v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008.

⁴ *Stevens v. Erie Ry. Co.*, 21 N. J. Eq. 259.

⁵ *Stevens v. Erie Ry. Co.*, 21 N. J. Eq. 259.

⁶ *Pulford v. Fire Department of City of Detroit*, 31 Mich. 458.

⁷ See § 226, *supra*.

⁸ *Alabama*. *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325.

Illinois. *Metropolitan West Side Elec. R. R. v. Chicago*, 261 Ill. 624, 104 N. E. 165; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497,

17 Am. St. Rep. 319, 22 N. E. 798; *Chicago Municipal Gas Light & Fuel Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616, *aff'g* 27 Ill. App. 346.

Iowa. *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290; *State v. Central Iowa Ry. Co.*, 71 Iowa 410, 60 Am. Rep. 806, 32 N. W. 409.

Michigan. *Taggart v. Perkins*, 73 Mich. 303, 41 N. W. 426; *Van Etten v. Eaton*, 19 Mich. 187.

Minnesota. *In re Fuller Laundry Co.*, 82 N. W. 673.

Nebraska. *Lincoln St. Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480; *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416.

Ohio. *Cronin v. Potter's Co-op. Co.*, 29 Cinc. L. Bul. 52.

Oregon. *State v. Portland General Elec. Co.*, 52 Ore. 502, 95 Pac. 722, rehearing denied 98 Pac. 160.

The articles or certificate do not alone constitute the charter, and determine the powers of the corporation, but they are to be taken in connection with the statute. The statute is controlling, and the articles or certificate are valid and effectual, not only in so far as they are not in conflict with the statute, but in so far as the powers therein claimed are authorized by the statute.⁹ So, when a corporation is organized and a charter granted by the court under a general law, the order or certificate of the court is void in so far as it purports to confer powers not authorized by the statute.¹⁰

The articles or certificate cannot confer powers in violation of a statute; and it is sometimes held that, unless clearly authorized by statute, the articles or certificate cannot confer powers denied or not recognized at common law.¹¹

§ 766. — Amendments. If the legislature amends the charter of a corporation, and the amendatory act is accepted by the corporation, the amendatory act becomes a part of the charter.¹² And if the legislature, by an act which is constitutional, recognizes a corporation as having a particular power—as the power to take land, for example—this is equivalent to an express grant of such power.¹³

Pennsylvania. Society for Visitation of Sick v. Com., 52 Pa. St. 125, 91 Am. Dec. 139.

Virginia. Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891.

⁹ **United States.** Republican Mountain Silver Mines v. Brown, 58 Fed. 644.

Alabama. Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325.

Illinois. People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

New York. Eastern Plank Road Co. v. Vaughan, 14 N. Y. 516.

Tennessee. Heck v. McEwen, 12 Lea 97.

Virginia. Knights of Pythias v. Weller, 93 Va. 605.

¹⁰ **Greenville & P. R. Narrow Gauge R. Co. v. Johnson**, 8 Baxt. (Tenn.) 332; **Heck v. McEwen**, 12 Lea (Tenn.) 97.

¹¹ See § 114, *supra*.

¹² **Louisville & P. R. Co. v. Louisville City Ry. Co.**, 2 Duv. (Ky.) 175; **Mulloy v. Nashville & D. R. Co.**, 8 Lea (Tenn.) 427.

¹³ **Society for Propagation of Gospel v. Town of Pawlet**, 4 Pet. (U. S.) 480, 501, 7 L. Ed. 927; **Shaw v. Norfolk County R. Co.**, 5 Gray (Mass.) 162.

But see **State v. Lincoln Trust Co. (Mo.)**, 46 S. W. 593, in which case it was said: "But the question here is whether or not the legislature by its several subsequent acts before mentioned, by which the power of trust companies to receive moneys on general deposit, payable on demand or check, is recognized, did thereby ingraft on the statute, by implication, merely powers which did not theretofore exist in express terms or by implication. While a statute may be repealed by implication, it cannot be amended otherwise than as provided by section 34, art. 3, of the state constitution; and the mere recognition of

§ 767. — Special charter after incorporation under general law. It has been held that the acceptance of a special act of incorporation by a corporation which has been previously organized under the general law does not affect the organization under the general law to such an extent as to invalidate contracts or mortgages made after the passage of the special act, but before its acceptance, and that the charter of the company, after such acceptance, consists of both the general law and the special act, in so far as they are not inconsistent.¹⁴

§ 768. — By-laws. The by-laws of a corporation merely affect the management of its business and control its officers and agents. They constitute no part of its charter, and therefore can neither add to nor detract from its powers.¹⁵

§ 769. Charter as contract. It is well settled that the charter of a corporation is a contract between the state and the corporation.¹⁶ It is also a contract between the corporation and its stockholders.¹⁷ Such contract between the government and a corporation created by its charter is to be construed, it has been held, upon the same principles which are applied to contracts between individuals.¹⁸

§ 770. General rules as to construction. The rules applicable to construction and interpretation of charters are, for the most part, the same as govern the construction and interpretation of all statutes. For amplification of the rules laid down herein, as governing statutes in general, reference should be made to standard textbooks on the law of statutory construction.¹⁹

Charters are legislative acts, whether the incorporation was under a special act or a general law, and must be construed from their con-

such powers did not have the effect to create them."

¹⁴ Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173.

¹⁵ Steiner v. Steiner Land & Lumber Co., 120 Ala. 128, 26 So. 494; Kelly v. Mobile Building & Loan Ass'n, 64 Ala. 501; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

See generally Chap. 17, *supra*.

¹⁶ See chapter on Amendment or Repeal of Charters, *infra*.

¹⁷ See chapter on Amendment or Repeal of Charters, *infra*, and § 492, *supra*.

¹⁸ Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

"The Act of the Legislature thus became a contract between the government * * * with the company * * *. This contract is to be construed * * * on the same principles which are to be applied to contracts between private individuals." State v. Noyes, 47 Me. 189.

¹⁹ See Lewis' Sutherland, Statutory Construction (2nd ed.).

tents, contemporaneous history, and other legitimate aids to their proper construction.²⁰ And it has been held that the same rules of construction apply to articles of incorporation adopted in pursuance of general laws as to charters granted by special acts of the legislature;²¹ but there is authority tending to the contrary.²²

The earlier decisions, controlled largely by the rules governing construction of statutes in general, were based, for the most part, on the construction of charters consisting of special acts of the legislature. Inasmuch as nearly all corporations are now, and have been for some years, created under general laws, the decisions wherein a special act is involved are becoming less and less frequent. And the courts, in construing provisions of the articles or certificate of incorporation, in recent years, seldom refer to the statutory rules of construction, but instead merely construe the articles or certificate to determine whether certain powers are to be implied from the express powers conferred by the articles or certificate, without referring to the general rules as to statutory construction.

§ 771. Intention of legislature. The cardinal rule of statutory construction, that the intention of the legislature must govern, is just as applicable to special and general acts of incorporation as to any other statute.²³ When there is no reasonable doubt as to the intention

²⁰ *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

²¹ *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340, 101 N. W. 735.

²² "It occurs to us that, in determining the powers of a corporation, a distinction should be observed between such as are created by special charters and such as come into existence by virtue of authority conferred by a general law. A charter is in the nature of a contract, and it may be that, in construing a special charter, we should construe it in the light of the special circumstances attending the enterprise which was intended to be promoted; as, in case of a railroad, its connection with other lines of transportation, whether by water or land, or its terminus at a seaport."

Northside Ry. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055.

²³ **United States.** *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *The Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *Chesapeake & O. Canal Co. v. Key*, 3 Cranch C. C. 599, Fed. Cas. No. 2, 649.

Connecticut. *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 221.

New Hampshire. *Burke v. Concord R. Co.*, 61 N. H. 192.

New Jersey. *Morris Canal & Banking Co. v. Central R. Co.*, 16 N. J. Eq. 419.

New York. *White v. Syracuse & U. R. Co.*, 14 Barb. 559.

Ohio. *Straus v. Eagle Ins. Co.*, 5 Ohio St. 60.

"In construing this act of incorporation, we are to bear in mind the

of the legislature, all the courts have to do is to give it effect, provided, of course, the statute is constitutional. But no evidence of the intent on the part of the legislature, either individually or collectively, is competent.²⁴

§ 772. Construction as a whole. In construing a charter or general incorporation law for the purpose of determining the intention of the legislature, the act must be construed as a whole, and, if possible, all parts of it must be harmonized.²⁵ Moreover, words and clauses general in their character must yield to those which are particular when both the general and the particular clauses refer to the same matter.²⁶

The construction of the charter should be, if possible, such as to uphold the act as constitutional,²⁷ and to render it not contrary to general public policy.²⁸

§ 773. Strict construction as to powers of company—In general. While there is some authority to the contrary,²⁹ the rule supported by

time and circumstances under which it was made, but more especially to take into consideration every part and clause of the act, and deduce from it the true meaning and intent of the parties. The act, like every act and charter of the same kind, is a contract between the government, on the one part, and the undertakers, accepting the act of incorporation, on the other; and therefore what they both intended, by the terms used, if we can ascertain it, forms the true construction of such contract." Per Chief Justice Shaw in *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1, 28, 29.

²⁴ *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 317, 150 N. W. 1101, 149 N. W. 754.

²⁵ *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *Straus v. Eagle Ins. Co. of Cincinnati*, 5 Ohio St. 61; *Bennett's Branch Improvement Co.'s Appeal*, 65 Pa. St. 242.

"The declared purposes of the society are set out in the articles of association, and are not to be limited

by the words of a single clause, but are to be ascertained by the reading of the entire declaration. All the clauses are to be considered together and in association with one another in determining what the society may do. Its powers are not to be limited by reading each sentence by itself and carefully excluding every act not expressly included in some one sentence, but are defined by reading the statement of its powers as a connected whole." *Eaton v. Woman's Home Missionary Soc. of M. E. Church*, 264 Ill. 88, 105 N. E. 746.

See generally *Lewis' Sutherland, Statutory Construction* (2nd ed.), § 368 et seq.

²⁶ See § 775, *infra*.

²⁷ *Citizens' St. Ry. Co. v. Jones*, 34 Fed. 579; *Farnum v. Blackstone Canal Corporation*, 1 Sumn. 46, Fed. Cas. No. 4,675; *Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50.

²⁸ *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427.

²⁹ "As a rule, the courts give to statutes, authorizing the formation of

practically all the authorities is that when there is any doubt as to the intention of the legislature, the rule of construction, for the purpose of determining what powers are conferred upon a corporation by its charter, is that the charter, like other grants from the state, is to be construed most strictly against the corporation and in favor of the public, and that powers not clearly granted are to be regarded as impliedly withheld.³⁰

This is certainly true when a corporation claims powers and privi-

railroad companies, a liberal construction in respect to the requirements thereof concerning the designation of the termini of the road for the construction of which the company is formed." *Deepwater R. Co. v. Lambert*, 54 W. Va. 387, 46 S. E. 144, citing 1 *Redfield on Railways*, 412, 413.

"No doubt (in determining whether a corporation is transcending its charter powers or not) both the statute and the charter should be given a fair and reasonably liberal construction." *National Mercantile Co. v. Mattson*, 45 Utah 155, 143 Pac. 223.

³⁰ **United States.** *Perrine v. Chesapeake & D. Canal Co.*, 9 How. 172; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957.

Alabama. *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; *Grand Lodge of Alabama v. Waddill*, 36 Ala. 318.

Connecticut. *Hooker v. New Haven & N. Co.*, 15 Conn. 321.

Georgia. *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574.

Illinois. *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153.

Massachusetts. *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361.

Missouri. *State v. Payne*, 129 Mo. 468, 31 S. W. 797. See also *State v. Lewin*, 128 Mo. App. 149, 106 S. W. 581.

New Hampshire. *De Lancey v. Rockingham Farmers' Mut. Fire Ins. Co.*, 52 N. H. 581.

New Jersey. *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427.

New York. *Auburn & C. Plank Road Co. v. Douglass*, 9 N. Y. 444.

Oregon. *State v. Portland General Elec. Co.*, 52 Ore. 502, 95 Pac. 722.

Pennsylvania. *In re American Transfer Co.'s Petition*, 237 Pa. 241, 85 Atl. 143; *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 356, 67 Am. Dec. 471; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; *Pennsylvania R. Co. v. Canal Commissioners*, 21 Pa. St. 22; *In re South Western State Normal School*, 26 Pa. Super. Ct. 99.

Tennessee. *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 118 S. W. 390.

England. *Proprietors of Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792; *Parker v. Great Western Ry. Co.*, 7 M. & G. 288.

"Public grants are to be strictly construed, and whatever is not plainly granted must be understood to have been withheld." *Somerville Water Co. v. Borough of Somerville*, 78 N. J. Eq. 199, 78 Atl. 793.

Charter construed as sufficiently broad to authorize corporation to enter into a building and loan contract. *National Mercantile Co. v. Mattson*, 45 Utah 155, 143 Pac. 223.

leges not enjoyed by others, or in derogation of common right, or of the common law, such as the power to do an act which will create a nuisance, etc.³¹ It is true when a corporation claims exemption from taxation,³² or exclusive rights or privileges,³³ or the power of eminent

31 United States. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Beaty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813.

Alabama. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453.

Illinois. *Snell v. Buresh*, 123 Ill. 151.

Massachusetts. *Coolidge v. Williams*, 4 Mass. 145.

New Jersey. *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq. 296; *Keyport & M. P. Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13, 511.

New York. *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

North Carolina. *State v. Kerbs*, 64 N. C. 604.

Pennsylvania. *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293.

Vermont. *Farnsworth v. Goodhue*, 48 Vt. 209.

32 Chesapeake & O. Ry. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121; *Delaware Railroad Tax Case*, 18 Wall. (U. S.) 206, 21 L. Ed. 888; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436, 17 L. Ed. 173; *Lincoln St. Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Wilmington & W. R. Co. v. Reid*, 64 N. C. 226; *Baltimore & O. R. Co. v. Marshall County Sup'rs*, 3 W. Va. 319.

In *Citizens' Bank of Louisiana v. Parker*, 192 U. S. 73, 85, 48 L. Ed. 346, Justice McKenna, delivering the opinion of the majority of the court, said: "We recognize the force and salutary character of the rule [that a statute exempting property from taxation must be strictly construed], but

it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking: It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them,—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute. Will courts ever be exempt, or have they ever been exempt, from that duty? Has skill in the use of language ever been so universal, or will it ever be so universal, as to make indubitably clear the meaning of legislation? Has forecast of events ever been so sure, or will it ever be so sure, as to make inevitably certain all the objects contemplated by a statute? We think not, and there never will be a time in which judicial interpretation of laws will not be invoked, and it cannot be omitted because a doubt may be asserted concerning the meaning of the legislators. We repeat, it is the judicial duty to ascertain if doubts exists."

33 United States. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 35 L.

domain,³⁴ or the right of exemption from the laws relating to usury.³⁵

In a leading English case it was said in reference to a canal company: "The canal having been made under the provisions of an act of parliament, the rights of the plaintiffs are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not

Ed. 622; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Parrott v. Lawrence*, 2 Dill. 332, Fed. Cas. No. 10,772.

Alabama. *Birmingham & P. Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

Connecticut. *Hooker v. New Haven & N. Co.*, 15 Conn. 312.

Indiana. *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369, 26 N. E. 893, 24 N. E. 1054.

Maine. *Rockland Water Co. v. Camden & R. Water Co.*, 80 Me. 544, 15 Atl. 785; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.

Mississippi. *Gaines v. Coates*, 51 Miss. 335.

New Hampshire. *De Lancey v. Rockingham Farmers' Mut. Fire Ins. Co.*, 52 N. H. 581.

New York. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381; *Auburn & C. Plank Road Co. v. Douglass*, 9 N. Y. 444; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige 554.

Pennsylvania. *In re Scranton Elec. Light & Heat Co.'s Appeal*, 122 Pa. St. 154, 9 Am. St. Rep. 79, 15 Atl. 446; *Emerson v. Com.*, 108 Pa. St. 111; *In re Bennett's Branch Improvement Co.'s Appeal*, 65 Pa. St. 242.

Vermont. *Isham v. Bennington Iron Co.*, 19 Vt. 248.

Virginia. *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.*, 11 Leigh 43, 36 Am. Dec. 374.

The power to regulate water rates will not be deemed to have been bargained away except from words of positive grant. If any doubt exists, it will be solved in favor of the state. *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 48 L. Ed. 217.

34 Illinois. *East St. Louis v. St. John*, 47 Ill. 463.

Massachusetts. *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. 501.

Missouri. *Hannibal Bridge Co. v. Schaubaker*, 49 Mo. 555.

New York. *New York & Harlem R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

Ohio. *Moorhead v. Little Miami R. Co.*, 17 Ohio 340.

"The statute [conferring the power of eminent domain] must be strictly construed in favor of the property owner, and doubts must be solved adversely to the claim of right to exercise the power. Unless both the letter and the spirit of the statute confer the power, it cannot be exercised, and if the words of the grant are doubtful they are to be taken most strongly against the grantee." *Gillette v. Aurora Rys. Co.*, 228 Ill. 261, 81 N. E. 1005.

35 Johnson v. Griffin Banking & Trust Co., 55 Ga. 691; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Houser v. Hermann Bldg. Ass'n*, 41 Pa. St. 478.

clearly given to them by the act.”³⁶ In this country the cases are to the same effect. “Every power,” said the Supreme Court of Illinois, “that is not clearly granted (to a corporation) is withheld, and any ambiguity in the terms of the grant must operate against the corporation and in favor of the public.”³⁷ And in a Pennsylvania case it was said: “In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference.”³⁸ In the Supreme Court of the United States it was said: “The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.”³⁹ Furthermore, this rule of strict construction applies with even greater force, if that be possible, to articles of incorporation where a corporation is created under a general law.⁴⁰

Ambiguities operate against the corporation and in favor of the public.⁴¹

³⁶ *Proprietors of Stourbridge Canal v. Wheeley*, 2 B. & A. 792.

³⁷ *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153.

³⁸ *Pennsylvania R. Co. v. Canal Commissioners*, 21 Pa. St. 22.

³⁹ *Mr. Justice Swayne in Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

⁴⁰ *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957.

“We have to consider, when such articles become the subject of construction, that they are in a sense, *ex parte*; their formation and execution—what shall be put into them as

well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good.” *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837.

⁴¹ *Bankers' Mut. Casualty Co. v. First Nat. Bank*, 131 Iowa 456, 108 N. W. 1046; *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305, 65 Atl. 504; *Borough of Edgewood v. Scott*, 29 Pa. Super. Ct. 156.

“In the construction of this [charter] contract the public is interested. Rights are asserted under it that are

§ 774. — When rule not applicable. However, the rule requiring a strict construction of charters has been held not to be applicable when a corporation or its members are seeking to evade a liability by giving a narrow and restricted meaning to words.⁴² And it should never be applied if it would defeat the evident intention of the legislature.⁴³

deemed inimical to the public good. This being so, no question of the intention of the parties outside of the terms of the contract can be looked to in determining their rights. The powers of the corporation are to be settled by the contract itself, and it is to be strictly construed against it. No intendment will be taken for granted in its favor, nor will anything be assumed in its behalf. If there is doubt, it will be resolved against the grant. If there is uncertainty, it will be construed in favor of the state. If the contract is susceptible of two meanings, that one will be adopted that restricts and not enlarges the power granted." *German Ins. Co. v. Com.*, 141 Ky. 606, 133 S. W. 793.

"In case of doubt arising from the language used in the charter, or the nature of the business claimed to be within the implied powers of the charter, or the express enactments or general policy of the state with reference to the power or privilege claimed to be incident to the express powers of the corporation, the doubts should be resolved against the corporation. *R. S. arts. 1164, 1167, 1140*"; citing also various cases. *State v. Country Club*, — Tex. Civ. App. —, 173 S. W. 570.

⁴² *Tod v. Kentucky Union Land Co.*, 57 Fed. 53; *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.*, 47 Fed. 22; *Gaff v. Flesher*, 33 Ohio St. 114.

⁴³ *Whitaker v. Delaware & H. Canal Co.*, 87 Pa. St. 34.

In a case in the Supreme Court of the United States it was said: "A great deal of the argument at the bar

was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River bridge, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it,

This rule as to strict construction is subject to the further rule that the construction must always be reasonable,⁴⁴ and in accordance with the obvious spirit and purpose of the law.⁴⁵ So the rule that a charter should be strictly construed against the corporation is to be considered in connection with the rule that where a grant is susceptible of two constructions, one of which would render the grant void and the other make it legal and enforceable, the latter should be adopted.⁴⁶ Moreover, the rule of strict construction can only be applied in cases of ambiguity, or where a power is claimed by inference or implication, and is not expressly given by the charter.⁴⁷

Furthermore, it has been held prohibitions in a charter which are in derogation of the common and ordinary powers of a corporation must be strictly construed.⁴⁸

those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts." Per Mr. Justice Davis, in *The Binghamton Bridge*, 3 Wall. (U. S.) 51, 18 L. Ed. 137.

⁴⁴ **United States.** Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515.

Alabama. See *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Powell v. Sammons*, 31 Ala. 552.

Connecticut. See *Talcott Mountain Turnpike Co. v. Marshall*, 11 Conn. 185.

Florida. *State v. Florida Cent. R. Co.*, 15 Fla. 699.

Maryland. See *Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50.

New Jersey. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 401. See also *State v. Passaic Turnpike Co.*, 27 N. J. L. 217.

Pennsylvania. See *West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co.*, 121 Pa. St. 143, 6 Am. St. Rep. 766, 15 Atl. 509; *Brown v. Susquehanna Boom Co.*, 109 Pa. St. 68, 68 Am. Rep. 708, 1 Atl. 156; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 84 Am. Dec. 527.

Wisconsin. *Clark v. Farrington*, 11 Wis. 306.

England. *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473, 11 Ch. Div. 449.

⁴⁵ *State v. Passaic Turnpike Co.*, 27 N. J. L. 217.

⁴⁶ *State v. Lewin*, 128 Mo. App. 149, 106 S. W. 581.

See also § 772, *supra*.

⁴⁷ *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 273, 275.

⁴⁸ *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 18 Vt. 131, 139.

§ 775. Enumeration of certain powers as exclusion of others. It is a general rule that when the charter of a corporation enumerates certain powers as thereby conferred upon the corporation, it is to be construed as excluding or withholding all other powers than those enumerated and such incidental powers as are reasonably necessary to the proper exercise thereof. This rule is expressed in the maxim, *expressio unius est exclusio alterius*. Thus, if a charter or general law in terms gives a corporation power to hold land for certain enumerated purposes, or to lend money on or invest in certain enumerated securities, it impliedly excludes all other purposes or securities, as the case may be.⁴⁹

The Supreme Court of the United States has stated the rule as follows: "The clear result of the decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental."⁵⁰

And in a late case in Pennsylvania it is held that "if a particular power is omitted from those enumerated in the charter, it is to be taken as a prohibition against its exercise, unless there is an imperative implication of its inclusion."⁵¹

This rule is generally qualified, however, "by the statement that the failure to enumerate them in the charter does not deprive a cor-

⁴⁹ **United States.** Case v. Kelly, 133 U. S. 21, 33 L. Ed. 513; Perrine v. Chesapeake & D. Canal Co., 9 How. 172, 13 L. Ed. 92.

Connecticut. New York Firemen Ins. Co. v. Ely, 5 Conn. 572, 13 Am. Dec. 100.

Nebraska. State v. Atchison & N. R. Co., 24 Neb. 143, 8 Am. St. Rep. 164.

New York. Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Talmage v. Pell, 7 N. Y. 328; New York Firemen Ins. Co. v. Ely, 2 Cow. 678; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31.

Oregon. State v. Portland General Elec. Co., 52 Ore. 502, 95 Pac. 722, rehearing denied 98 Pac. 160.

England. Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

See also § 772, supra, and see generally, as applicable to all statutes, Lewis' Sutherland, Statutory Construction (2nd ed.), § 491.

⁵⁰ Mr. Justice Gray in Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48, 35 L. Ed. 55.

⁵¹ Connellsville & S. L. R. Co. v. Markletom Hotel Co., 247 Pa. 565, 93 Atl. 635. Compare, however, Borough of Edgewood v. Scott, 29 Pa. Super. Ct. 156, in which it was said, "*Expressio unius est exclusio alterius*," argues the learned counsel for the plaintiffs. But surely, that is not the rule of construction applicable to charters. They are to be taken most strongly against the corporations or persons who claim rights or powers under them and most favorably for the public," quoting Johnson v. Philadelphia, 60 Pa. St. 445.

poration of such incidental powers as are reasonably necessary to accomplish the purposes for which it was organized.”⁵²

If the powers are expressly enumerated in detail, “such specification by implication” excludes all other powers or rights, except such incidental or subordinate rights and powers as may be necessary to an exercise of the powers and rights expressly given.”⁵³ In other words, an enumeration of corporate powers implies the exclusion of all other powers except such as are essential to corporate existence and to the enjoyment and exercise of powers expressly conferred.⁵⁴

The proper method of overcoming the effect of an enumeration of specific powers in the articles or certificate of incorporation, as excluding desired powers not thought of or the necessity for the exercise of which afterwards develops, is to include therein a clause stating that recitations of particular powers or purposes shall not be deemed to be exclusive but that all other lawful powers not inconsistent therewith are therein included.⁵⁵

§ 776. Meaning of particular words. Words should be given their ordinary meaning,⁵⁶ unless they have acquired a different meaning

⁵² Doty v. American Telephone & Telegraph Co., 123 Tenn. 329, 130 S. W. 1053.

⁵³ Prairie Slough Fishing & Hunting Club v. Kessler, 252 Mo. 424, 159 S. W. 1080.

⁵⁴ Seattle Gas & Electric Co. v. Citizens' Light & Power Co., 123 Fed. 588.

“The enumeration of powers in its charter is a limitation on corporate capacity, and not an enlargement of inherent rights attaching to the legal person thus created.” San Joaquin & K. R. Canal & Irrigation Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285.

Where a corporation is authorized to make contracts, acquire and transfer property, and is declared to possess “the same powers in such respects as private individuals now enjoy,” this general grant of power will be deemed limited by further provisions in the articles stating that the corporation shall have power to do certain things specified. Greene v. Middlesborough Town & Lands Co., 28 Ky. L. Rep. 303, 89 S. W. 228.

Where a compliance with the terms of a legacy to a religious association, requiring it to pay an annuity, is merely incidental, and such compliance will further the accomplishment by the association of the substantial purposes for which it was incorporated, the association is not barred from such compliance by the fact that by its charter it is given certain specified powers. Sherman v. American Congregational Ass'n, 113 Fed. 609.

⁵⁵ See form 965 in Fletcher's Corporation Forms, and also forms 955, 958, 959 and 962.

⁵⁶ Fairchild v. Masonic Hall Ass'n, 71 Mo. 526; Riker v. Leo, 133 N. Y. 519, 30 N. E. 598. See generally Sutherland, Statutory Construction, § 247.

Thus, where a charter in terms gives the corporation “perpetual succession,” the words are to be taken in their ordinary meaning, and the corporation has the right to exist forever. Fairchild v. Masonic Hall Ass'n, 71 Mo. 526.

“Vicinity,” meaning of, see Township of Landis v. Millville Gas Light

by custom or usage.⁵⁷ However, the subject-matter must control the meaning of a word if there is any doubt.⁵⁸ General words may be restricted in their meaning by specific words,⁵⁹ and such words are always to be construed as merely auxiliary to the primary objects for which the corporation was created, unless a contrary intention appears.⁶⁰

Co., 72 N. J. Eq. 347, 65 Atl. 716; Borough of Madison v. Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439.

Charter power to sell and dispose of property "in any mode or manner" the corporation "shall deem best" does not authorize it to sell property by means of a lottery, which is an indictable offense, under the rule that general words in a charter do not authorize the company to do acts which by the public law are indictable. Plain and positive words are necessary to convey such a privilege. State v. Krebs, 64 N. C. 604.

Power to construct a railroad "along" a river does not authorize it to construct it "in" or "upon" the river. The court said: "And even if giving authority to construct a railroad along a turnpike, could be held to authorize laying it upon the turnpike, such could never be inferred if the authority given was to lay it along a canal. The subject matter in that case as in this, forbids such construction." Stevens v. Erie Ry. Co., 21 N. J. Eq. 259, 261.

⁵⁷ Dexter Lime-Rock Co. v. Dexter, 6 R. I. 353, 364, where the court said: "Had the term 'Dexter Ledge of Lime-Rock' as used in the charter, acquired a settled definite meaning, well understood in the community as including certain lime-rock of definite extent, and excluding all other, we should be obliged to hold that such lime-rock only was covered by the charter, and we could not consider any general intent of the corporators to

have included more, or to have included less."

⁵⁸ Stevens v. Erie Ry. Co., 21 N. J. Eq. 259.

⁵⁹ State v. International Inv. Co., 88 Wis. 512, 60 N. W. 796; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

Thus, in Ashbury Railway Carriage & Iron Co. v. Riche, supra, where a charter authorized a corporation to carry on the business "of mechanical engineers and general contractors," it was held that the words "and general contractors" were not to be taken in their widest sense, but were restricted by the words preceding them, and that they authorized the corporation, therefore, to enter into such contracts only as are usually entered into in the business of mechanical engineers. It was also held in this case that authority given by the charter "to purchase, lease, work, and sell mines, minerals, land, and buildings," meant such land and buildings only as might be acquired for the purpose of purchasing, leasing, working, and selling mines and minerals, as the words "lands, and buildings" were restricted in their meaning by the words preceding them. Compare Brown v. Corbin, 40 Minn. 508, 42 N. W. 481; State v. Corkins, 123 Mo. 56, 27 S. W. 363; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; National Bank of Jefferson v. Texas Inv. Co., 74 Tex. 421, 12 S. W. 101.

⁶⁰ Lusk v. Lewis, 32 Miss. 297; In re German Date Coffee Co., 20 Ch. Div. 169.

§ 777. Meaning of provisos or exceptions. If the meaning of provisos or exceptions in the statute is clear, they must be given effect, even though the result may be to defeat the grant.⁶¹ But they should not be so construed if the language reasonably admits of any other construction.⁶²

§ 778. Construction in aid of validity and effectiveness. The fact that the legislature exceeds its power in attempting to grant to a corporation certain rights does not vitiate a grant of right within the authorized limits.⁶³

§ 779. As abrogating general laws. Provided no constitutional provision is in the way, the legislature may exempt corporations, or

⁶¹ *Talmadge v. North American Coal & Transportation Co.*, 3 Head (Tenn.) 337.

The general principle that a proviso or saving clause in a statute, which is directly repugnant to the body of the act, will not have effect to defeat the purpose of the enactment, does not apply in construing the charters of private corporations, where the matters contained in the proviso or saving clause are made, and intended to be made, an essential condition of the enjoyment of the charter. "If private corporations accept charters under such circumstances, they take them cum onere; they must enjoy their privileges subject to the conditions, or not enjoy them at all." *West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co.*, 121 Pa. St. 143, 6 Am. St. Rep. 766, 15 Atl. 509.

⁶² *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Town of Lebanon v. Oleott*, 1 N. H. 343; *West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co.*, 121 Pa. St. 143, 159, 6 Am. St. Rep. 769, 15 Atl. 509; *Whitaker v. Delaware & H. Canal Co.*, 87 Pa. St. 34; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 84 Am. Dec. 527.

This applies with peculiar force to quasi public corporations which are intended to serve the interests of the

public, as well as the private interests of themselves. Speaking of the charter of a boom company, it was said in a Pennsylvania case: "It is doubtless true that such charters are to be construed most beneficially for the public, and more strictly against the company, but the construction must be a reasonable one. The charters of most private corporations are for the purpose of private gain, and many of them grant exclusive privileges in abridgment of individual right, but as they are intended also to subserve great public interests they should be so construed as not to defeat the purpose of their creation." *Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57, 68, 58 Am. Rep. 708, 1 Atl. 156. And see *West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co.*, 121 Pa. St. 143, 6 Am. St. Rep. 766, 15 Atl. 509.

⁶³ *Brown v. Atlanta Railroad & Power Co.*, 113 Ga. 462, 39 S. E. 71, in which case it was said: "If the power to authorize such a company to carry freight does not exist in the general assembly, so much of the charter as refers to this power would be simply inoperative, and certainly would not affect its right to exercise the powers lawfully conferred, at least, so long as it does not attempt to exercise the power to carry freight."

particular corporations, from the operation of general laws and police regulations; and constitutional acts of incorporation, general or special, will repeal as to corporations created by or under them, or render inapplicable to such corporations, any general laws or police regulations which are inconsistent therewith.⁶⁴

However, a charter, whether consisting of a special act or a general statute, is not to be construed as exempting a corporation from the operation of general laws and police regulations which apply to persons generally throughout the state, unless such an intention on the part of the legislature is clear beyond any reasonable doubt.⁶⁵ Thus, generally, corporations authorized to lend money are within the laws relating to usury.⁶⁶ Corporations are also within statutes prohibiting the exercise of banking privileges without special legislative sanction.⁶⁷ And they are within the operation of common-law principles and statutes in relation to nuisances, both public and private,⁶⁸ and criminal offenses,⁶⁹ unless they are expressly excluded, or unless the law is inapplicable to them in its reason or purpose.⁷⁰

The court will not construe a statute as exempting a corporation

⁶⁴ See *State v. Stoll*, 17 Wall. (U. S.) 425, 21 L. Ed. 650; *Wood v. Wellington*, 30 N. Y. 218; *Howland v. Myer*, 3 N. Y. 290.

⁶⁵ *United States. Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

Illinois. Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560, aff'd 107 U. S. 365, 27 L. Ed. 419.

Louisiana. See Mabire v. New Orleans Canal Bank, 11 La. 83, 30 Am. Dec. 710.

Maine. Burbank v. Bethel Steam Mill Co., 75 Me. 373.

Massachusetts. French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113.

New Hampshire. De Lancey v. Insurance Co., 52 N. H. 581; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 160, 82 Am. Dec. 201.

New York. Tyng v. Commercial Warehouse Co., 58 N. Y. 308. See also *Talmage v. Pell*, 7 N. Y. 340.

North Carolina. See State Bank v. Cape Fear Bank, 13 Ired. 75.

Virginia. See Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 801; *Richmond, F. & P. R. Co. v. Richmond*, 26 Gratt. 83.

⁶⁶ *Philadelphia Loan Co. v. Townner*, 13 Conn. 249; *Johnson v. Griffin Banking & Trust Co.*, 55 Ga. 691.

⁶⁷ *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

⁶⁸ *United States. Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

Illinois. Snell v. Buresh, 123 Ill. 151.

Maine. Burbank v. Bethel Steam Mill Co., 75 Me. 373.

New Hampshire. Eastman v. Amoskeag Mfg. Co., 44 N. H. 160, 82 Am. Dec. 201.

New York. Renwick v. Morris, 7 Hill 575.

⁶⁹ *State v. Krebs*, 64 N. C. 604. See also chapter on Penalties and Crimes, *infra*.

⁷⁰ See generally § 765, *supra*.

from future legislation of a particular character unless the exemption is expressly stated or is based on implication as clear as if stated in express terms.⁷¹ In other words, as stated by the United States Supreme Court, "the provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case."⁷² Moreover, the simple incorporation into a special charter of a portion of the provisions found in a public and general statute cannot be treated as a repeal of other provisions which are omitted.⁷³

§ 780. Mandatory and directory provisions. Whether a particular provision is mandatory or directory is governed to a great extent by the rules relating to statutes generally as to whether such statutes are mandatory or directory.

In regard to the difference between directory and mandatory statutes in general, Mr. Sutherland, in his valuable work on Statutory Construction, says: "The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results. This distinction grows out of a fundamental difference in the nature, importance and relation to the legislative purpose of the statutes so classified. The statutory provisions which may thus be departed from with impunity without affecting the validity of statutory proceedings are usually those which relate to the mode or time of doing that which is essential to effect the aim and purpose of the legislature or some incident of the essential act. * * * There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory."⁷⁴

Sometimes provisions in the charter of a corporation or articles of association are intended merely as directory to its officers, and in such a case they do not limit or affect the powers of the corporation. Thus, where the deed of settlement of an insurance company provided that the seal of the company should not be affixed to any policy except by the order of three of the directors, signed by them

⁷¹ Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. Ed. 298.

⁷² State v. Stoll, 17 Wall. (U. S.) 425, 436, 21 L. Ed. 650.

⁷³ Pratt v. Atlantic & St. L. R. Co., 42 Me. 579, 587.

⁷⁴ Lewis' Sutherland, Statutory Construction (2nd ed.), §§ 610, 611.

and countersigned by the manager, it was held that the provision was merely directory to the officers, and that a policy to which the seal was affixed without such an order was valid and binding upon the company.⁷⁵

Many provisions in a charter, although mandatory in form, are regarded as merely directory.⁷⁶ The question whether particular charter or other statutory provisions are mandatory or directory is considered in the chapters dealing with the particular act in regard to which the statute applies.

§ 781. Construction as to special franchises. Where a corporation is granted special franchises, as distinguished from the franchise to be a corporation,⁷⁷ by its charter or general laws, the construction of such franchises is governed by the rules relating to franchises as laid down in a subsequent chapter.⁷⁸

75 Prince of Wales Life & Educational Assur. Co. v. Harding, E. B. & E. 183. See also in this connection:

United States. Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552.

Connecticut. Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271.

Florida. Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Indiana. New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536.

Kansas. Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

Maine. Proprietors of Middle Bridge v. Brooks, 13 Me. 391, 29 Am. Dec. 510.

76 Proprietors of Middle Bridge v. Brooks, 13 Me. 391, 29 Am. Dec. 510.

“That some of the provisions of the charter and by-laws may well be deemed directory to the officers, and not conditions without which their acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions must depend upon the sound construction of the nature and object of each regulation, and of public convenience, and apparent legislative intention.” Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 81, 6 L. Ed. 552.

77 See Chap. 31, *infra*.

78 See Chap. 31, *infra*.

CHAPTER 21

POWERS IN GENERAL

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I. GENERAL RULES

§ 782. Introductory. The powers of a corporation are those (1) expressly conferred upon it by its charter or other statutes¹ and those (2) implied from the express powers or incidental to the existence of the corporation.² A corporation has no power to do an act (1) where it is not within the express, implied or incidental powers resulting from the charter, or (2) where it is prohibited by the charter or some special statute, or (3) where it is prohibited by a general statute applicable to both natural and artificial persons. Therefore, in determining whether a corporation has power to do an act, it is necessary to first refer to the charter to see whether the power is conferred expressly or by implication, then to examine the

¹ See § 784, *infra*.

² See §§ 789-803, *infra*.

charter and the statutes relating to corporations to see if the act is prohibited, and then in some cases to consult the general statutes to see if the act is illegal even in case of natural persons.

The powers of a corporation have been the subject of much controversy and discussion. While there has been more or less divergence of opinion as to the proper construction of statutes and articles of incorporation as to the powers expressly conferred thereby on corporations, the most of the conflict has been as to whether, conceding the general rule as to, and the definition of, implied and incidental powers, certain acts come within such rule and definition. In this chapter, the general rules relating to powers will be considered, in the following order: (1) the general rules governing; (2) the application of such rules to particular acts of corporations other than those made the subject of separate succeeding chapters; and (3) the application of such rules to particular corporations. Then in subsequent chapters there is considered the powers of corporations in regard to certain particular acts, which are more or less common, such as the power to acquire and hold real property,³ to acquire and hold personal property,⁴ to transfer property,⁵ to make contracts in general,⁶ to borrow and loan money,⁷ to act as surety or guarantor,⁸ to execute negotiable instruments,⁹ to lease property,¹⁰ to execute bonds¹¹ and mortgages,¹² etc. Then, in a following chapter the effect of acts done by a corporation in excess of its powers will be separately treated of, since even if a corporation acts beyond its powers, its acts ordinarily are as effective as if they were within its powers, subject of course to important exceptions.¹³

The general rules relating to the construction and interpretation of charters, while ordinarily applied only to the powers of a corporation, are treated of in a separate chapter.¹⁴

Whether acts of a corporation are beyond its power is a conclusion of law to be drawn from the facts stated.¹⁵

There is no such thing as a *de facto* power.¹⁶

³ See Chap. 29, *infra*.

⁴ See Chap. 28, *infra*.

⁵ See Chap. 32, *infra*.

⁶ See Chap. 22, *infra*.

⁷ See Chap. 25, *infra*.

⁸ See Chap. 23, *infra*.

⁹ See Chap. 26, *infra*.

¹⁰ See Chap. 33, *infra*.

¹¹ See Chap. 27, *infra*.

¹² See Chap. 34, *infra*.

¹³ See Chap. 37, *infra*.

¹⁴ See Chap. 20, *supra*.

¹⁵ *Spencer v. Seaboard Air Line R. Co.*, 137 N. C. 107, 1 L. R. A. (N. S.) 604, 49 S. E. 96.

¹⁶ *Boca & L. R. Co. v. Sierra Valleys R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

§ 783. Inherent powers. A natural person does not derive his powers, any more than he derives his existence, from the sovereign, and therefore he may lawfully make any contract, or do any act, which is not forbidden by the law. The same is true of an ordinary partnership. It is a mere voluntary association of individuals, and its powers are coextensive with the powers of the individuals who compose it. It is very different in the case of a corporation. A corporate body, as we have seen, is a mere creature of the law, and its powers, like its existence, are derived from the state. It has no natural powers. It is well settled, therefore, that a corporation can lawfully exercise no other powers than such as are expressly or impliedly conferred upon it by its charter.¹⁷

17 United States. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 24 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pearce v. Madison & I. R. Co.*, 21 How. 441, 16 L. Ed. 184; *In re Liquor Dealers' Supply Co.*, 177 Fed. 197; *Cumberland Telephone & Telegraph Co. v. Evansville*, 127 Fed. 187, aff'd 143 Fed. 238.

Alabama. *Farihope Single Tax Corporation v. Melville*, 193 Ala. 289, 69 So. 466; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122; *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Cunningham Hardware Co. v. Gama Transp. Co.*, 4 Ala. App. 561, 58 So. 740.

Arkansas. *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W. 162; *Rachels v. Stecher Coöperation Works*, 95 Ark. 6, 128 S. W. 348; *Arkansas Stave Co. v. State*, 94 Ark. 27, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103, 125 S. W. 1001; *Ozan Lumber Co. v. Biddie*, 87 Ark. 587, 113 S. W. 796.

California. *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; *Boca & L. R. Co. v. Sierra Valleys R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

Connecticut. *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100.

Florida. *McQuaig v. Gulf Naval Stores Co.*, 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2.

Georgia. *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574; *Harriman v. First Bryan Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117; *Cherokee Iron Co. v. Jones*, 52 Ga. 276; *Central R. Co. v. Collins*, 40 Ga. 582; *Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 12 Ga. App. 818, 79 S. E. 45.

Illinois. *Converse v. Emerson, Talcott & Co.*, 242 Ill. 619, 90 N. E. 269, aff'g 148 Ill. App. 604; *People v. Illinois Cent. R. Co.*, 233 Ill. 378, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181, 13 Ann. Cas. 285, 84 N. E. 368; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464; *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303; *First M. E. Church of Chicago v. Dixon*, 178 Ill. 260, 52 N. E. 887, rev'g 77 Ill. App. 166; *People v. Pullman's Palace-Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; *People v. Chicago Gas Trust Co.*,

A somewhat different expression of this rule is that "a corporation

130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, rev'g 20 Ill. App. 473; Caldwell v. Alton, 33 Ill. 416, 85 Am. Dec. 282; Metropolitan Bank v. Godfrey, 23 Ill. 579; Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Dunbar v. Royal League, 184 Ill. App. 1; Pond v. Royal League, 127 Ill. App. 476.

Indiana. Huter v. Union Trust Co. (Ind.), 51 N. E. 1071; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Brooklyn Gravel Road Co. v. Slaughter, 33 Ind. 185.

Iowa. Bathe v. Decatur Co. Agr. Society, 73 Iowa 11, 5 Am. St. Rep. 651, 34 N. W. 484; Lucas v. White Line Transfer Co., 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771.

Kansas. Bankers' Union of World v. Crawford, 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79.

Kentucky. Thweatt v. Bank of Hopkinsville, 81 Ky. 1, 4 Ky. L. Rep. 557.

Louisiana. Kelly Weber & Co. v. Vordenbaumen Lumber Co., 133 La. 290, 62 So. 910; Robert Gair Co. v. Columbia Rice Packing Co., 124 La. 193, 50 So. 8; Milwaukee Trust Co. v. Germania Ins. Co., 106 La. 669, 31 So. 298.

Maine. Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9.

Maryland. Lazear v. National Union Bank, 52 Md. 78, 36 Am. Rep. 355; Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

Massachusetts. Attorney General v. New York, N. H. & H. R. Co., 197 Mass. 194, 83 N. E. 408; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

Michigan. Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; People v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64; Bank of Michigan v. Niles, 1 Doug. 401, 41 Am. Dec. 575, Walk. Ch. 99.

Minnesota. In re Fuller Laundry Co., 79 Minn. 414, 82 N. W. 673; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

Mississippi. Southern Elec. Securities Co. v. State, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785; Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879; Abby v. Bullups, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. State v. Missouri Athletic Club, 261 Mo. 576, L. R. A. 1915 C 876, Ann. Cas. 1916 D 931, 170 S. W. 904; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

Nebraska. State v. Atchison & N. R. Co., 24 Neb. 143, 8 Am. St. Rep. 164, 38 N. W. 43.

New Hampshire. Downing v. Mt. W. Road Co., 40 N. H. 230.

New Jersey. State v. Atlantic City & S. R. Co., 77 N. J. L. 465, 72 Atl. 111; Elkins v. Camden & A. R. Co., 36 N. J. Eq. 5.

New York. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 N. E. 670, aff'g 129 App. Div. 36, 113 N. Y. Supp. 439; People v. Campbell, 144 N. Y. 166, 38 N. E. 990; Jemison v. Citizens'

has no natural rights or capacities, such as an individual or an ordinary partnership, and if a power is claimed for it, the words giving the power, or from which it is necessarily implied must be found in the charter, or it does not exist."¹⁹

"An individual," it has been said, "has an absolute right freely to use, enjoy and dispose of all his acquisitions, without any control or domination, save only by the laws of the land. But the civil rights of a corporation (for it has no natural rights) are widely different. The law of its nature, or its birthright, in the most comprehensive sense, is such, and such only, as its charter confers."²⁰ "A corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes."²¹

Sav. Bank of Jefferson, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; **Nassau Bank v. Jones**, 95 N. Y. 115, 47 Am. Rep. 14; **Scarsdale Pub. Co. v. Carter**, 63 Misc. 271, 116 N. Y. Supp. 731.

Ohio. **White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co.**, 12 Ohio St. 601; **Straus v. Eagle Ins. Co.**, 5 Ohio St. 59.

Oklahoma. **Peck-Williamson Heating & Ventilating Co. v. Board of Education of City of Oklahoma**, 6 Okla. 279, 50 Pac. 236.

Pennsylvania. **First Nat. Bank of Allentown v. Hoch**, 89 Pa. St. 324, 33 Am. Rep. 769; **Fowler v. Scully**, 72 Pa. St. 456, 13 Am. Rep. 699; **Com. v. Erie & N. E. R. Co.**, 27 Pa. St. 339, 67 Am. Dec. 471.

Tennessee. **Doty v. American Telephone & Telegraph Co.**, 123 Tenn. 329, Ann. Cas. 1912 C 167, 130 S. W. 1053; **Knapp v. Supreme Commandery, United Order of Golden Cross of World**, 121 Tenn. 212, 118 S. W. 390; **Miller v. American Mut. Acc. Ins. Co.**, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39; **Mallory v. Hanaur Oil Works**, 86 Tenn. 598, 8 S. W. 396.

Texas. **Gulf, C. & S. F. Ry. Co. v. Morris**, 67 Tex. 692, 4 S. W. 156.

Utah. **A. Booth & Co. v. Weigand**, 28 Utah 372, 79 Pac. 570.

Washington. **Pacific Nat. Bank of Tacoma v. Aetna Indemnity Co.**, 33 Wash. 428, 74 Pac. 590.

Wisconsin. **Northwestern Union Packet Co. v. Shaw**, 37 Wis. 655, 19 Am. Rep. 781; **Rock River Bank v. Sherwood**, 10 Wis. 230, 78 Am. Dec. 669; **Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.**, 7 Wis. 59.

England. **Wenlock v. River Dee Co.**, 10 App. Cas. 354, 19 Q. B. D. 155; **Attorney General v. Great Eastern Ry. Co.**, 5 App. Cas. 473; **Coleman v. Eastern Counties Ry. Co.**, 10 Beav. 1; **East Anglian Ry. Co. v. Eastern Counties Ry. Co.**, 11 C. B. 775; **Ashbury Railway Carriage & Iron Co. v. Riche**, L. R. 7 H. L. 653.

¹⁹ **National Home Building & Loan Ass'n v. Home Sav. Bank**, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303.

²⁰ **Hosmer, C. J.**, in **New York Firemen Ins. Co. v. Ely**, 5 Conn. 560, 13 Am. Dec. 100.

²¹ Chief Justice Taney, in **Bank of**

§ 784. Powers expressly conferred—In general. Powers may be expressly conferred on a corporation either by the statute under which it is incorporated, by other statutes which are applicable, or, to some extent, by the provisions of the articles or certificate of incorporation. How far the powers, other than those conferred by statute or the common law, may be conferred by the articles or certificate of incorporation has been considered in a preceding chapter.²²

As the charter of a corporation formed under a general law consists of its articles of incorporation and the laws governing such corporation, the powers are not confined to those enumerated in the articles of association, but include all those conferred by statute.²³

The statute under which the corporation is created, rather than the statement in the charter with reference to the objects of the incorporation, controls its charter powers.²⁴ Moreover, the powers are ordinarily not confined to those enumerated in the articles of incorporation and the powers conferred by the general incorporation statute but also include powers conferred by any statute.²⁵ Furthermore, powers may be granted to a corporation created by a special act, by reference to charters of other corporations without specifically enumerating them.²⁶ It follows from what has been said that a statement that "the powers of a corporation are defined and limited by its articles"²⁷ is not necessarily true.

Keeping in mind what has been stated in a preceding chapter in regard to strict construction of charters,²⁸ the rule is that express powers cannot be enlarged by implication.²⁹

The questions of express exclusion of powers in the charter and implied exclusion by failure to enumerate, are discussed in detail elsewhere.³⁰

Statutes granting powers to corporations are generally construed to be applicable to corporations previously created as well as those subsequently created.³¹

Augusta v. Earle, 13 Pet. (U. S.) 519, 102 L. Ed. 274.

²² See Chap. 7, *supra*.

²³ *Westport Stone Co. v. Thomas*, 175 Ind. 319, 35 L. R. A. (N. S.) 646, 94 N. E. 406.

²⁴ *David Bradley Mfg. Co. v. Chicago & S. Traction Co.*, 229 Ill. 170, 82 N. E. 210.

²⁵ *Overholser v. Oklahoma Interurban Traction Co.*, 29 Okla. 571, 119 Pac. 127.

²⁶ *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *People v. Wayman*, 256 Ill. 151, 99 N. E. 941.

²⁷ *Caviness v. La Grande Irrigation Co.*, 60 Ore. 410, 119 Pac. 731.

²⁸ See § 778, *supra*.

²⁹ *Victor v. Louise Cotton Mills*, 148 N. C. 648, 61 S. E. 648.

³⁰ See § 775, *supra*, and §§ 785-788, *infra*.

³¹ *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

§ 785. — **Powers not prohibited by charter.** It has been said in some of the English cases, that it is not that a corporation has such powers only as are conferred by its charter, but that it has such powers as are not prohibited thereby, or, in other words, that a corporation may do any acts that is not prohibited by its charter.³² This dictum, however, cannot be sustained, if it really means that a corporation can lawfully exercise any power not conferred, either expressly or impliedly. In a leading case in the Supreme Court of the United States, in which the question was whether a railroad company had the power to make a lease, the lessees contended that a corporation may do any act which is not prohibited by its charter, but the court did not concur. "We take the general doctrine to be in this country," it was said, "that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."³³ In other words, it is not true with respect to a corporation, as it is with respect to a natural person, that it may engage in any course of business not prohibited by law. It is the rule, on the contrary, that a corporation is prohibited from exercising powers not granted to it.³⁴

A power does not exist because not expressly prohibited.³⁵ Even in England it is settled that powers not expressly or impliedly granted by the charter of a corporation are impliedly prohibited, and the rule, therefore, is in effect the same as in the United States. As was said by Lord Cranworth in the House of Lords, speaking of a railway company: "Practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into."³⁶

³² South Yorkshire Railway & River
Dun Co. v. Great Northern Ry. Co., 9
Exch. 84; Scottish North Eastern Ry.
Co. v. Stewart, 3 Macq. H. L. 382.
And see Thompson v. Waters, 25 Mich.
214, 12 Am. Rep. 243.

³³ Thomas v. West Jersey R. Co.,
101 U. S. 71, 25 L. Ed. 950. See also
State v. Florida Cent. R. Co., 15 Fla.

690; Mallory v. Hanaur Oil-Works,
86 Tenn. 598, 8 S. W. 396.

³⁴ Seattle Gas & Electric Co. v. Citi-
zens' Light & Power Co., 123 Fed.
588.

³⁵ Alexander v. Bankers Union of
Chicago, 187 Ill. App. 469.

³⁶ Shrewsbury & B. Ry. Co. v.
Northwestern Ry. Co., 6 H. L. Cas.

This rule is in effect the same as the rule that, when the charter of a corporation enumerates certain powers as thereby conferred upon the corporation, it is to be construed as excluding or withholding all other powers than those enumerated, and such incidental powers as are reasonably necessary to the proper exercise thereof.³⁷

§ 786. — Limitation or restriction by articles of incorporation. A corporation may limit or restrict the scope of its powers and authority conferred by the statutes or the general law, by appropriate provisions in the articles of incorporation.³⁸

§ 787. — As dependent on what statute incorporated under. Of course, a company incorporated under one statute, such as the general corporation act, may not have powers which it might have obtained by incorporating under another statute, such as a special act relating only to a particular class of corporations. Thus, in New Jersey, a corporation organized under the general corporation act of 1896 has no power to lay sewers in the public streets, since the legislature has expressly provided for the incorporation of sewer com-

113. See also *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775.

In *Riche v. Ashbury Railway Carriage & Iron Co.*, L. R. 9 Exch. 224, it was said by Blackburn, J., in the exchequer chamber: "I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate

has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, show an intention in the legislature, to prohibit and so avoid the making of, a contract of this particular kind?"

This case was reversed in the House of Lords, and it was held in effect that a corporation has such powers only as are conferred upon it by its charter, expressly or impliedly, and that all powers not so conferred upon it are impliedly prohibited. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

³⁷ See § 775, *supra*.

³⁸ *Seamless Pressed Steel & Manufacturing Co. v. Monroe*, 57 Ind. App. 136, 106 N. E. 538.

Thus, "A benevolent association may restrict the object of its benevolence to classes more limited than those which the statute authorizes it to include, and in such case

panies, on compliance with certain conditions intended to protect the public.³⁹

§ 788. — As affected by by-laws. The powers of a corporation cannot be enlarged by its by-laws.⁴⁰

§ 789. Distinction between incidental and implied powers. So far as known, the courts have never drawn any well defined line between implied and incidental powers, and the terms are used as meaning the same thing, and with no attempt to distinguish them, by both the courts and the textbook writers on the subject. However, in a few cases there are statements which seem to form the basis for a division by enumerating certain powers as incidental,—such powers being those laid down by Blackstone and the early writers as pertaining to all corporations without regard to their express powers.⁴¹

Thus it has been said that “it is not necessary that any powers at all be expressed in the charter in order to endow it with many rights. The mere creation of a corporation carries with it certain powers, which are regarded as incidents of corporate existence.”⁴² Such powers are those of (1) perpetual succession; (2) to sue and be sued; (3) to purchase, hold and convey property;⁴³ (4) to have a common seal; (5) to make by-laws; etc.⁴⁴ However, this enumeration of powers as incidental rather than implied powers, is of little if any practical use and the courts, even when attempting to define incidental powers, have in fact included both classes of powers in their

persons not within the restricted classes specified cannot receive the benefits of the association.”¹ *National Union v. Keefe*, 263 Ill. 453, Ann. Cas. 1915 C 271, 105 N. E. 319, rev'g on other grounds 172 Ill. App. 101.

³⁹ *Fogg v. Ocean City*, 74 N. J. L. 362, 65 Atl. 885.

⁴⁰ *Bailey v. Master Plumbers' Ass'n*, 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853.

See generally Chap. 16.

⁴¹ *Jonesboro v. McKee*, 2 Yerg. (Tenn.) 167. See *Robert Gan Co. v. Columbia Rice Packing Co.*, 124 La. 193, 50 So. 8.

⁴² *Doty v. American Telephone &*

Telegraph Co., 123 Tenn. 329, Ann. Cas. 1912 C 167, 130 S. W. 1053.

⁴³ This power, however, is also generally referred to as an implied power resulting from the express power to do business.

⁴⁴ Next section, *infra*.

“The power to make by-laws is incident, for a corporation must necessarily have laws to regulate its proceedings. Of the same character is the power to make and use a common seal; for the law anciently was that a corporation could act and speak only by its common seal. The right to sue is also incident.” *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

definition.⁴⁵ Thus an incidental power has been defined as "one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it"; but this definition is fully as applicable to the one class of powers as to the other, and was used in connection with the power of a corporation to purchase and hold the stock of other corporations.⁴⁶ So incidental powers are sometimes defined as those directly and immediately appropriate to the execution of the powers expressly granted, and which exist only to enable the corporation to carry out the purpose of its creation, while implied powers are defined as "those possessed by a corporation, not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient, and suitable for that purpose, including as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers."⁴⁷

The term "incidental," as used in this and succeeding chapters in relation to powers, will be used as synonymous with "implied."

§ 790. Powers incident to corporate existence. It has long been settled that the powers of a corporation are not limited to such as are expressly conferred upon it by its charter. Indeed no particular powers need be conferred in express terms. The mere creation of a corporation is alone sufficient, in the absence of a prohibition, to confer upon it all those powers which are regarded as incident to corporate existence.⁴⁸ The powers which are thus impliedly conferred, and which will be separately considered hereafter, are: First, the power to have succession, so that the corporation will continue to exist as the same legal entity, notwithstanding the death or withdrawal of members;⁴⁹ second, the power to sue and be sued, and

⁴⁵ Thus, the Missouri Supreme Court in *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129, said: "The incidental powers may be, and are, frequently restrained by the terms of the charter. When they are not thus restricted, they can only be exercised for the purpose of carrying into effect the ends for which the corporation was designed. It is a well-settled principle that a corporation has no other powers than those which are specifically conferred upon it, and

those which are necessary to carry into effect the powers expressly delegated."

⁴⁶ *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

⁴⁷ *State v. Missouri Athletic Club*, 261 Mo. 576, L. R. A. 1915 C 876, Ann. Cas. 1916 D 931, 170 S. W. 904.

⁴⁸ *Conservators of River Tone v. Ash*, 10 B. & C. 349; *Sutton's Hospital Case*, 10 Coke 23a.

⁴⁹ See § 6, supra.

to grant and receive, in the corporate name;⁵⁰ third, the power to purchase, hold, and convey real and personal property for such purposes as are within the objects of its creation;⁵¹ fourth, the power to have a common seal;⁵² fifth, the power to make by-laws for its government;⁵³ and, sixth, the power, in the proper cases, to disfranchise or remove members.⁵⁴

§ 791. Powers implied from powers expressly granted. In addition to the powers above enumerated as incidental, powers are also implied as incidental to the particular corporation, because they are necessary to enable it properly to exercise the powers which are expressly granted, and to accomplish the objects for which it is created. The general rule is that the charter of a corporation impliedly confers upon it the power to make all contracts and to do all acts which are reasonably necessary to enable it to accomplish the objects of its creation.⁵⁵

⁵⁰ *Conservators of River Tone v. Ash*, 10 B. & C. 349; *Sutton's Hospital Case*, 10 Coke 23a. See also §§ 23-39, *supra*.

⁵¹ *Sutton's Hospital Case*, 10 Coke 23a. And see Chaps. 28, 29 and 32, *infra*.

⁵² *Sutton's Hospital Case*, 10 Coke 23a. See Chap. 19, *supra*.

⁵³ *Sutton's Hospital Case*, 10 Coke 23a. See Chap. 16, *supra*.

⁵⁴ See § 511, *supra*, and chapter on Stock and Stockholders, *infra*.

⁵⁵ *United States*. *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 385, 33 L. Ed. 157.

California. *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621.

Connecticut. *Hope Mut. Life Ins. Co. v. Weed*, 28 Conn. 51.

Illinois. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, *aff'g* 41 Ill. App. 268; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484.

Iowa. *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa 223, 7 Am. Rep. 183.

Massachusetts. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Brown v. Winnisimmet Co.*, 11 Allen 326.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

New Hampshire. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86, 59 Am. Dec. 364.

New Jersey. *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

New York. *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *McCrath v. National Mohawk Val. Bank*, 104 N. Y. 414, 10 N. E. 862; *Moss v. Averell*, 10 N. Y. 455.

Ohio. *White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co.*, 12 Ohio St. 601.

Pennsylvania. *Malone v. Lancaster Gas Light & Fuel Co.*, 182 Pa. St. 309,

Implied powers are recognized and given effect for the purpose of enabling the corporation to exercise the express powers granted.⁵⁶

As was said in a Connecticut case: "While a corporation has no powers except those which are conferred by its charter, it is not requisite that those powers should be expressly granted, but it possesses impliedly and incidentally all such powers as are necessary for the purpose of carrying into effect those which are expressly granted. The creation of a corporation for a specified purpose implies a power to use the means necessary to effect that purpose."⁵⁷

In a Massachusetts case it was said: "We know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business is to be strictly construed, as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."⁵⁸

§ 792. Classification of implied powers. No attempt has been made by the courts or textbook writers to divide the implied powers into groups. However, in order for a clearer understanding of the subject, the following rough classification is submitted, embracing most of the implied powers:

1. Acts in the usual course of business. This includes such acts as borrowing money; making ordinary contracts; executing promissory notes, checks or bills of exchange; taking notes or other securities;

37 Atl. 932; *In re Watt's Appeal*, 78 Pa. St. 370.

Tennessee. *Union Bank v. Jacobs*, 6 Humph. 515.

Wisconsin. *Clark v. Farrington*, 11 Wis. 306.

England. *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473; *Simpson v. Directors of Westminster Palace Hotel Co.*, 8 H. L. Cas. 712.

"While the powers of a corporation are limited to those expressly granted and those fairly incidental thereto,

they include the latter as completely as the former, and they always include the indispensable and the suitable means to exercise the granted powers." *Burnes v. Burnes*, 137 Fed. 781.

⁵⁶ *Alton Mfg. Co. v. Garrett Biblical Institute*, 243 Ill. 298, 90 N. E. 704.

⁵⁷ *Hope Mut. Life Ins. Co. v. Weed*, 28 Conn. 51, 63.

⁵⁸ *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326.

acquiring personal property for use in connection with the business; acquiring and holding land and buildings to be used as places of business or in connection therewith; and selling, leasing, mortgaging or other transfer of property of the corporation in connection with the running of the business. As to these matters, most of which are considered in subsequent chapters in this volume, the law is well settled and ordinarily is easy of application. It is evident that all of such acts, under ordinary circumstances, are necessary in order to run a business.

2. Acts to protect debts owing to the corporation. If a corporation is a creditor, it may do many things to protect its rights which it could not otherwise do. The courts are very liberal in holding all reasonable acts of a corporation in connection with its collection of debts to be within its powers, and there is little conflict in the decisions. Thus, corporations may purchase property, or sometimes run a business temporarily, to collect a debt, where otherwise it would have no power to do so.

3. Embarking in a different business. The power in this respect is quite well settled. It depends largely on whether the engaging in the other business is as a regular and permanent part of its business or is merely casual, temporary or incidental, and whether it is to secure a debt or not. If as a part of its regular business, it is not within its powers. Thus, a corporation not chartered for that purpose cannot go into the banking, insurance or real estate business. On the other hand, a corporation may often go outside its business and do any isolated act of banking, insurance or the like in connection with some other express power, in which case the act is ordinarily within the corporate powers. So it is generally held that it is permissible to temporarily conduct an outside business to collect a debt.

4. Acts in part or wholly to protect or aid employees. While there is some conflict in the decisions, the later and better considered decisions favor such acts as building homes, places of amusement, hospitals, etc., for employees as within the corporate powers.

5. Acts to increase business. This is where the most of the conflict occurs, as hereafter stated, and as illustrated in subsequent sections and chapters.⁵⁹

§ 793. Extent of implied powers—In general. A power is implied when “reasonably necessary” to enable the corporation to accomplish the objects of its creation.⁶⁰ However, the doctrine of implied

⁵⁹ See §§ 793-803, *infra*.

⁶⁰ See § 791, *supra*.

power "is not to be stretched to permit that to be done by a corporation which the legislature has previously said shall not be done, even if without such implied power the grant of some particular franchise should be valueless."⁶¹ Furthermore, it seems that ordinarily a corporation should not be deemed to have implied power to do things for the accomplishment of which the creation of corporations is not permitted by the legislature.⁶²

§ 794. — Reasonably as distinguished from indispensably necessary. It is not necessary that the act shall be necessary in the sense of indispensable. All that is required is that it shall be reasonably appropriate and convenient.⁶³

"Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptance of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one. * * * The term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view, at the time of the enactment of the charter."⁶⁴ "It has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must

⁶¹ *Pittsburg Rys. Co. v. Pittsburg*, 226 Pa. 498, 75 Atl. 681.

⁶² *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90 (holding of real estate for purposes of profit).

⁶³ *Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co.*, 60 Ohio St. 96, 64 L. R. A. 395, 53 N. E. 711; *Clark v. Farrington*, 11 Wis. 306; *Madison, W. & M. Plankroad Co. v. Watertown & P. Plankroad Co.*, 5 Wis. 173.

⁶⁴ *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. L. 545. See also in this connection:

New Jersey. Crawford v. Longstreet, 43 N. J. L. 325.

New York. Central Gold Min. Co. v. Samuel R. Platt & Sons, 3 Daly 263.

Pennsylvania. Malone v. Lancaster Gas Light & Fuel Co., 182 Pa. St. 309, 37 Atl. 932.

Texas. Northside Ry. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

Wisconsin. Clark v. Farrington, 11 Wis. 306; *Madison, W. & M. Plankroad Co. v. Watertown & P. Plankroad Co.*, 5 Wis. 173.

have a choice of means adapted to ends, and are not to be confined to any one mode of operation.”⁶⁵

§ 795. — Direct as distinguished from indirect relation of act. In order that a corporation may have the implied power to do a particular act, the act must be directly and immediately appropriate to the execution of the specific powers granted by the charter, and not bear merely a slight or remote relation to them.⁶⁶

In an Illinois case it was said: “Corporations possess what are known as ‘incidental powers,’ but incidental powers are such as are necessary in order to enable a corporation to carry into execution the specific powers conferred upon it by its charter. Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable, and proper to accomplish the object of the grant,—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation.”⁶⁷

⁶⁵ Bridgeport v. Housatonic R. Co., 15 Conn. 475, 502, followed in S. O. & C. Co. v. Ansonia Water Co., 83 Conn. 611, 78 Atl. 432.

The doctrine of ultra vires, said Lord Selborne, “ought to be reasonably, and not unreasonably, understood and applied, and whatever may fairly be regarded as incidental to, and consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.” Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473. And see Ellerman v. Chicago Junct. Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

⁶⁶ Alton Mfg. Co. v. Garrett Bibli-

cal Institute, 243 Ill. 298, 90 N. E. 704; First M. E. Church of Chicago v. Dixon, 178 Ill. 260, 52 N. E. 887, rev’g 77 Ill. App. 166; People v. Pullman’s Palace-Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; People v. Chicago Gas Trust Co., 130 Ill. 268, 283, 17 Am. St. Rep. 319, 22 N. E. 798; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43, 45, 28 Am. Rep. 9; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160; Buffet v. Troy & B. R. Co., 40 N. Y. 168.

⁶⁷ First M. E. Church of Chicago v. Dixon, 178 Ill. 260, 52 N. E. 887, rev’g 77 Ill. App. 166; People v. Pullman’s Palace-Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664, quoted in part in People v. Illinois Cent. R. Co.,

In Texas the rule is stated as follows: "In short, if the means be such as are usually resorted to, and a direct method of accomplishing the purpose of the incorporation, they are within its powers. If they be unusual, and tend in an indirect manner only to promote its interests, they are held to be *ultra vires*."⁶⁸

A leading textbook writer lays down the rule as follows: "Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this; it may not, under the pretense of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect, i. e., that a company shall not enter into engagements, as the rendering assistance to other undertakings from which it anticipates a benefit to itself. not immediately, but mediately, by reaction, as it were, from the success of the operations thus encouraged."⁶⁹ It is submitted, however, that whether the act is a usual one is wholly unimportant, except as it may have a tendency to show that it is reasonably necessary in order properly to conduct the business; and it has been held that an act is not beyond the powers of a corporation merely because it is unusual.⁷⁰ Moreover, any attempt to apply the distinction between immediate and remote benefits must depend on whether the court, in the circumstances of the particular case, deems the act reasonably necessary to further the interests of the corporation. And it will be noticed in subsequent sections, in applying these rules to particular acts or particular corporations, the courts are far from being in accord. One line of cases applies this rule strictly, including a leading case in Massachusetts where it was held beyond the powers of a railroad, or musical instrument manufacturing company, to guaranty the payment of the expenses of a musical festival.⁷¹ And in Texas, in a well considered case, the respective rights of land companies and street railway companies to aid each other was denied.⁷² These decisions, however, represent the minority holdings of

223 Ill. 378, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181, 13 Ann. Cas. 285, 84 N. E. 368.

⁶⁸ *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

⁶⁹ *Green's Brice's Ultra Vires*, 88.

⁷⁰ *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 5 Wis. 173, 180-182, followed in *Clark v. Farrington*, 11 Wis. 306.

⁷¹ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

⁷² "If it is to be held that, because of the indirect benefits which would result to it from the success of the enterprise, it was authorized by the law to aid in building up the suburb of the City Company, then it should also be held that it had the power to employ its funds and its credit in fostering any other undertaking which

the courts. And while the rule itself may not be changed, it is seldom applied strictly against the power of a corporation.⁷³

The best statement in regard to this matter, found in the decisions, is the following: "It is a question, therefore, in each case, of the logical relation of the act to the corporate purpose expressed in the charter. If that act is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful, sense, it may fairly be considered within charter powers."⁷⁴

The officers of a subsidiary corporation do not act beyond their powers "when they agree that credits which exist upon its books only through the action of a corporation which manages its affairs may be offset against the debts of such managing corporation. The relations of corporations of this nature are such that the courts should not be swift to hold ultra vires their mutual arrangements or to apply the test of direct special benefit in every transaction."⁷⁵

§ 796. — Effect of act being beneficial to company. The rule that a corporation has such powers only as are conferred by its charter is based upon the ground that a corporation derives its powers, as well as its existence, from the state. It follows, therefore, that a corporation has no power, as a general rule, to make contracts or engage in transactions which are foreign to the objects for which it was created, merely because such contracts or transactions will be beneficial to it.⁷⁶

was calculated to increase the population of the city of Ft. Worth, or of any portion of the territory which lies along its line. The effect of that ruling would be to empower every business corporation, not only to carry on the very business it was created to prosecute, but also to engage in every enterprise which would tend to increase the volume of its principal business, and the revenues to be derived therefrom. This would leave the scope of its operations without any reasonable limit." *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

⁷³ For instance, see §§ 1199-1202, *infra*, as to power to make subscriptions, gifts or donations of property.

⁷⁴ Per Justice Beekman in *Steinway v. Steinway & Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718.

⁷⁵ *Gay v. Hudson River Elec. Power Co.*, 187 Fed. 12.

⁷⁶ **United States.** *Pearce v. Madison & I. R. Co.*, 21 How. 441, 16 L. Ed. 184.

Georgia. *Cherokee Iron Co. v. Jones*, 52 Ga. 276.

Illinois. *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464.

Massachusetts. *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

Minnesota. *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

Thus, it has been said that "it cannot be held that every act in furtherance of the interests of a corporation is *inter vires*. Many acts can be suggested, which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case."⁷⁷ However, the tendency of the more recent decisions is to hold an act within corporate powers, if possible, where it is clearly beneficial to the company, as where the act directly tends to increase the business of the company.

§ 797. — As coextensive with those of individuals. It has been said that "a corporation in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends."⁷⁸ However, this statement is too broad if it is to be construed as meaning that in all cases a corporation, authorized to engage in a certain business, may do any act in furtherance of the business and deemed beneficial, which an individual might perform.⁷⁹

§ 798. — Particular acts as controlled by nature of entire transaction. It must be kept in mind that a corporation may undertake many things in the enforcement of its rights and the conservation of its property previously acquired, which it could not engage in as a primary business.⁸⁰

England. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775.

The mere fact that an act of the corporation results in increasing the corporate assets does not save it from being *ultra vires*. *Force v. Age-Herald Co.*, 136 Ala. 271, 33 So. 866.

⁷⁷ *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464.

⁷⁸ *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 280.

"A corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. Within its prescribed range it can do whatever a natural person, *mutatis mutandis*, could do." *Killingsworth v. Port-*

land Trust Co., 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

"The powers of a corporation in effecting its objects are as broad and comprehensive as those of an individual, when not expressly prohibited." *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685, following *Thompson v. Lambert*, 44 Iowa 239.

⁷⁹ See this chapter, *infra*, and succeeding chapters relating to powers, for illustrations of powers held not within the scope of the powers of a corporation, but which an individual engaged in the business would have power to perform.

⁸⁰ *Morris v. Third Nat. Bank of Springfield, Massachusetts*, 142 Fed. 25.

Acts of a corporation which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not beyond its powers when they are incidental to, or form a part of, an entire transaction which, in its general scope, is within the purpose of the corporation.⁸¹ Illustrations of this rule are plentiful, as noticed in subsequent parts of this chapter and in succeeding chapters.

§ 799. — As affected by usage and custom. The fact that it has been the custom of a corporation to enter into transactions which are not authorized by its charter cannot render such transactions any the less *ultra vires*. "The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the state, (speaking of a corporation organized under a general law) of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these cannot be varied either by usage or contract."⁸²

§ 800. — As affected by public policy. Public policy may be ground for objection on the part of the state to the exercise of so-called implied powers.⁸³ This matter will be treated of at length in a succeeding chapter.⁸⁴

§ 801. — As affected by consent of all of stockholders. In determining whether an act is beyond the power of a corporation, the consent of all the stockholders is wholly immaterial. Of course if they consent, they are precluded from thereafter objecting to the want of power, but their consent makes no difference so far as the power of the corporation is concerned,⁸⁵ at least in respect to creditors

⁸¹ Central Ohio Natural Gas & Fuel Co. v. Capital Dairy Co., 60 Ohio St. 96, 64 L. R. A. 395, 53 N. E. 711.

⁸² Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425.

⁸³ Williams v. Johnson, 208 Mass. 544, 95 N. E. 90.

⁸⁴ See Chap. 38, *infra*.

⁸⁵ United States. Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950.

Georgia. Cherokee Iron Co. v. Jones, 52 Ga. 276.

New Hampshire. Downing v. Mt. Washington Road Co., 40 N. H. 230.

New Jersey. National Trust Co. v. Miller, 33 N. J. Eq. 155.

England. Colman v. Eastern Counties Ry. Co., 10 Beav. 1; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

"If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*." Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 258.

"Nor can the powers of a corporation be in the slightest degree en-

and the state.⁸⁶ This principle, as far as creditors are concerned, has been applied by holding that one who owned all the stock of a company was not authorized to transfer the property of the corporation to secure an individual indebtedness, to the prejudice of the corporation creditors.⁸⁷

The rule, as far as the public is concerned, is well stated by Justice Folger in a leading case in New York as follows: "When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail."⁸⁸ This general rule applies to by-laws adopted by the stockholders, which cannot enlarge the powers of the company.⁸⁹

As said by Mr. Justice Miller of the Supreme Court of the United

larged or extended by the assent of its stockholders, or by any action they may take." *National Trust Co. v. Miller*, 33 N. J. Eq. 155.

"In our view of the matter, stockholders in a corporation cannot by consent set aside and render void a limitation placed by law upon the corporate action. If they could, it would serve no good purpose to limit the powers of a corporation. The shareholders could receive all the benefits of incorporation and not be subject to any of the restrictions imposed upon them by law. * * * If the view contended for by the defendant in error be sound, then a mercantile corporation, with the consent of all its stockholders, could embark in a manufacturing business or in other enterprises wholly foreign to the objects and purposes expressed in the charter." *Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 12 Ga. App. 818, 79 S. E. 45.

In regard to power to accept drafts for accommodation, the Connecticut court said: "It cannot acquire this power simply by exercising it repeatedly. The directors and stockholders cannot, either by permission or ratification, confer it upon any of

its officers or agents." *Webster v. Howe Mach. Co.*, 54 Conn. 394, 8 Atl. 482.

That the shareholders give consent does not empower a corporation to transact business in another state in excess of its chartered powers. *Seattle Gas & Electric Co. v. Citizens' Light & Power Co.*, 123 Fed. 588; *Rio Grande W. R. Co. v. Telluride Power Transmission Co.*, 23 Utah 22, 63 Pac. 995.

⁸⁶ "When a corporation enters into a contract which under no circumstances it has power to make such contract is void as to creditors, although assented to by all its stockholders." *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067.

⁸⁷ *Stewart v. Gould*, 8 Wash. 367, 36 Pac. 277.

⁸⁸ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

⁸⁹ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 256; *Traders' & Mechanics' Ins. Co. v. Brown*, 142 Mass. 403, 8 N. E. 134; *Mutual Ben. Life Ins. Co. v. Utter*, 34 N. J. L. 489.

States, in approving an English decision⁹⁰ that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the stockholders, this rule "represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle."⁹¹

So it has been held that "the consent of all the stockholders will not estop the corporation from challenging the legality of an act which is wholly beyond the scope of its charter powers";⁹² but as to this proposition there is much authority to the contrary.⁹³

It follows that an act which is not within the powers of a corporation cannot be ratified by the stockholders so as to become valid, even though all may consent.⁹⁴

There is no doubt that private, as distinguished from quasi public, corporations, may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured, since under such circumstances there is no one to complain except the state, and, the business being purely private, the state does not interfere.⁹⁵ Moreover, there are some decisions tending to support the rule that the consent of the stockholders may prevent an act being ultra vires.⁹⁶ But these decisions, or at least most of them, do not hold that the consent of the stockholders makes the act within the power of the corporation. Instead, they hold that such consent, at least in a court of equity,⁹⁷ estops the corporation to set up the defense of ultra vires, where there are no creditors or the creditors are not injured thereby and where the rights of the state or the public are not involved. Thus, in New Jersey, in a suit to foreclose a corporate

⁹⁰ *Ashbury Ry. Carriage Co. v. Riche*, L. R. 7 H. L. 653.

⁹¹ *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950.

⁹² *Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 12 Ga. App. 818, 79 S. E. 45.

⁹³ *Infra*, this section.

⁹⁴ *Alabama Great Southern R. Co. v. Loveman Compress Co.*, — Ala. —, 72 So. 311; *Elkins v. Camden & Atlantic R. Co.*, 36 N. J. Eq. 5; *Ashbury Ry. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

⁹⁵ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Fifth Ave. Coach Co. v. New York*, 58 N. Y. Misc. 401, 111 N. Y. Supp. 759.

Where an accommodation indorsement by a corporation was ratified by the stockholders and no other rights intervened, the corporation is bound. *Martin v. Niagara Falls Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303.

⁹⁶ *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87, 67 N. Y. Supp. 10; *Little v. Garabrant*, 90 Hun (N. Y.) 404, 35 N. Y. Supp. 689; *Osborn v. Montelae Park*, 89 Hun (N. Y.) 167, 35 N. Y. Supp. 610, aff'd without opinion 153 N. Y. 672, 48 N. E. 1106.

⁹⁷ *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 167, where statement of rule is clearly made.

mortgage, where the corporation pleaded *ultra vires*, it was held that the consent of the stockholders prevented the corporation from setting up the defense; but the real ground on which the ruling was based was not that the act was within the powers of the corporation because consented to by the stockholders, but that the corporation was estopped.⁹⁸ So, in a federal court, where the suit was to foreclose a mortgage and the plea was *ultra vires*, the court said: "The land company is a private corporation. It owed no debts. The paper was issued by the consent of all the stockholders, and it has been accepted, and the consideration parted with * * * for it. Can it now be permitted to take shelter under the plea of *ultra vires*? I think not";⁹⁹ but in that case there are dicta that the principle does not apply to railroads or other quasi public corporations.¹ So in New York it has been held that accommodation paper is binding on a corporation where ratified by all the stockholders, provided no rights of creditors intervene and there is no fraud.² And it has been held in New Jersey that "unanimous consent and acquiescence of the stockholders, acted on by the parties concerned to such extent as to materially change their position, preclude the assenting stockholders as individuals and the corporation as such, from afterwards setting up legal informalities in matters of internal concern that affect only the interests of the stockholders, to the overthrow of rights that have been acquired on the faith of the consent and acquiescence."³ And it has been held in Michigan that a mortgage given to secure a guaranty is enforceable where all the stockholders consented to the transaction, although it be conceded that the guaranty was beyond the corporate powers.⁴ Likewise, where there are no stockholders except the directors and officers, they may by unanimous consent make any disposition of the assets of the corporation which will not impair the rights of creditors.⁵

So far as the right to plead *ultra vires*, as distinguished from the

⁹⁸ "In cases where stockholders have all assented to corporate action, and no rights of the state or creditors intervene, the doctrine of estoppel is fully applicable, and the plea of *ultra vires* is unavailing." *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 167.

⁹⁹ *Murphy v. Arkansas & L. Land & Improvement Co.*, 97 Fed. 723.

¹ *Murphy v. Arkansas & L. Land & Improvement Co.*, 97 Fed. 723.

² *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303.

³ Per Justice Pitney in *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313.

⁴ *Butterworth & Lowe v. Kritzer Milling Co.*, 115 Mich. 1, 72 N. W. 990.

⁵ *Jorndt v. Reuter Hub & Spoke Co.*, 112 Mo. App. 341, 87 S. W. 29, holding stockholders may, if they

power of the corporation considered in the abstract, is concerned, the rule is thus laid down in the leading case in New York: "A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts."⁶

If there is only one owner of the stock, of course no one but creditors can complain in regard to his acts as corporate acts for his individual benefit.⁷

§ 802. Implied powers as governed by facts of particular case—In general. The rules laid down above as to implied powers are well settled and are, at the present day, not even questioned by courts or writers. The difficulty comes in applying the rules. It is easy to say that a power is implied if it is "reasonably necessary" to the exercise of express powers, but there is no test to decide whether a particular act, done by a particular corporation, under particular circumstances, is "reasonably necessary." Of course many acts are clearly on one side of the line or the other. But there are many close to the dividing line, which occasions more or less confusion in the decisions. The result is the rule that whether an act comes within the implied powers of a corporation "must be determined in each case from all its facts and circumstances."⁸

In an early Massachusetts case, Chief Justice Shaw said: "The extent and limits of these implied duties and powers, in the absence of positive provision in the legislative act, by which the power is granted, can only be determined by considering what is reasonable in each case."⁹

"The authority of a corporation to perform a particular act is always dependent to a very considerable extent upon the facts and circumstances existing at the time when it is proposed to perform

wish, give away an asset by unanimous consent, unless the rights of creditors are impaired.

⁶ Kent v. Quicksilver Min. Co., 78 N. Y. 159.

⁷ Millsaps v. Merchants' & Planters' Bank, 71 Miss. 361, 13 So. 903. To

same effect, see Swift v. Smith, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534.

⁸ Central Ohio National Gas & Fuel Co. v. Capital Dairy Co., 60 Ohio St. 96, 64 L. R. A. 395, 53 N. E. 711.

⁹ Rowe v. Granite Bridge Corporation, 21 Pick. (Mass.) 344.

the act.”¹⁰ “Exceptional circumstances or extraordinary conditions may make it necessary to the proper prosecution of the business of a corporation that it shall be accorded implied power to perform acts beyond its express power, and which, except for the prevailing conditions, would be wholly unwarranted.”¹¹

The following statement by a leading textbook writer clearly sums up the situation as follows: “No rules can be framed which would be of any practical value in determining cases of this character. The most that can be done is to state the general principles which have influenced the courts in their decisions, and to illustrate these general principles by examples. The application of the law to individual cases must always remain a matter involving the exercise of sound practical judgment and business experience. Great caution is therefore necessary in treating a decision that a corporation has or has not authority to do a particular act, as a precedent to be followed in other cases. Such a decision would not establish an absolute rule, which could be applied mechanically; but all the facts and the general principles by which the court was guided in reaching its conclusion must always be considered.”¹²

In determining whether particular acts are within the powers of a private corporation, decisions as to whether like acts are within the powers of municipal corporations are often valuable.¹³

§ 803. — Tendency of the courts. There is no question but that the tendency of the courts is to broaden the scope of implied powers.¹⁴

¹⁰ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N. S.) 967, 89 N. E. 476, aff'g 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080.

¹¹ *People v. Pullman's Palace-Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

¹² *Morawetz, Priv. Corp.* § 362.

¹³ See 1 *McQuillin Mun. Corp. Chap.* 10.

¹⁴ See *infra*, this note.

“The field of corporate action in respect to the exercise of incidental powers is thus, I think, an expanding one. As industrial conditions change, business methods must change with them, and acts become permissible which at an earlier period would not have been considered to be within

corporate power. This, I think, tends to explain the difference found in the reported cases.” *Steinway v. Steinway & Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718.

“As noted in many of the cases, courts in recent times have been more liberal in construing the powers of corporations to accomplish the general scope and object of their creation, and the question of ultra vires has not been, of late years, construed with that strictness that existed in former times.” *Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 84 N. W. 833.

“It would seem from the later opinions of courts and jurists that the doctrine of ultra vires is thought to have been heretofore too often

The modern view of most courts is that the rule as to implied powers "should be reasonably applied, with a view of promoting the legitimate objects of the corporation, rather than with a strictness that would so hedge it about as to obstruct the practical attainment of the corporate purposes, or embarrass the corporate business."¹⁵

§ 804. Mode of exercising powers. If the charter of a corporation prescribes no particular mode for the exercise of its powers, they may be exercised in any mode, provided it is not contrary to law, which the stockholders or officers may deem best.¹⁶ So it has been well said that corporations "may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."¹⁷ But if the charter requires its powers to be exercised in any particular manner, or by particular

and too strictly applied, especially in cases of contracts of corporations * * * not in themselves harmful to the public." *Oakland Elec. Co. v. Union Gas & Electric Co.*, 107 Me. 279, 78 Atl. 288.

"The range of incidental powers has been steadily enlarged under the growing exigencies of complicated modern commercial relations." *Virgil v. Virgil Practice Clavier Co.*, 33 N. Y. Misc. 200, 68 N. Y. Supp. 335.

"The doctrine of ultra vires took its rise at a very early day in the history of corporations, at a time when they were not common, and were created for quasi public purposes, and regarded to a certain extent as public in their nature. At that time not only was their manner of contracting closely limited, but their power to make contracts was jealously guarded, and the courts were not slow to invalidate any act by which a corporation might go beyond the express powers which had been granted to it. But that doctrine has been considerably limited in later days. Corporations are now organized to carry on every kind of business which may be

performed by individuals. The purposes of trading corporations are in no way public in their nature. So far as the people are concerned, whether a corporation shall make one contract or another, so long as it advances the purposes for which the corporation was organized, is absolutely unimportant." *Koehler & Co. v. Reinheimer*, 26 N. Y. App. Div. 1, 49 N. Y. Supp. 755.

¹⁵ *Central Ohio Natural Gas & Fuel Co. v. Capital Dairy Co.*, 60 Ohio St. 96, 64 L. R. A. 395, 53 N. E. 711.

"While it is true that, in deciding whether any act is beyond the power of the corporation, the courts must look into the circumstances of each particular case, yet that doctrine will always be reasonably applied." *New York v. Interborough Rapid Transit Co.*, 53 N. Y. Misc. 126, 104 N. Y. Supp. 157.

¹⁶ *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

¹⁷ *S. O. & C. Co. v. Ansonia Water Co.*, 83 Conn. 611, 78 Atl. 432; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475.

officers or agents, they cannot be properly exercised in any other way, for the powers of a corporation are measured by its charter, not only as to the things which it may lawfully do, but also as to the mode of doing them.¹⁸ However, as will be noticed in treating of the effect of ultra vires transactions, the fact that a corporation exercises a power in a mode different from that prescribed by its charter will not necessarily prevent it from acquiring rights or incurring liabilities by reason thereof.¹⁹

Of course, a corporation must exercise its powers through agents. Thus, a corporation cannot file a bill in equity except through an authorized agent.²⁰ If a license cannot issue to a corporation as such, it may take out a license in the name of a designated agent, and the agent may lawfully act under the license in selling the goods of the corporation.²¹

§ 805. Time of exercising powers. If the charter of a corporation prescribes conditions precedent to the right to exercise the powers conferred upon it, it cannot lawfully exercise such powers until these conditions are fulfilled.²² This is true, for example, of national banks, which are prohibited by the National Bank Act from transacting any business, except such as is incidental and necessarily preliminary to their organization, until certain conditions have been complied with and the comptroller of the currency has authorized them to commence business.²³ A corporation must also exercise its powers within the time, if any, fixed by its charter.²⁴ As was shown in a former chapter, an association cannot exercise corporate powers and

¹⁸ **United States.** *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552.

Illinois. *Fridley v. Bowen*, 87 Ill. 151.

New York. *Beatty v. Marine Ins. Co.*, 2 Johns. 109, 3 Am. Dec. 401; *Hosack v. College of Physicians & Surgeons of New York*, 5 Wend. 547.

Ohio. *Bartholomew v. Bentley*, 1 Ohio St. 37.

Tennessee. *Talmdage v. North American Coal & Transportation Co.*, 3 Head 337.

West Virginia. *Pennsylvania Lightning Rod Co. v. Board of Education of Cass Tp.*, 20 W. Va. 360.

¹⁹ See Chap. 37, *infra*.

²⁰ *Jockish v. Deutscher Krieger Verein*, 98 Ill. App. 9.

²¹ *Crall & Ostrander v. Com.*, 103 Va. 855, 862, 49 S. E. 638.

²² *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, aff'g 162 Ill. 100, 44 N. E. 381, 61 Ill. App. 33; *Medill v. Collier*, 16 Ohio St. 599, 47 Am. Dec. 387; *Bonham v. Taylor*, 10 Ohio 108.

²³ *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, aff'g 162 Ill. 100, 44 N. E. 381, 61 Ill. App. 33.

²⁴ *Town of Williamsport v. Kent*, 14 Ind. 309.

franchises until it has acquired, at the least, a *de facto* corporate existence.²⁵

§ 806. Place of exercising powers—General rules. If there are no express or implied restrictions in its charter, a corporation may locate and carry on its business at any place within the state.²⁶ It cannot do so, however, if its charter requires that it shall be located and conduct its operations at a particular place within the state, as in the case of a bank, hospital, college, etc.²⁷ So an insurance policy issued in a county other than one of those fixed by the charter as the counties in which it could do business, was held void.²⁸

Where a private act creating a corporation was entitled "An act to incorporate the Institution of Protestant Deaconesses, and to provide for the encouragement and control of an hospital in Chicago," and provided for the establishing of such a hospital in Chicago, and then in general terms authorized the corporation to establish, regulate, and control any hospital, infants' home, insane asylum, or school necessary and proper for carrying out the general objects of the act, it was held that the corporation had no authority to establish or maintain schools, hospitals, or asylums outside of the city of Chicago.²⁹

So, where a corporation was required by its charter, as a condition to the exercise of its franchises, to locate and maintain a slaughterhouse for the use of all the butchers of a certain city, who were forbidden to ply their vocation at any other place, for the purpose of protecting the health of the city, it was held that the corporation, after establishing a slaughterhouse, could not change its location, and compel the butchers to follow it to some other locality.³⁰

§ 807. — Incidental business. A requirement that a corporation shall be located and conduct its operations at a particular place has

²⁵ See § 252, *supra*.

²⁶ *City Bank v. Beach*, 1 Blatchf. (U. S.) 425, Fed. Cas. No. 2,736; *Ashley Wire Co. v. Illinois Steel Co.*, 60 Ill. App. 179, *aff'd* 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410; *Stickle v. Liberty Cycle Co.* (N. J. Eq.), 32 Atl. 708.

²⁷ *People v. Protestant Deaconesses Inst.*, 71 Ill. 229; *Berthin v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 28 La. Ann. 210; *Underwood v. Waldron*, 12 Mich. 73; *Attorney General v. Oakland County Bank*,

Walk. (Mich.) 90; *People v. Geneva College*, 5 Wend. (N. Y.) 211.

²⁸ *Eddy v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 651, 40 N. W. 775.

Fire insurance company chartered in New Jersey to locate in Trenton cannot locate in Jersey City. *Booth v. Wonderly*, 36 N. J. L. 250.

²⁹ *People v. Institution of Protestant Deaconesses*, 71 Ill. 229.

³⁰ *Berthin v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 28 La. Ann. 210.

reference to the general business, only, of the corporation and does not prohibit an isolated or incidental transaction at another place. Thus, a bank, although required by its charter to conduct its business in a particular city, may nevertheless discount a note at another place for the purpose of securing a demand.³¹ Likewise, the main purpose of an educational corporation must be carried on at a place where it is established, but the incidental powers which are necessary for the maintenance of the corporation may be exercised elsewhere. Thus, the power to receive gifts of money and other property for the purpose of maintaining an academy, and to hold and convey property for such purpose, may be exercised anywhere, unaffected by the restriction as to the location of the academy.³²

§ 808. — Power to act in other states. As will be noticed more at length in another chapter,³³ a corporation may, like a natural person, carry on business and make contracts, through its agents, in another state or country than that by or under whose laws it was created, provided the other state or country expressly or impliedly consents, and provided there is no restriction in its charter.³⁴ The power to act outside the state need not be expressly conferred, but may be implied.³⁵ A corporation, however, since it is a mere creature of the law, and since the laws of particular states or countries have no force beyond their territorial limits, can have no "existence" in a foreign state or country. "It must dwell in the place of its creation, and cannot migrate to another sovereignty."³⁶ And it follows that

³¹ *Potter v. Bank of Ithaca*, 5 Hill (N. Y.) 490, *aff'd* 7 Hill (N. Y.) 530.

³² *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183.

³³ See chapter on Foreign Corporations, *infra*.

³⁴ *United States. Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274.

Illinois. Reichwald v. Commercial Hotel Co., 106 Ill. 439.

Kentucky. Fawcett's Assignee v. Mitchell, Finch & Co., 133 Ky. 361, 117 S. W. 956.

Massachusetts. Kennebec Co. v. Augusta Insurance & Banking Co., 6 Gray 204.

New York. Cary v. Cleveland & T. R. Co., 29 Barb. 35.

"By the provisions of the charter, plaintiff was incorporated for the purpose of manufacturing engines, boilers, and other machinery of iron and brass 'and of disposing of and dealing in the same.' Under the charter, plaintiff possessed the power to make valid contracts for the sale of its manufactured machinery not only in the state of its creation, but in any other state where such contracts are not prohibited by the local law." *Hall v. Tanner & De Laney Engine Co.*, 91 Ala. 363, 8 So. 348.

³⁵ *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886.

³⁶ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274.

a corporation cannot itself act in another state or country. In other words, a corporation cannot, in a sovereignty other than that of its own creation, do any act which cannot be done through the intervention of a mere agent, but which is, in contemplation of law, the direct act of the corporate body itself.³⁷

It seems to have been conceded that power to furnish water to a village "and vicinity" includes an adjoining city even though in another state.³⁸ On the other hand, it seems to be held in New Jersey that a water company, with power to dam rivers and streams, and store and sell water, has no power to convey water beyond the boundaries of the state.³⁹

Where a reservoir company had the right, by its charter, to raise the waters, not only of certain ponds, but also of the river below for a considerable distance, the act is not unauthorized merely because the land between the dam and the ponds was in another state.⁴⁰

It is, of course, entirely within the power of the legislature, in creating a corporation, to place restrictions upon its power to act, even through mere agents, outside of the state, and if it disregards such restrictions, it violates its charter and acts *ultra vires*. Thus, under a New Jersey statute authorizing any corporation under a general law to carry on part of its business out of the state, provided the certificate of incorporation should state what part was to be so carried on, and the certificate of incorporation of a manufacturing corporation stated that the portion of its business to be carried on out of the state should be the selling of its manufactured products, it was held that it had no authority to remove its manufacturing plant out of the state.⁴¹ So in Kansas the statutes relating to mutual fire insurance companies, although not explicit and clear, were at

³⁷ See in this connection:

Maine. *Freeman v. Machias Water Power & Mill Co.*, 38 Me. 343; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619.

Maryland. *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 54 Am. Rep. 760, 20 Atl. 1032.

Missouri. *Camp v. Byrne*, 41 Mo. 525.

New York. *Mitchell v. Vermont Copper Min. Co.*, 40 N. Y. Super. Ct. 406, *aff'd* 67 N. Y. 280.

North Carolina. *Tuckasegee Min.*

Co. v. Goodhue, 118 N. C. 981, 24 S. E. 797.

³⁸ *Duluth v. Duluth Gas & Water Co.*, 45 Minn. 210, 47 N. W. 781.

³⁹ *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116, 65 Atl. 489, where statute also forbids it.

⁴⁰ *Phillips v. Watuppa Reservoir Co.*, 184 Mass. 404, 68 N. E. 848.

⁴¹ *Stickle v. Liberty Cycle Co. (N. J. Eq.)*, 32 Atl. 708.

one time construed as not warranting the issuing of policies on property situated outside the state.⁴²

The legislature may require a corporation to keep its officers, place of business, and books within the state, and such a requirement must be complied with. Where a statute provided that the secretary and treasurer of every domestic corporation should reside, have their place of business, and keep the books of the corporation within the state, it was held that it was not complied with by the residence within the state of a person who was nominally secretary and treasurer of the corporation, where the business of the corporation was transacted in another state, in which all of the corporate property was situated, and that a corporation thus conducting its business forfeited its charter.⁴³

The validity of stockholders' or directors' meetings outside the state is treated of in subsequent chapters.⁴⁴

§ 809. — Extent of powers outside of state. It has been held that a corporation has no greater powers outside the state in which it was created than it has in the state of its creation. And it has been said that "it is a matter of surprise to find that a large amount of capital has been invested by able men in the belief that the lawful powers of a corporation would expand by the mere extension of its operations into fields beyond the territorial boundaries of the state government to which its allegiance is due."⁴⁵ So in Illinois it was held that a New York corporation could not exercise a power in Illinois which was denied to it by the general statutes of New York.⁴⁶ On the other hand, a later case in Illinois holds that a general statute of the state of New York prohibiting the assignment or transfer of property by a corporation in contemplation of insolvency is only a part of the local law of that state and does not apply to an assignment of a fund in Illinois by a New York corporation.⁴⁷ This question is the subject of some conflict in the decisions, as will be noticed in a subsequent chapter where the matter is treated of in full.⁴⁸

⁴² *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731, 23 Pac. 1061.

⁴³ *State v. Park & Nelson Lumber Co.*, 58 Minn. 330, 49 Am. St. Rep. 516. 59 N. W. 1048.

⁴⁴ See chapter on Corporate Meetings and Elections, *infra*.

⁴⁵ *Seattle Gas & Electric Co. v. Citizens' Light & Power Co.*, 123 Fed. 588, where New Jersey corporation having

no power in that state to manufacture and sell gas was held to have no such power in the city of Seattle in Washington.

⁴⁶ *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133.

⁴⁷ *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122.

⁴⁸ See chapter on Foreign Corporations, *infra*.

§ 810. Notice of extent of corporate powers. Persons dealing with a corporation are presumed to act with full knowledge of its charter powers.⁴⁹ The application of this rule is found in a subsequent chapter relating to the effect of ultra vires acts.⁵⁰

§ 811. Evidence, presumptions and burden of proof. When a question arises as to whether a particular act or contract is in excess of the powers of a corporation, and there might be circumstances under which it would be authorized, it will be presumed to have been authorized unless the contrary appears, the burden of showing the contrary being upon the one who sets up the want of power. This rule is based upon the maxim, *omnia acta rite esse praesumuntur*.⁵¹ It follows that the burden of establishing the defense of ultra vires is on the corporation or person asserting it.⁵² Thus, the burden of showing that a corporation is not engaged wholly or in part in the business stated in the charter is on the person who makes such contention.⁵³

Where the charter is not before the court, it will not be presumed that unusual and extraordinary powers are conferred;⁵⁴ and if a

⁴⁹ *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L. R. A. 631, 65 N. E. 451; *Scott v. Bankers' Union of World*, 73 Kan. 575, 85 Pac. 604; *American Southern Nat. Bank v. Smith*, 170 Ky. 512, 186 S. W. 482; *Hermitage Hotel Co. v. Dyer*, 125 Tenn. 302, 142 S. W. 1117.

⁵⁰ See Chap. 37, *infra*.

⁵¹ *United States. Wykes v. City Water Co. of Santa Cruz*, 184 Fed. 752.

Alabama. *Alabama Gold Life Ins. Co. v. Central Agr. & Mech. Ass'n*, 54 Ala. 73.

Arkansas. *Bloom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293.

Illinois. *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321.

Indiana. *International Building & Loan Ass'n, No. 2 v. Wall*, 153 Ind. 554, 55 N. E. 431.

Iowa. *West v. Averill Grocery Co.*, 109 Iowa 488, 80 N. W. 555.

Michigan. *Harrison Wire Co. v. Moore*, 55 Mich. 110, 22 N. W. 62.

New Hampshire. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

New York. *De Groff v. American Linen Thread Co.*, 21 N. Y. 127; *Chautauqua County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Hyde v. Equitable Life Assur. Soc. of United States*, 61 Misc. 518, 116 N. Y. Supp. 219.

Washington. *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174.

England. *Scottish North Eastern Ry. Co. v. Stewart*, 3 Macq. H. L. 382.

⁵² *Knapp v. Tidewater Coal Co.*, 85 Conn. 147, 81 Atl. 1063; *Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co.*, 101 Ill. App. 349; *Howard Oil & Grease Co. v. Hughes*, 12 Pa. Super. Ct. 311.

⁵³ *Com. v. Filbert Paving & Construction Co.*, 229 Pa. 231, 78 Atl. 104.

⁵⁴ *Victor v. Louise Cotton Mills*, 148 N. C. 107, 16 L. R. A. (N. S.) 1020, 16 Ann. Cas. 291, 61 S. E. 648.

corporation claims that it possesses a certain power, the burden rests on it to show the source of the power.⁵⁵ Of course, if the charter of a corporation invests it "with all the rights, privileges and immunities granted to" another specified company, the charter of the latter company is admissible in evidence on an issue as to the powers of the former company.⁵⁶

The articles of incorporation are the sole guide in determining the nature and character of a corporation,⁵⁷ and extrinsic evidence in regard thereto is not admissible.⁵⁸

II. PARTICULAR ACTS

§ 812. Introductory. Sometimes, in applying the general rules relating to the powers of corporations already stated,⁵⁹ the kind of corporation involved is one of minor importance. It is this class of decisions, as illustrating the general rules, which are collected in this subdivision.

Whether corporations are citizens within laws conferring powers on citizens is treated of in a preceding chapter,⁶⁰ as is also the power to make by-laws.⁶¹

§ 813. Advertising. A corporation may adopt any proper means of advertising its business or its enterprise, and make necessary contracts with the publishers of newspapers or others for such purpose.⁶²

In like manner, a corporation organized under a statute authorizing corporations for the purpose of aiding, encouraging, and inducing immigration, and authorized by its articles of incorporation to buy, hold, and sell lands, town lots, and mineral springs, to improve such property, build hotels and bathhouses, etc., has the implied power to make contracts for printed matter, and views of scenery calculated

⁵⁵ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁵⁶ *Southern Ry.—Carolina Division v. Howell*, 79 S. C. 281, 60 S. E. 677.

⁵⁷ *Craig v. Benedictine Sisters Hospital Ass'n*, 88 Minn. 535, 93 N. W. 669.

The articles or a certified copy thereof are primary proof of the right of the company to transact business. *Equitable Building & Loan Ass'n v. Bidwell*, 60 Neb. 169, 82 N. W. 384.

⁵⁸ *Craig v. Benedictine Sisters Hos-*

pital Ass'n, 88 Minn. 535, 93 N. W. 669.

⁵⁹ See §§ 782-811, *supra*.

⁶⁰ See Chap. 13.

⁶¹ See Chap. 17.

⁶² *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212, where it was held that a corporation created for the purpose of building a bridge across the Mississippi could enter into a contract with the publisher of a newspaper to publish statistical articles showing the value of the enterprise as an investment.

and intended to benefit the corporation by advertising the locality where its lands and springs are located, and to induce immigration.⁶³

In accordance with this rule, a hardware company may purchase an advertising scheme to increase its sales.⁶⁴

However, it has been held that a railroad corporation has no authority to grant the exclusive right to use its box cars for advertising purposes.⁶⁵ So, too, the lease of space for exterior advertisements on stagecoaches or sight seeing automobiles is beyond the power of a carrier engaged in conducting such coach or automobile,⁶⁶ and the same is true as to a lease by a street railway company of the space both inside and outside the cars for advertising purposes.⁶⁷ However, it would seem that there can be no question as to the power of street railway companies to put advertisements in the inside of its cars.⁶⁸

§ 814. Aiding persons or associations, in order to increase business.

The most difficult of all the questions relating to implied powers is whether, in a particular case, a corporation may aid a person or a firm or another company when its purpose in so doing is to increase its own business. This question often arises in connection with donations by a corporation to aid an enterprise, the success of which will increase the business of the donating corporation,⁶⁹ in connection with the power of a corporation to become a guarantor or surety to help a person, firm or another corporation, where the effect will be to enable the corporation to make a sale or to obtain a steady customer or to otherwise help its business,⁷⁰ and in various other phases. It most frequently arises in connection with the business of brewing companies,⁷¹ land companies,⁷² street car companies,⁷³ and the like.

⁶³ Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, where contracts related to a panoramic view of Pike's Peak, and in its immediate vicinity, including Manitou and Colorado Springs.

⁶⁴ American Mfg. Co. v. O. C. Frey Hardware Co., — Tex. Civ. App. —, 180 S. W. 956.

⁶⁵ National Car Advertising Co. v. Louisville & N. R. Co., 110 Va. 413, 24 L. R. A. (N. S.) 1010, 66 S. E. 88.

⁶⁶ Fifth Ave. Coach Co. v. New York, 58 N. Y. Misc. 401, 111 N. Y. Supp. 759.

⁶⁷ Pittsburg & B. Traction Co. v. Seidell, 6 Pa. Dist. 414.

⁶⁸ See Burns v. St. Paul City R. Co., 101 Minn. 363, 12 L. R. A. (N. S.) 757, 112 N. W. 412, holding that question of power of street railway company to place advertisements in its cars cannot be attacked by the publisher of a newspaper.

⁶⁹ See § 1199, *infra*.

⁷⁰ See Chap. 23, *infra*.

⁷¹ See § 862, *infra*.

⁷² See § 873, *infra*.

⁷³ See § 892, *infra*.

All that can be said is that the circumstances of the particular case largely control the question; that some courts are more liberal than others in allowing corporations to do acts which a level headed business man, as an individual, would do to help his business; that the undoubted tendency of the courts is in the direction of upholding such acts; that the courts are apparently more liberal in upholding the acts of certain classes of corporations, such as brewing companies, than other classes, such as banks; that while the courts often refer to and attempt to draw the line between direct and indirect benefits from the act as the test, they have carefully refrained from stating what is a direct and what is an indirect benefit within the rule laid down.

A few decisions, in laying down general rules, have inadvertently gone too far. Thus, in one case, it was said: "The simple question is, if the contract were carried out, whether it would have been likely to increase the business of the corporation."⁷⁴

§ 815. Annuities. Charter power to grant, purchase or dispose of annuities includes power to grant an annuity otherwise than by deed.⁷⁵

A statute forbidding dealing in annuities by corporations not organized for that express purpose does not apply to prevent a corporation from agreeing to pay for property in yearly instalments, either during stated periods or during the lives of the payees.⁷⁶ So a religious corporation may comply with the terms of a legacy requiring it to pay an annuity, where this action on its part tends to the accomplishment of the substantial purposes of its incorporation.⁷⁷

A contract by which a corporation purchases the business of another, is not in the nature of an agreement for an annuity so as to constitute the corporation engaged in life insurance business, merely because the consideration is a certain sum per month during the life of the seller, the latter agreeing to assist with his advice and experience.⁷⁸

⁷⁴ Koehler & Co. v. Reinheimer, 26 N. Y. App. Div. 1, 49 N. Y. Supp. 755.

⁷⁵ Cahill v. Maryland Life Ins. Co., 90 Md. 333, 47 L. R. A. 614, 45 Atl. 180.

⁷⁶ "Such payments may in fact constitute annuities; but they are the means or incidents to the accomplishment of the purpose or business which the corporation is authorized to trans-

act, and hence they are within its granted powers." Burnes v. Burnes, 137 Fed. 781, aff'g 132 Fed. 485.

⁷⁷ Sherman v. American Congregation Ass'n, 113 Fed. 609, aff'g 98 Fed. 495.

⁷⁸ Lee v. United States Graphite Co., 161 Mich. 157, 17 Det. L. N. 211, 125 N. W. 748.

§ 816. Arbitration. A corporation has the power to enter into an agreement to submit matters to arbitration. This power is incidental to the power to contract and to sue and be sued.⁷⁹

§ 817. Assisting in legal proceedings. For a corporation to employ its funds in employing counsel, paying costs, or otherwise rendering assistance in the prosecution or defense of actions or other legal proceedings which do not affect its own rights or privileges, is clearly a diversion of its funds to a purpose which is foreign to the objects of its creation, and is *ultra vires*.⁸⁰ And a corporation cannot lawfully pay the expenses of a suit not instituted by it, even though it may be incidentally benefited by the suit.⁸¹ A corporation, however, is authorized to thus assist in prosecuting or defending an action or proceeding which directly or indirectly affects its own rights or privileges.⁸² For example, it has been held that a railroad company cannot assist by paying costs in a criminal prosecution for libel instituted by its directors against a former officer or agent of the company,⁸³ and that a municipal corporation cannot assist by employing counsel in a criminal prosecution by the state against a former officer of the municipality.⁸⁴ On the other hand, it has been held that a religious society may assist by paying costs in defending a suit to enjoin the sale of the pews in its church;⁸⁵ that a corporation engaged in the publication of a newspaper may assist in defending its editor against an action for libel based upon matter published in

⁷⁹ *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60; *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40; *Remington Paper Co. v. London Assur. Corporation*, 12 N. Y. App. Div. 218, 43 N. Y. Supp. 431; *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584; *Day v. Essex County Bank*, 13 Vt. 97.

As to the power of a corporation to enter into a compromise, see § 823, *infra*.

⁸⁰ *Butler v. Milwaukee*, 15 Wis. 493; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Kernaghan v. Williams*, L. R. 6 Eq. 228.

⁸¹ *Kernaghan v. Williams*, L. R. 6 Eq. 228.

⁸² *Connecticut. Harbison v. Hart-*

ford First Presbyterian Society, 46 Conn. 529, 33 Am. Rep. 34.

Georgia. Macon v. Cummins, 47 Ga. 321.

Maine. Baker v. Inhabitants of Windham, 13 Me. 74.

Massachusetts. Babbitt v. Selectmen of Savoy, 3 Cush. 530.

England. Holdsworth v. Borough of Clifton Dartmouth Hardness, 11 A. & E. 490; *Breay v. Royal British Nurses' Ass'n*, [1897] 2 Ch. 272; *Attorney General v. Norwich*, 2 Myl. & C. 406.

⁸³ *Pickering v. Stephenson*, L. R. 14 Eq. 322.

⁸⁴ *Butler v. Milwaukee*, 15 Wis. 493.

⁸⁵ *Harbison v. Hartford First Presbyterian Society*, 46 Conn. 529, 33 Am. Rep. 34.

the paper;⁸⁶ and that a corporation may employ persons to examine its property and testify as experts as to its value, to show that statements of its officers in regard thereto were not false, where its officers are being prosecuted for using the mails to defraud;⁸⁷ and that a municipal corporation may assist in defending quo warranto proceedings against its members in which its corporate existence is attacked.⁸⁸

§ 818. Banking business. An insurance company, railroad company, trading company, or any other corporation not created for the purpose of banking, has not any authority to engage in such business.⁸⁹ Authority to engage in the business of banking is not included in a grant of authority merely to buy and sell negotiable paper.⁹⁰

§ 819. Business, trade or profession requiring license—Business or trade. The fact that a business or trade cannot be carried on without first obtaining a license does not preclude a corporation from engaging in such business or trade. Thus, a corporation may conduct the trade of a plumber, although a license is required.⁹¹

It has been held also that while a license cannot issue to a corporation as such, it is competent for the corporation to take out a license in the name of a designated agent or employee, or agents or employees, and the latter may lawfully act in pursuance of the license.⁹² This rule has been applied to a license to peddle.⁹³ On the other hand, it has been held that an auctioneer's license "may" be granted to a corporation, but that the city clerk may refuse, in his discretion, to grant the license on that ground.⁹⁴

⁸⁶ Breay v. Royal British Nurses' Ass'n, [1897] 2 Ch. 272.

⁸⁷ Lincoln Mountain Gold Min. Co. v. Williams, 37 Colo. 193, 85 Pac. 844.

⁸⁸ Attorney General v. Norwich, 2 Myl. & C. 406.

⁸⁹ People v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Memphis v. Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045.

A railroad company cannot issue paper designed to circulate as money, as this is an act of banking. People v. River Raisin & L. E. R. Co., supra.

Discounting bills and notes as a regular business is within a prohibition against banking. New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13

Am. Dec. 100; New York Firemen Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664.

⁹⁰ Sumner v. Marcy, 3 Woodb. & M. (U. S.) 105, Fed. Cas. No. 13,609; Duncan v. Maryland Sav. Inst., 10 Gill & J. (Md.) 299; State v. Granville Alexandrian Society, 11 Ohio 1; In re Ohio Life Insurance & Trust Co., 9 Ohio 291.

⁹¹ William Messer Co. v. Rothstein, 129 N. Y. App. Div. 215, 113 N. Y. Supp. 772.

⁹² Crall & Ostrander v. Com., 103 Va. 855, 49 S. E. 638.

⁹³ Standard Oil Co. v. Com., 107 Ky. 606, 55 S. W. 8; Crall & Ostrander v. Com., 103 Va. 855, 49 S. E. 638.

⁹⁴ People v. Scully, 23 N. Y. Misc. 732, 53 N. Y. Supp. 125.

A corporation may obtain a license to sell intoxicating liquors, unless it is otherwise provided by statute.⁹⁵

§ 820. — Practice of law. Statutes in some states expressly prohibit corporations from practicing law,⁹⁶ and, independently of statute, it has been held that the practice of law by a corporation is contrary to public policy and *malum in se*, and that a corporation cannot practice law, either directly or indirectly, by employing lawyers to practice for it.⁹⁷

The practice of law, as the term is used in the statutes, is held to include services ordinarily incident to representing a creditor and enforcing his claim in bankruptcy matters.⁹⁸ However, there is obiter dictum to the effect that the collection of claims without legal proceedings is not the practice of law.⁹⁹

The New York statute which prohibits any corporation from practicing law does not prevent a corporation from prosecuting an action for the benefit of others at its own expense, where it employs members of the bar to conduct the litigation.¹

§ 821. — Practice of medicine. A corporation is not such a person as can be licensed to practice medicine.² But it is held in Missouri that even if a corporation cannot be organized to practice medicine, yet a corporation formed for the purpose "of furnishing treatment for hernia and medical and surgical treatment for all other diseases, accidents, and deformities" has power to contract with physicians to furnish medical treatment.³ So it is held in Nebraska that licensed

⁹⁵ See § 839, *infra*.

⁹⁶ See § 130, *supra*, and *United States Title Guaranty Co. v. Brown*, 21 N. Y. 628, 111 N. E. 828, *aff'g* 166 N. Y. App. Div. 688, 152 N. Y. Supp. 470; *Meisel & Co. v. National Jewelers' Board of Trade*, 90 N. Y. Misc. 19, 152 N. Y. Supp. 913, holding statute not void because preventing a corporation from practicing law in the federal courts.

⁹⁷ *In re Co-operative Law Co.*, 198 N. Y. 479, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, 92 N. E. 15; *In re Certain Lands for Bridge Purposes in City of New York*, 144 N. Y. App. Div. 107, 128 N. Y. Supp. 999.

⁹⁸ *Meisel & Co. v. National Jewelers'*

Board of Trade, 90 N. Y. Misc. 19, 152 N. Y. Supp. 913.

⁹⁹ *In re Associated Lawyers' Co.*, 134 N. Y. App. Div. 350, 119 N. Y. Supp. 77, which, however, is criticised in *Meisel & Co. v. National Jewelers' Board of Trade*, 90 N. Y. Misc. 19, 152 N. Y. Supp. 913.

¹ *Irving v. Neal*, 209 Fed. 471.

² See § 130, *supra*, and *State Electro-Medical Institute v. State*, 74 Neb. 40, 12 Ann. Cas. 673, 103 N. W. 1078; *People v. John H. Woodbury Dermatological Institute*, 192 N. Y. 454, 85 N. E. 697, *aff'g* 124 N. Y. App. Div. 877, 109 N. Y. Supp. 578.

³ *State v. Lewin*, 128 Mo. App. 149, 106 S. W. 581.

physicians may form a corporation and make contracts for the services of its members and other licensed physicians, notwithstanding a corporation cannot be licensed to practice medicine.⁴ These rulings are in direct conflict with the New York decision as to the right of corporations to practice law.⁵

§ 822. — Practice of dentistry. It seems that a corporation, such as a department store company, cannot engage in the practice of dentistry for which a license is required.⁶

§ 823. Compromise. A corporation, as an incident to its power to contract and to sue and be sued, has the power to enter into a compromise.⁷ And the compromise is not rendered invalid by the fact that the claim was disputed on the ground that it arose out of an ultra vires contract or transaction.⁸

§ 824. Control by or of other corporations. It has been held that a corporation cannot make itself permanently subordinate to any other corporation.⁹

Where it is not otherwise provided, the implication in a grant of corporate power "is that the corporation shall exercise its powers and carry on its business through its own officers and employees, and not indirectly, through another corporation operated under its

⁴ State Electro-Medical Institute v. Platner, 74 Neb. 23, 121 Am. St. Rep. 706, 103 N. W. 1079.

"Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine, within the meaning of the statute. No professional qualifications are requisite for doing these things." State Electro-Medical Institute v. State, 74 Neb. 40, 12 Ann. Cas. 673, 103 N. W. 1078.

⁵ See preceding section.

⁶ Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 52 L. R. A. 429, 60 N. E. 597.

⁷ Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 28 L. Ed. 948; First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore, 92 U. S. 122, 23 L. Ed. 679; Farmers'

Mut. Ins. Co. v. Meese, 49 Neb. 861, 69 N. W. 113; Moss v. Averell, 10 N. Y. 449; In re Norwich Provident Ins. Society, 8 Ch. Div. 334.

As to the power of a corporation to arbitrate, see § 816, supra.

⁸ Farmers' Mut. Ins. Co. v. Meese, 49 Neb. 861, 69 N. W. 113, where it was held that a corporation is liable on a note which it issues in compromise of a doubtful claim based upon a policy of insurance issued by it, and for which it received the premium, although it had no power under its charter to accept the risk, and the doubt as to the validity of the claim arose as to that fact.

⁹ Council of Jewish Women v. Boston Section Council of Jewish Women, 212 Mass. 219, 98 N. E. 862.

control, and that it shall maintain an independent corporate existence, and not surrender the control of its affairs or the exercise of its powers to another corporation.”¹⁰ In other words, a corporation, either as incidental to the sale of its property or otherwise, cannot clothe another corporation with the right to maintain the corporate life or exercise the corporate powers, unless such power is expressly conferred by the charter.¹¹ So it has been said in Tennessee that “the public policy of this state will not permit the control of one corporation by another.”¹² However, the right to purchase the stock or all the property of another corporation is now expressly authorized by statute, at least as to certain corporations, in many states.¹³

§ 825. Criminal acts or acts constituting a nuisance. A corporation has no implied power to violate the criminal laws of the state.¹⁴ So by the mere fact of incorporation no right is implied to operate the plant of the corporation in such manner as to constitute a nuisance. The right of a corporation in this respect would be the same as that of a natural person.¹⁵ Thus, a carnival association has no power to obstruct streets by a structure preventing public travel.¹⁶ So legislative authority to a railroad company to construct its workshops and yards within specified limits does not empower it, as against a particular householder, to construct its shops, etc., so as to constitute a nuisance.¹⁷

§ 826. Discontinuance of business by public service corporation. Independently of the power of a public service company to transfer all of its property,¹⁸ it is generally held that a public service company cannot wholly discontinue its operations,¹⁹ at least while still holding

¹⁰ *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721.

¹¹ See Chaps. 30 and 33, *infra*.

¹² *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

¹³ See Chap. 30, *infra*.

¹⁴ *State v. Country Club*, — Tex. Civ. App. —, 173 S. W. 570.

¹⁵ *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S. W. 646.

A corporation does not necessarily possess an exclusive right to use the streets of a city merely because it

has been granted the right to use the same. *Hastings Water Co. v. Borough of Hastings*, 216 Pa. 178, 65 Atl. 403.

¹⁶ *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345.

¹⁷ *Terrell v. Chesapeake & O. R. Co.*, 110 Va. 340, 32 L. R. A. (N. S.) 371, 66 S. E. 55.

¹⁸ See Chap. 32, *infra*.

¹⁹ *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394, Ann. Cas. 1914 C 1266, 101 N. E. 1061.

“A public service corporation cannot arbitrarily cease to do that which the public is rightly depending on it to do. It can not cease its service

its franchise and before vacating the public service field.²⁰ This applies to an electric light company²¹ and to a gas company.²² In Ohio, however, a contract between a municipality and a gas company which contained no provision as to the duration of the franchise, was held to be determinable at the option of either party, and it was held that the gas company could not be compelled to supply gas in the municipality.²³

As to street railroad companies the authorities are conflicting. In Massachusetts it is held that where such a company has a mere license to use streets which may be revoked at any time by the municipality, the company may discontinue the operation of a certain part of its line at its pleasure, at least where the part discontinued is all of its line covered by a particular location under which it was built.²⁴ So in Texas it is held that the company cannot be compelled to operate an abandoned portion of its line, where its charter does not forbid it to discontinue the enterprise,²⁵ and there is a like decision in Montana.²⁶ On the other hand, in New Jersey²⁷ and Washington²⁸ it is held that a street railway may be compelled to operate its line or a portion of it which has been abandoned, and the same rule was laid down in Kansas where the street franchise was for a definite time not then expired.²⁹

As to steam railroads, it has been held that they may discontinue business when they cannot operate except at a loss,³⁰ but that they may

merely because the municipality which granted the franchise will not accede to its desire to charge a higher rate." *Town v. Gassaway Gas Co.*, 75 W. Va. 60, 83 S. E. 189.

²⁰ *Town v. Gassaway Gas Co.*, 75 W. Va. 60, 83 S. E. 189.

²¹ *Gainesville v. Gainesville Gas & Electric Power Co.*, 65 Fla. 404, 46 L. R. A. (N. S.) 1119, 62 So. 919.

²² *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394, Ann. Cas. 1914 C 1266, 101 N. E. 1061; *Town v. Gassaway Gas Co.*, 75 W. Va. 60, 83 S. E. 189.

²³ *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332, 90 N. E. 40.

²⁴ *Selectmen of Amesbury v. Citizens' Elec. St. R. Co.*, 199 Mass. 394, 19 L. R. A. (N. S.) 865, 85 N. E. 419, which, however, distinguishes deci-

sions to the contrary in which a company sought to retain a part of its franchise, or of some particular location, while abandoning the rest of it.

²⁵ *San Antonio St. Ry. Co. v. State*, 90 Tex. 520, 35 L. R. A. 662, 59 Am. St. Rep. 834, 39 S. W. 926.

²⁶ *State v. Helena Power & Light Co.*, 22 Mont. 391, 44 L. R. A. 692, 56 Pac. 685.

²⁷ *Bridgeton v. Bridgeton & M. Traction Co.*, 62 N. J. L. 592, 45 L. R. A. 837, 43 Atl. 715.

²⁸ *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 41 L. R. A. 515, 67 Am. St. Rep. 739, 53 Pac. 719.

²⁹ *Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 609.

³⁰ *Jack v. Williams*, 113 Fed. 823, aff'd 145 Fed. 281.

Rule applied to branch line, where

be compelled to operate a ferry as a part of the line although the operation of the ferry itself is unprofitable.³¹ Ordinarily, however, a railroad company cannot abandon the operation of the road,³² although it may, where, by consolidation, it becomes the owner of two lines of road between the same termini, abandon one of the two lines.³³

§ 827. Discriminations. Public service companies must serve all who apply and on equal terms.³⁴ This is elementary and applies equally well to water, gas, electric light, and all other like corporations.

§ 828. Engaging in different kind of business. Constitutional provisions sometimes expressly forbid corporations to engage in any business other than that expressly authorized in their charters or incidental thereto,³⁵ and in some states statutes have been enacted reiterating this well settled rule. So, independently of statute or constitutional provision, a corporation created for the purpose of carrying on a particular kind of business only cannot lawfully engage in an entirely different business.³⁶ Many illustrations of this rule are noted in

business could be handled at smaller expense, through another terminal. *Sherwood v. Atlantic & D. Ry. Co.*, 94 Va. 291, 26 S. E. 943.

³¹ *Brownell v. Old Colony R. Co.*, 164 Mass. 29, 29 L. R. A. 169, 49 Am. St. Rep. 442, 41 N. E. 107.

³² "The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property, in which whole communities, created and existing upon the faith of the continuous use of the chartered powers, are interested, and, indeed, the life of the citizen, as well as his property rights, are thus jeopardized." *Gates v. Boston & N. Y. Air-Line R. Co.*, 53 Conn. 333, 5 Atl. 695.

³³ *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

³⁴ *People v. Forest Home Cemetery Co.*, 258 Ill. 36, Ann. Cas. 1914 B 277, 101 N. E. 219; *Louisville Tobacco Warehouse Co. v. Louisville Water*

Co., 162 Ky. 478, 172 S. W. 928; *Vaught v. East Tennessee Tel. Co.*, 123 Tenn. 318, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912 C 132, 130 S. W. 1050.

³⁵ *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137.

³⁶ "Every corporation must act according to its nature; a trading corporation must trade, a manufacturing corporation must manufacture, a banking corporation must bank, a transportation corporation must carry, and a religious corporation must preach, teach, minister to spiritual edification, and promote works of mercy and benevolence." *Harriman v. First Bryan Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117.

"The other objection is from the side of the stockholder in the corporation. He invests his money by subscribing for the shares of stock, with a knowledge of the purpose for which the corporation is organized, and with a view to the probable gain, and a

preceding and succeeding sections in this chapter.³⁷ However, in some states, by statute, a corporation may change the nature of its business by amending its articles of incorporation at a stockholders' meeting;³⁸ and a corporation may engage in any business which is reasonably necessary or incidental to the business expressly authorized.³⁹ Furthermore, a corporation is sometimes held authorized temporarily to engage in an independent business, in order to protect a debt due it.⁴⁰

A general statute providing that any person or corporation may engage in a particular business under certain conditions does not authorize a corporation to engage in such a business if it was organized for an entirely different purpose. Thus it has been held that a corporation organized for the purpose of manufacturing and selling nails and other products of iron and steel is not authorized to engage in the business of a public warehouseman, or to issue warehouse receipts, by a general statute declaring that "any person or incorporated company" desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor from a particular public officer. The statute applies to such corporations only as are organized for the purpose of keeping a public warehouse.⁴¹

thought of the possible loss, that may result from the transaction of the business of the corporation. He does not invest in any other kind of enterprise than that which is within the authority conferred upon the corporation. His protection requires that the company be confined strictly to the business and functions for which it was organized. It would leave him without compass or rudder in making his investment, if the managing officers, or a majority of the stockholders, could use the corporate property in a business foreign to that for which the company was established." *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90.

³⁷ See §§ 812-818, *supra*; §§ 829-855, *infra*.

³⁸ *Teele v. Rockport Granite Co.* (Mass.), 112 N. E. 497.

³⁹ *United States. Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515.

California. *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46, 89 Am. Dec. 147.

Massachusetts. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Brown v. Winnisimmet Co.*, 11 Allen 326.

Pennsylvania. *Malone v. Lancaster Gas Light & Fuel Co.*, 182 Pa. St. 309, 37 Atl. 932.

Tennessee. *Searight, Thornton & Co. v. Payne*, 6 Lea 283.

Vermont. *Dauchy v. Brown*, 24 Vt. 197.

England. *Flanagan v. Great Western Ry. Co.*, L. R. 7 Eq. 116.

⁴⁰ See § 861, *infra*.

⁴¹ *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592, where the court said: "If the appellant's construction of the section is the correct one, then all the corporations in the state, whether educational, charitable, religious, commercial, or otherwise,

§ 829. Entries on public lands. A corporation is generally without power to make an entry on public lands, because of the wording of the public land statutes. Thus, a statute permitting the entry on desert lands of "any citizen of the United States, or any person of requisite age who may be entitled to become a citizen and who has filed his declaration to become such" does not permit a corporation to make an entry.⁴²

§ 830. Erection of buildings. Of course, corporations have power to erect buildings necessary for offices or to house the plant or the like. Moreover, where a bank owned the lot on which its building was located, and the ground was very valuable, and the bank had a large surplus, it had power to erect a new and larger building to be occupied in part by the bank and the balance of the floors rented out to third persons.⁴³ On the other hand, a serious question often arises in connection with the power to erect buildings merely to house or accommodate employees or for some purpose not directly connected with the running of the business.⁴⁴

§ 831. Establishment of offices. A corporation has power not only to establish offices for the conduct of its chief business but also for the transaction of any business incidental thereto.⁴⁵

§ 832. Furnishing physician to members. A corporation without stock or stockholders, the object of which is to protect the interest of its members, and which pays sick benefits to its members, has power to furnish members the care of a physician in time of sickness.⁴⁶ And

whatever may be the provisions of the law under which organized, are given the right of going into and carrying on the business of public warehousemen. While the language of the section is very broad, it was certainly not the intention of the legislature to confer on all the corporations in the state, without regard to the law under which they were organized, and the purposes and objects of their organization, the privileges of public warehousemen. As well hold that persons without the capacity to contract on account of infancy, insanity, or other disqualifications, were, by the statute, authorized to engage in the business

of public warehousemen, and execute valid warehouse receipts."

⁴² *Salina Stock Co. v. United States*, 85 Fed. 339.

⁴³ *Wingert v. First Nat. Bank of Hagerstown, Maryland*, 175 Fed. 739; *Brown v. Schleier*, 118 Fed. 981.

As to the power of a railroad company to erect hotels and eating houses, see § 885, *infra*.

As to the power of a land company to erect hotel, see § 873, *infra*.

⁴⁴ See §§ 885, 890, *infra*.

⁴⁵ *Ferguson Contracting Co. v. Coal & Coke Ry. Co.*, 33 App. Cas. (D. C.) 159, 169.

⁴⁶ *Flaherty v. Portland Longshore*

it is generally held that corporations may donate the services of physicians to injured employees.⁴⁷

§ 833. Hospitals. It has been held that a corporation employing a large number of people has power to maintain a hospital for consumptive employees to enable them to regain their health.⁴⁸ And railroad companies have power to maintain relief departments and run hospitals in connection therewith.⁴⁹

§ 834. Instituting criminal proceedings. A corporation has no authority to institute criminal prosecutions for violations of the public criminal laws of the state, nor to cause requisition papers to be issued for alleged criminals.⁵⁰

§ 835. Insurance—In general. Corporations other than insurance companies have no power to write insurance as a business.⁵¹ Thus, a social corporation has no power to make contracts of life insurance, either technically or substantially on the assessment plan or otherwise.⁵²

§ 836. — Insurance of lives of officers. In North Carolina, in a case of first impression, it was held that a manufacturing corporation has no implied power to insure the life of its president, at least in so far as the insurance runs after he ceases to be an officer.⁵³ Among the reasons assigned were that, if such implied power existed, “we should find it difficult to fix any limit in respect to other officers or employees, or the amount of the insurance carried”; that “it affords a temptation to depart from sound, safe methods of operating the affairs of the corporation, and launch into speculation, based upon anticipated large returns, hastened by the age, condition of health, etc., of the officers”; and that “it is a temptation to acquire interest in, and ultimate control of, the insurance company and the investment of its surplus, all of which has been demonstrated to be unsafe and

men’s Benev. Society, 99 Me. 253, 59 Atl. 58.

⁴⁷ See § 886, *infra*.

⁴⁸ *People v. Hotchkiss*, 136 N. Y. App. Div. 150, 120 N. Y. Supp. 649.

⁴⁹ See § 886, *infra*.

⁵⁰ *Hansford v. National Bank of Tifton Nat. Bank*, 10 Ga. App. 270, 73 S. E. 405. In this case the corporation was a national bank.

⁵¹ Relief department of railroad company as engaging in insurance, see § 886, *infra*.

⁵² *Society of St. Stephen The Martyr v. Sikorski*, 141 Ill. App. 1.

⁵³ *Victor v. Louise Cotton Mills*, 148 N. C. 107, 16 L. R. A. (N. S.) 1020, 16 Ann. Cas. 291, 61 S. E. 648.

unsound corporate business methods." In addition, it is stated that the argument that the "lives of officers who have special peculiar capacity or business relation are valuable to the corporation is persuasive in support of the power to insure their lives during their term of office, but loses its force when urged as the basis for finding the incidental power, when the relation has ceased to exist"; and that "the necessity for paying out large sums after his life has ceased to have any possible relation to the welfare of the company, with all of the uncertainty attendant upon the cost and ultimate result, requires an investment out of all proportion to the purpose in view in making the original contract." In the particular case, a cotton mill company with a capital stock of three hundred thousand dollars took out a twenty-year payment life policy for one hundred thousand dollars, and the president resigned a little more than a year afterwards. While, perhaps, the rule laid down was correct as applicable to the particular facts, it is submitted that it is too broad for general application, and that the power to insure property is more or less analogous. For instance, is there any question as to the power of a corporation to take out accident insurance on a particularly valuable officer or employee? And if a corporation may take out accident insurance for a period covering the term of office or employment why may it not take out life insurance for such period? Whatever may be the rule as to insurance extending beyond the term of office or employment of the officer or employee, it would seem that the question as to the power to take out insurance limited in point of time should always depend on the circumstances of the particular case, taking into consideration the peculiar value of the services of the officer or employee, the amount of assets of the corporation, the amount of the insurance, and the period the insurance covers. And in Virginia, in a later case, it has been held that a corporation has power to insure the life of its president who is also general manager, in order to protect itself from loss in case of his death.⁵⁴

§ 837. — Insurance of property of corporation. Corporations may take out insurance on their plant and properties, including raw materials and finished products.⁵⁵

⁵⁴ *Mutual Life Ins. Co. of New York v. Board, Armstrong & Co. Corporation*, 115 Va. 836, L. R. A. 1915 F 979, 80 S. E. 565, in which case there is a mere statement that the contract is not ultra vires, the principal point

decided being that the corporation had an insurable interest.

⁵⁵ *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

A corporation which has power to make a loan and take security therefor, has power to insure the property taken as security.⁵⁶ Moreover, it seems that manufacturing companies may insure each other against fire loss, where all are engaged in the same hazardous business, by forming an inter-insurance association.⁵⁷

§ 838. Issuance of certificates of stock. The right to issue certificates of stock is not one of the implied or incidental powers of a corporation. Such right, if it exists at all, is by virtue of the charter of the corporation or the statute under which it is incorporated.⁵⁸

§ 839. Liquor licenses and sale of liquor. A corporation, unless it is otherwise provided by statute, may be granted a liquor license.⁵⁹ So, it would seem that a hotel corporation, where there is no law to the contrary, may sell liquor as an incident to the business of keeping a hotel.⁶⁰ But it has recently been held that a social club, such as an athletic club, has no implied power to serve liquor to its members, where a corporation cannot, under the statutes, secure a license to sell such liquors.⁶¹ And it has been held that a golf club has no implied power to dispense intoxicating liquors to its members.⁶²

§ 840. Organization of subsidiary companies. A corporation authorized to purchase and sell goods and to purchase the stock of other corporations for such purpose may organize corporations in other states to act as agents for the disposal of its goods, and may hold a portion of the stock of such corporations.⁶³

§ 841. Partnership—General rules. Unless the power is expressly conferred, as is seldom the case, it is well settled, except as hereinafter

⁵⁶ Chicago Bldg. Society v. Crowell, 65 Ill. 453.

⁵⁷ Sales-Davis Co. v. Henderson-Boyd Lumber Co., 193 Ala. 166, 69 So. 527.

⁵⁸ See chapter on Stock and Stockholders, *infra*.

⁵⁹ People v. Pullman's Palace-Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664 (sleeping and dining car company); Enterprise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855 (brewing company); *In re Consumers' Brewing Co.*, 20 Pa. Co. Ct. 597.

⁶⁰ Enterprise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855.

⁶¹ State v. Missouri Athletic Club, 261 Mo. 576, L. R. A. 1915 C 876, Ann. Cas. 1916 D 931, 170 S. W. 904, with note on "Applicability of liquor laws to social club dispensing liquor to members."

⁶² State v. Country Club, — Tex. Civ. App. —, 173 S. W. 570.

⁶³ Dittman v. Distilling Co. of America, 64 N. J. Eq. 537, 54 Atl. 570. See also Chap. 30, *infra*.

noted,⁶⁴ that a corporation has no power to enter into a contract of partnership with another corporation or an individual, since a partnership and a corporation are incongruous.⁶⁵ However, a corporation may enter into a joint venture with an individual, where the nature of the contract is in line with the business its charter authorizes.⁶⁶

"Such a contract," said the Tennessee Supreme Court, "is wholly

⁶⁴ See § 843, *infra*.

⁶⁵ *United States*. *Pearce v. Madison & I. R. Co.*, 21 How. 441, 16 L. Ed. 184; *Stephens v. Gall*, 179 Fed. 938; *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462.

Alabama. *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353.

Georgia. *Gunn v. Central Railroad & Banking Co.*, 74 Ga. 509.

Illinois. *Chicago & A. R. Co. v. Mulford*, 162 Ill. 522, 35 L. R. A. 599, 44 N. E. 861, rev'g 59 Ill. App. 479; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765, rev'g 51 Ill. App. 417; *Marine Bank of Chicago v. Ogden*, 29 Ill. 248.

Indiana. *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37.

Massachusetts. *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90; *Whitenton Mills v. Upton*, 10 Gray 582, 71 Am. Dec. 681.

Michigan. *White Star Line v. Star Line of Steamers*, 141 Mich. 604, 113 Am. St. Rep. 551, 12 Det. L. N. 586, 105 N. W. 135.

Minnesota. See *French v. Donohue*, 29 Minn. 111, 12 N. W. 354.

Missouri. *Franz v. Wm. Barr Dry Goods Co.*, 132 Mo. App. 8, 111 S. W. 636.

New York. *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, 22 Abb. N. Cas. 164, 3 N. Y. Supp. 401; *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. 412.

Ohio. *Geurineck v. Alcott*, 66 Ohio St. 94, 63 N. E. 714.

Oklahoma. *Municipal Paving Co. v. Herring*, — Okla. —, 150 Pac. 1067.

Pennsylvania. *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206, 37 Atl. 937.

Tennessee. *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

Texas. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.*, — Tex. Civ. App. —, 186 S. W. 446; *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 40 S. W. 837.

In Rhode Island, however, it was held that a corporation whose stock was held by a single stockholder could form a partnership with an individual to be terminated at will by the corporation, especially where the act incorporating the company did not specify the nature of its business. *Allen v. Woonsocket Co.*, 11 R. I. 288.

The fact that a railroad company owns the greater part of the stock of another railroad company and that the same person is president of both corporations does not show that the corporations are partners. *Southern Pac. R. Co. v. W. T. Meadors & Co.*, 104 Tex. 469, 140 S. W. 427.

A national bank may not become the absolute owner of stock in a partnership, even though taken in satisfaction of a debt. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036.

⁶⁶ *Quitman Oil Co. v. McRee* (Ga. App.), 88 S. E. 921; *Municipal Paving Co. v. Herring*, — Okla. —, 150 Pac. 1067; *Salem-Fairfield Tel. Ass'n v. McMahan*, 78 Ore. 477, 153 Pac. 788.

inconsistent with the scope and tenor of the power expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation, or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations, looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts.”⁶⁷ But, a corporation has power to become a member of an employers’ association organized to regulate industrial disputes between its members and their employees, where the association is composed of persons or corporations in the same line of business.⁶⁸ And a corporation may bind itself to the extent of dividing profits as a consideration for advances made.⁶⁹ It has been held also that a partnership between the creditors of an insolvent, one of whom is a corporation, to turn the stock into money as soon as possible, is not so illegal as to prevent a bill for a partnership accounting.⁷⁰

§ 842. — What constitutes partnership. This rule applies to any contract which brings the parties within the definition of an ordinary partnership,—to any agreement under which the property of the

⁶⁷ *Mallory v. Hanaur Oil-Works*, 86 Tenn. 598, 8 S. W. 396. And see *Gunn v. Central Railroad & Banking Co.*, 74 Ga. 509; *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582, 71 Am. Dec. 681.

“The agency of each partner for the partnership is inconsistent with the management of the corporation by its stockholders through directors and officers chosen only by them-

selves.” *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462.

⁶⁸ *McCord v. Thompson-Starrett Co.*, 112 N. Y. Supp. 902, rev’d on other grounds 129 N. Y. App. Div. 130, 113 N. Y. Supp. 385.

⁶⁹ *L. J. Mestier & Co. v. A. Chevalier Pavement Co.*, 108 La. 562, 32 So. 520.

⁷⁰ *Kelly v. Biddle*, 180 Mass. 147, 61 N. E. 821.

parties is to be held in common, or managed for the common benefit, and each is to share in the profits and losses. In a New Hampshire case two railroad companies agreed to run their roads jointly under the control of a general manager to be chosen by them, the finances of both companies to be managed by a cashier chosen in like manner, the running expenses of the roads to be paid out of the joint profits, and the net profits to be divided between the companies in a certain proportion. It was held that this was a partnership agreement and *ultra vires*.⁷¹ There was a similar decision in a Tennessee case, where several manufacturing companies entered into a contract under which a committee composed of representatives selected from each corporation took possession and control of the machinery and other property of each company, and managed and operated the same for the common benefit, under an association name, the several companies sharing the profits and losses in certain agreed proportions.⁷²

Whether an agreement actually constitutes a partnership is to be determined by the general rules relating to partnerships, which are the same when a corporation is a partner as when all the partners are individuals.⁷³ Of course, mere business relations between corporations, or between a corporation and an individual, do not necessarily involve the corporation in the partnership relation.⁷⁴

⁷¹ *Burke v. Concord R. Co.*, 61 N. H. 160. And see *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *Galveston, H. & S. A. Ry. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301; *Charlton v. New Castle & C. Ry. Co.*, 5 Jur. (N. S.) 1096.

⁷² *Mallory v. Hanaur Oil-Works*, 86 Tenn. 598, 8 S. W. 396.

⁷³ See *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462; *Municipal Paving Co. v. Herring*, — Okla. —, 150 Pac. 1067; *Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.), 75 S. W. 74; *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174.

And see generally textbooks on Partnership.

An agreement between steamship companies to pool their earnings and divide the balance in certain proportions after paying expenses does not constitute a partnership. *White Star*

Line v. Star Line of Steamers, 141 Mich. 604, 113 Am. St. Rep. 551, 12 Det. L. N. 586, 105 N. W. 135.

The fact that a lease provides that the rent should be a sum equal to twenty-five per cent. of the net profits of the business does not establish a partnership relation. *McTigue v. Arctic Ice Cream Supply Co.*, 20 Cal. App. 708, 130 Pac. 165.

Where an agreement was entered into between two corporations to carry on a joint business under a name which was assumed, each corporation contributing capital and the net profits being divided equally, the court held that the combination did not constitute a partnership agreement. *Geurinck v. Alcott*, 66 Ohio St. 94, 63 N. E. 714.

⁷⁴ *Paris Mercantile Co. v. Hunter*, 74 Ark. 615, 86 S. W. 808.

§ 843. — Exceptions to rule. The rule that a corporation cannot enter into a contract of partnership does not apply when such a contract is expressly authorized by its charter, as it may be.⁷⁵ Nor does it apply so as to prevent the law from imposing upon a corporation the liability of a partner as to third persons by reason of a contract made by it in furtherance of the objects of its creation, since the law may impose such a liability, not only when there was no intention to become a partner, but also when no contract of partnership could have been made.⁷⁶

The reason for the rule preventing a corporation from entering into a contract of partnership⁷⁷ does not apply to a partnership agreement between a corporation and an individual, by which the entire management of the business is intrusted solely to the corporation, as in the case of a contract between a corporation created for the purpose of buying and selling land and an individual, to buy and sell certain lands and share the profits and losses.⁷⁸ Thus, there might be supposed "the case of a silent or secret partner, who puts in a part of the capital stock, but is accorded no right of control or power to act for the partnership, or to bind it in any way. It is plain that such a partnership on the part of a corporation is not forbidden by the rule (the corporation being the active partner) because in none of its elements does the contract come within the reason of the rule. In such a case the corporation neither confuses nor hides its identity in the partnership, nor surrenders the right to control its own affairs through its authorized officials and agents. The individual partner in such a case merely buys an interest in the possible profits by paying an agreed sum, and assuming the responsibility for half the losses. He is in no proper sense a partner. Such contracts between corporations and individuals have been generally upheld."⁷⁹ Nor does the rule apply to traffic agreements between railroad companies owning connecting lines, by which each company, while retaining the sole management of its own line, is authorized to make

⁷⁵ *Butler v. American Toy Co.*, 46 Conn. 136; *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37; *Morgan v. Child, Cole & Co.*, — Utah —, 155 Pac. 451; *News-Register Co. v. Rockingham Pub. Co.*, 118 Va. 140, 86 S. E. 874.

⁷⁶ *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37; *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152, 34 N. W.

556; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471.

⁷⁷ See § 841, *supra*.

⁷⁸ *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855.

⁷⁹ *Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.)*, 75 S. W. 74.

contracts for the carriage of passengers and goods over both lines, and each is to share in the profits and losses on such business,⁸⁰ or to an agreement by which railroad companies, whose roads form a continuous line, severally appoint the same person as manager, and run through trains.⁸¹

There is nothing to prevent a corporation from owning real or personal property in common with another corporation or an individual, and by reason of such ownership in common it may acquire rights jointly with its co-owner, or incur joint liabilities.⁸² It has also been held that a corporation may own a business jointly with another, as a ferry or a stage line, and that they may jointly conduct the business.⁸³

§ 844. Public offices. A corporation is not eligible to any public office for the reasons that it cannot take the oath of office and that it is not a human but a legal being.⁸⁴

§ 845. Rewards. There is no doubt that in a proper case a corporation may offer a reward for information leading to the arrest, or the arrest and conviction, of persons injuring it.⁸⁵ Thus, a railroad company may properly offer a reward for the detection and conviction of persons committing offenses against its property.⁸⁶

⁸⁰ Chicago & A. R. Co. v. Mulford, 162 Ill. 522, 35 L. R. A. 599, 44 N. E. 861, rev'g 59 Ill. App. 479; Chicago, P. & St. L. Ry. Co. v. Ayers, 140 Ill. 644, 30 N. E. 687, aff'g 39 Ill. App. 607; Hill Mfg. Co. v. Boston & L. R. Corporation, 104 Mass. 122, 6 Am. Rep. 202; Najac v. Boston & L. R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686; Stewart v. Erie & W. Transp. Co., 17 Minn. 372; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339, 2 Am. Rep. 242.

⁸¹ State v. Concord R. Co., 59 N. H. 85.

⁸² DeWitt v. San Francisco, 2 Cal. 289; New York & S. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Estell v. University of The South, 12 Lea (Tenn.) 476.

⁸³ Calvert v. Idaho Stage Co., 25 Ore. 412, 36 Pac. 24; Hackett v. Mult-

nomah Ry. Co., 12 Ore. 124, 53 Am. Rep. 327, 6 Pac. 659.

⁸⁴ "It is obvious that the execution of police regulations which affect the life, liberty, property, health, and happiness of human beings, should be vested in human beings, and not in such legal entities as cannot be endowed with moral qualities, and cannot be adequately punished for official misconduct." Fox v. Mohawk & H. R. Humane Society, 25 N. Y. App. Div. 26, 48 N. Y. Supp. 625.

⁸⁵ See Bank of Minneapolis v. Griffin, 168 Ill. 314, 48 N. E. 154, aff'g 66 Ill. App. 577, holding that the president of a bank is authorized to offer a reward for information leading to the arrest of a defaulter.

⁸⁶ Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802.

"There can be no question of the

§ 846. Rules and regulations. Public utility companies have a right to adopt and enforce reasonable rules and regulations for their security and convenience, and to enforce compliance therewith by refusing or discontinuing the service, provided the rules are lawful, just, reasonable and not discriminatory.⁸⁷ This is too well settled to require either comment or an extended citation of supporting decisions.

§ 847. Speculations on stock or grain market. Of course, a corporation cannot ordinarily speculate in stocks or produce. Thus, a company created to buy grain and live stock direct from producers, and to sell and ship it to the general markets, and to operate grain elevators for such purposes, has no power to speculate in grain and pork on the Chicago Board of Trade.⁸⁸

§ 848. Taking and enforcing securities—General rules. In the absence of express or implied restrictions, a corporation, whenever it has the power, express or implied, to loan money or enter into any other contract by which another may become indebted or bound to it, or whenever it has lawfully acquired a claim against another, has the incidental power, to the same extent as an individual would have, to take security for the payment of the debt or performance of the contract.⁸⁹ It may not only take a bond or promissory note, and other choses in action,⁹⁰ but it may, in the absence of restrictions, as

authority of the corporations to offer rewards and employ agents to detect and arrest violators of the criminal law enacted for their protection.
* * * A general standing reward may be offered by natural persons, and equally by corporations." *Central Railroad & Banking Co. v. Cheatham*, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. 828.

⁸⁷ *Huston v. City Gas & Electric Co.*, 158 Ill. App. 307; *Louisville Tobacco Warehouse Co. v. Louisville Water Co.*, 162 Ky. 478, 172 S. W. 928; *State v. Water Supply Co. of Albuquerque*, 19 N. M. 36, 140 Pac. 1059.

⁸⁸ *Farmers' Co-op. Shipping Ass'n v. George A. Adams Grain Co.*, 84 Neb. 752, 122 N. W. 55.

⁸⁹ *Illinois. Kraft v. West Side Brewery Co.*, 219 Ill. 205, 76 N. E. 372, aff'g 121 Ill. App. 371.

Indiana. Peru Bridge Co. v. Hendricks, 18 Ind. 11.

Kansas. Massey v. Citizens' Bldg. & Sav. Ass'n, 22 Kan. 624.

Maryland. Baltimore v. Baltimore & O. R. Co., 21 Md. 50.

Minnesota. Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145.

Missouri. Western Boatmen's Benev. Ass'n v. Kribben, 48 Mo. 37.

New York. Mann v. Eckford's Ex'rs, 15 Wend. 502.

Oklahoma. Local Inv. Co. v. Humes, — Okla. —, 151 Pac. 875.

Wisconsin. Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709.

⁹⁰ *Reed v. State Bank*, 5 Ark. 193;

hereafter explained, take a pledge or mortgage of personal property,⁹¹ or a mortgage on real estate,⁹² or, subject to exceptions which will be shown in another place, a pledge of its own stock,⁹³ or of stock in another corporation.⁹⁴

It may take a bond, mortgage, or other security to secure the payment of subscriptions to its capital stock, or notes given for stock,⁹⁵ or to secure the faithful performance of his duties by an agent,⁹⁶ or to secure the payment of any other debt, or performance of any other contract, which is within the powers expressly or impliedly conferred upon it by its charter.⁹⁷

§ 849. — Prohibition or restriction in general. The taking of a security, where in violation of an express or implied prohibition or restriction, is always ultra vires, and may be enjoined in a suit by a stockholder, or may be ground for the forfeiture of the charter of the corporation, and under some circumstances the security may be void and unenforceable.⁹⁸

Massey v. Citizens' Bldg. & Sav. Ass'n, 22 Kan. 624, 632.

A trading corporation has implied power to purchase and indorse bills and notes. *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165.

⁹¹*State v. Rice*, 65 Ala. 83; *Bates v. State Bank*, 2 Ala. 465; *Morris v. Dixon Nat. Bank*, 55 Ill. App. 298; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508; *Western Boatmen's Benev. Ass'n v. Kribben*, 48 Mo. 37.

⁹²*California*. *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

Illinois. *Stevens v. Pratt*, 101 Ill. 206; *United States Mortg. Co. v. Gross*, 93 Ill. 483, aff'd 108 U. S. 477, 27 L. Ed. 795.

Indiana. *Peru Bridge Co. v. Hendricks*, 18 Ind. 11.

Kansas. *Massey v. Citizens' Bldg. & Sav. Ass'n*, 22 Kan. 624.

Kentucky. *Lathrop v. Commercial Bank*, 8 Dana 114, 33 Am. Dec. 481.

Massachusetts. *American Mut. Life Ins. Co. v. Owen*, 15 Gray 491.

New York. *Crocker v. Whitney*, 71 N. Y. 161; *Farmers' Loan & Trust Co.*

v. Clowes, 3 N. Y. 470, aff'g 4 Edw. 575.

Wisconsin. *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Clark v. Farrington*, 11 Wis. 306.

England. *Cutbill v. Kingdom*, 1 Exch. 494.

Having the power to take a mortgage on real property, it has the incidental power to provide for insurance of the property. *Chicago Building Society v. Crowell*, 65 Ill. 453.

⁹³See § 852, *infra*.

⁹⁴See § 851, *infra*.

⁹⁵*Andrews v. Hart*, 17 Wis. 297; *Clark v. Farrington*, 11 Wis. 306.

⁹⁶*Peru Bridge Co. v. Hendricks*, 18 Ind. 11.

⁹⁷See cases above cited.

⁹⁸*National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 43 Wis. 420, 28 Am. Rep. 549; *Bank of Toronto v. Perkins*, 8 Can. Sup. Ct. 603.

A prohibition against a loan on a particular kind of security applies to the taking of such security for future advances.⁹⁹ According to the maxim, *Expressio unius est exclusio alterius*, an express grant to a corporation of the power to take certain kinds of securities impliedly prohibits it from taking other securities,¹ unless there is something to show that the legislature did not intend such a restriction.²

It has been held that a statute prohibiting the purchase of securities by a corporation applied only while it was a going concern.³

§ 850. — Real estate security. Corporations are sometimes expressly or impliedly prohibited from taking real estate security, the object being, it has been said, to prevent hazardous real estate speculations, and to prevent large accumulations of such property in the hands of corporations.⁴ The taking of a mortgage on land, however, is not within an express or implied prohibition against dealing in land;⁵ and the taking of a mortgage upon land is not a purchase, location or holding of property, within the meaning of a statute requiring the filing of a copy of the articles of incorporation in counties in which the corporation shall purchase, locate or hold property.⁶

When the charter of a corporation, as is the case in the National Bank Act, specifies its powers, and expressly allows it to loan money on personal securities only, it impliedly prohibits loans on real estate security.⁷ Such a prohibition applies where a corporation loans

⁹⁹ *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, sub nom. *Crocker v. Whitney*, 71 N. Y. 161; *Kansas Valley Nat. Bank of Topeka v. Rowell*, 2 Dill. (U. S.) 371, Fed. Cas. No. 7,611.

¹ *United States. Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Mutual Life Ins. Co. v. Wilcox*, 8 Biss. 203, Fed. Cas. No. 9,980.

Alabama. Smith v. Alabama Life Insurance & Trust Co., 4 Ala. 558.

Connecticut. New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100.

Indiana. Daly v. National Life Ins. Co., 64 Ind. 1.

New York. Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; *Life & Fire*

Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31; *North River Ins. Co. v. Lawrence*, 3 Wend. 482.

England. In re Coltman, 19 Ch. Div. 64.

² *National Bank of Washington v. Continental Life Ins. Co.*, 41 Ohio St. 1.

³ *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

⁴ *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, per Mr. Justice Swayne.

⁵ *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Clark v. Farrington*, 11 Wis. 306.

⁶ *Anglo-California Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

⁷ *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, sub

money and takes as security an assignment of both a note and a mortgage on real estate securing the same, executed to the borrower by a third person,⁸ but does not apply when a loan is made on the security of a note only, assigned by the borrower to the corporation, though the note is secured by a mortgage to the borrower, which will, without assignment, inure to the benefit of the corporation.⁹ Nor does it apply to a loan made on security of the stock of a corporation, because its property consists wholly or partly of real estate;¹⁰ or to a loan on a note on which there is an indorsement by a married woman charging her separate estate;¹¹ or to a loan by a corporation on a note indorsed by a third person, who is secured against liability on his indorsement by a mortgage from the maker, even though it may be agreed that in case of default the security shall inure to the benefit of the corporation.¹²

§ 851. — Personalty and personal security. The charter of a corporation sometimes expressly or impliedly prohibits it from making loans on mere personal security, or on personal property, or a particular kind of personal security.¹³ The chief difficulty in this connection is in construing the charter. A provision that the funds of a corporation shall be invested in bonds and mortgages on real estate impliedly prohibits loans on mere personal security.¹⁴ But taking a mortgage or pledge of personal property as security for a debt, and enforcing the same by a sale of the property on default in payment is not within a prohibition, express or implied, against dealing in goods.¹⁵

When money is loaned, and the note of the borrower taken therefor, payable on demand, the note is merely evidence of the debt, and the loan is not on the security of the note.¹⁶ A grant of authority

nom. *Crocker v. Whitney*, 71 N. Y. 161; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

⁸ *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

⁹ *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, sub nom. *Crocker v. Whitney*, 71 N. Y. 161.

¹⁰ *Baldwin v. Canfield*, 26 Minn. 62, 1 N. W. 585.

¹¹ *Third Nat. Bank v. Blake*, 73 N. Y. 260.

¹² *First Nat. Bank v. Haire*, 36 Iowa 443.

¹³ See *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482; *In re Coltman*, 19 Ch. Div. 64.

¹⁴ *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482. And see *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100.

¹⁵ *Bates v. State Bank*, 2 Ala. 465; *Morris v. Dixon Nat. Bank*, 55 Ill. App. 298 (board of trade transactions); *DeLoach v. Jones*, 18 La. 447.

¹⁶ *United States Trust Co. v. Brady*, 20 Barb. (N. Y.) 119.

to invest funds in "public stocks or other securities" authorizes loans on bonds, notes, bills, and mortgages as well as on stocks, and loans by way of discount.¹⁷ And personal security without a pledge of chattels may be taken under authority to loan "upon personal security and the pledge of chattels."¹⁸

A loan on the security of personal property is a loan on "personal security," within the meaning of the National Bank Act restricting a national bank to loans on such security. As was said in an Ohio case, "it is not to be limited, in taking security for discounts and loans, to the personal undertaking of the borrower, or to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, stock of a corporation, and other personal chattels."¹⁹

§ 852. — Excepted transactions. When corporations are prohibited from taking a particular kind of security, certain exceptions are generally made. For example, they are allowed to take such security as collateral for a debt previously contracted. Thus, national banks, though prohibited from loaning money on shares of their own stock or real estate mortgages, are allowed to take such securities in good faith to prevent loss on a debt previously contracted.²⁰ This does not permit such securities to be taken for debts contemporaneously contracted or for future advances,²¹ but it permits them to be taken to

¹⁷ *Duncan v. Maryland Sav. Inst.*, 10 Gill & J. (Md.) 299. And see *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430.

¹⁸ *Missouri Loan Bank v. How*, 56 Mo. 53.

¹⁹ *Cleveland v. Shoeman*, 40 Ohio St. 176. And see *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 422, Fed. Cas. No. 12,801; *Pittsburgh Locomotive & Car Works v. State Nat. Bank*, 2 Cent. L. J. 692, Fed. Cas. No. 11,198, writ of error dismissed 154 U. S. 626, 24 L. Ed. 270; *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47, 22 Am. Rep. 35; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261.

²⁰ *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Ornn v. Merchants' Nat. Bank*, 16 Kan. 341; *Allen v. First Nat. Bank of Xenia*, 23 Ohio St. 97.

²¹ *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Kansas Valley Nat. Bank of Topeka v. Rowell*, 2 Dill. (U. S.) 371, Fed. Cas. No. 7,611; *Fridley v. Bowen*, 87 Ill. 151.

For the decisions in the state courts in the two United States Supreme Court cases above cited, see *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *Crocker v. Whitney*, 71 N. Y. 161. Compare, however, *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Western Assur. Co. v. Taylor*, 9 Grant Ch. (U. C.) 471; *Commercial Bank v. Upper Canada Bank*, 7 Grant Ch. (U. C.) 250, 423; *Bank of Montreal v. McWhirter*, 17 U. C. C. P. 506; *McDonell v. Upper Canada Bank*, 7 U. C. Q. B. 252.

secure a note taken in renewal of a note previously given, or on extending the time of payment of a note.²² This exception, however, does not permit the prohibition to be evaded by loaning money with the understanding that the prohibited security shall afterwards be taken, and afterwards taking it.²³

§ 853. — Power to enforce security. The power of a corporation to take security for a debt or for performance of a contract necessarily includes the power to take all necessary or proper steps to enforce the same as by the sale of collateral,²⁴ the foreclosure of a mortgage,²⁵ etc.

As will be shown in another section, a corporation is sometimes allowed to enforce a security taken by it in violation of an express or implied prohibition or restriction, but this is not universally true.²⁶

§ 854. Taking oath. A corporation cannot take an oath.²⁷ For that reason, in part, it cannot be a public officer;²⁸ and that was the reason, it was once held, that it could not be an executor or administrator.²⁹

§ 855. Utilization of surplus or idle property. If the business of a corporation is such as to render it necessary for it to own a certain kind of property, and at times such property is not necessary to its business, it may employ the property in a business or for a purpose which is not strictly within the objects of its creation, in order to prevent the same from remaining idle and unprofitable.³⁰

²² *Farmers' & Merchants' Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; *Howard Nat. Bank of Burlington v. Loomis*, 51 Vt. 349.

²³ *Merchants' Nat. Bank v. Mears*, 8 Biss. (U. S.) 158, Fed. Cas. No. 9,450.

²⁴ *Bates v. State Bank*, 2 Ala. 465; *Deloach v. Jones*, 18 La. 447.

A bank, having lawfully loaned money on a crop of cotton as security, may cause the cotton to be shipped and sold by an agent to pay the loan. *Deloach v. Jones*, 18 La. 447.

²⁵ Either by action to foreclose, or by sale after advertisement under a power of sale in the mortgage. *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32.

²⁶ See § 861, *infra*.

²⁷ *Killingsworth v. Portland Trust Co.*, 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

²⁸ See § 844, *supra*.

²⁹ See § 937, *infra*.

³⁰ *United States. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309.

Illinois. People v. Pullman's Palace-Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

Massachusetts. Brown v. Winnisimmet Co., 11 Allen 326.

New Jersey. Benton v. Elizabeth, 61 N. J. L. 693, 40 Atl. 1132, 61 N. J. L. 411, 39 Atl. 683, 906.

England. Forrest v. Manchester, S. & L. Ry. Co., 30 Beav. 40.

And see § 828, *supra*.

Thus, a railroad company which owns steamboats for use in connection with its road may use them for excursions, instead of allowing them to lie idle, at times when they are not needed for their ordinary purposes.³¹ A ferry company may, under similar circumstances, temporarily use its boats for other than ordinary purposes, or charter them to others, if they would otherwise remain idle.³² And in like manner a hotel company or other corporation, whose buildings are larger than its instant necessities require, may lease a portion until needed for its business.³³ On the same theory, a corporation such as a canning corporation may loan its funds during a season when such funds are not required for active use.³⁴

III. PARTICULAR CORPORATIONS

§ 856. Introductory. For the sake of convenience, and in order to render the decisions easy of access, the application of the general rules as to powers of corporations to particular classes of corporations formed for specific purposes, are set forth in this subdivision. However, powers of particular corporations to do certain acts which are the subject of subsequent chapters, such as the borrowing and lending of money, the becoming a surety or guarantor, etc., are not included herein but are treated of in such subsequent chapters.

So where a corporation chartered for the manufacture of railway cars, in erecting its plant, constructed larger boilers than were then necessary, but such as would be necessary to supply its needs in the future, it was held that it was not *ultra vires* for it to sell and furnish its surplus steam power to another company. *People v. Pullman's Palace-Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

On the same principle, a railroad company or other corporation, owning the fee in land, may grant an easement therein to another—as for the laying of pipes, for example—if the easement does not interfere with the ability of the corporation to perform its duties to the public. *Benton v. Elizabeth*, 61 N. J. L. 411, 39 Atl. 683.

In like manner, a railroad company

may let another company into the joint use and occupancy of its bridge, depots, tracks, and other terminal facilities. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309.

³¹ *Forrest v. Manchester, S. & L. Ry. Co.*, 30 Beav. 40.

³² *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326.

A ferry company has been held to have power to run excursions with its surplus boats not needed for ferry purposes. *Brown v. Manchester R. Co.*, 30 Beav. 40.

³³ *People v. Pullman's Palace-Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; *Simpson v. Directors of Westminster Palace Hotel Co.*, 8 H. L. Cas. 712. And see Chap. 33, *infra*.

³⁴ *Garrison Canning Co. v. Stanley*, 133 Iowa 57, 110 N. W. 171. See also Chap. 25, *infra*.

§ 857. Agricultural societies. It has been stated that the powers of an incorporated agricultural society, for the purpose of effecting the objects of the corporation, "are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited."³⁵

Agricultural societies holding annual fairs are created not only for educational purposes but also to furnish patrons with amusement and entertainment.³⁶ They may offer purses for horse racing³⁷ and may allow baseball games on the grounds.³⁸ However, they cannot license or permit gambling tables upon the grounds.³⁹ Furthermore, an agricultural society incorporated for the purpose of furthering the interests of agriculture, improving and encouraging the breeding of stock, and for holding annual fairs and exhibitions of agricultural products and stock, and authorized to do everything necessary or incidental to such purposes, has no power to employ persons to convey people in their own conveyances to and from the fair grounds.⁴⁰ Sometimes, such societies for the holding of annual fairs are municipal rather than private corporations.⁴¹

§ 858. Athletic clubs. An association incorporated ostensibly as a "Business Men's Athletic Club" under a statute authorizing the incorporation of associations for benevolent, religious, educational, and scientific purposes, where the articles specified its purposes as the providing and giving to its members entertainment by exhibition of feats of strength, such as boxing, sparring, etc., and "any and all other indoor sports and harmless games," has no power to stage prize fights as its real purpose, in violation of the criminal laws of the state, especially where the fights were open to the public.⁴²

§ 859. Banks—In general. The limitations on the powers of corporations are applied to banking and trust companies even more

³⁵ Thompson v. Lambert, 44 Iowa 239.

³⁶ Williams v. Dean, 134 Iowa 216, 11 L. R. A. (N. S.) 410, 111 N. W. 931.

³⁷ Delier v. Plymouth Agr. Society, 57 Iowa 481, 10 N. W. 872.

³⁸ Williams v. Dean, 134 Iowa 216, 11 L. R. A. (N. S.) 410, 111 N. W. 931.

³⁹ Cope v. District Fair Ass'n, 99 Ill. 489, 39 Am. Rep. 30.

⁴⁰ Bathe v. Decatur County Agr. Society, 73 Iowa 11, 5 Am. St. Rep. 651, 34 N. W. 484.

⁴¹ Melvin v. State, 121 Cal. 16, 53 Pac. 416; Berman v. Minnesota State Agr. Society, 93 Minn. 125, 100 N. W. 732.

⁴² State v. Business Men's Club, 178 Mo. App. 548, 163 S. W. 901.

strictly than to other corporations organized for business or trading purposes. The reason is that in the case of the former they occupy a fiduciary position in that they invite the public to submit to them the possession and care of its property, and the public who so trusts them is primarily entitled to protection, while in the case of the latter the only persons interested other than business creditors and the state are stockholders, and their only interest is to secure dividends upon their investment.⁴³

The incidental powers of a bank have been said to be such "as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently."⁴⁴

A bank "is empowered to do any act or make any contract even though under usual and ordinary circumstances such transaction is beyond the scope of its charter powers, if in the particular case the act was engaged in or contract entered into in furtherance of the business of the corporation, or to protect it in its property rights, or maintain the integrity of the corporate entity."⁴⁵ Of course, a bank may take bills and notes from depositors or others for collection.⁴⁶ But a corporation created for the purpose of banking, only, has no power to engage in a business not incidental to banking, such as manufacturing or the buying and selling of goods or land on speculation,⁴⁷ or acting as broker or agent in buying or selling bonds or stocks.⁴⁸ In like manner, a banking corporation cannot carry on the

⁴³ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N. S.) 967, 89 N. E. 376, *aff'g* 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080; *Hess v. Sloane*, 66 N. Y. App. Div. 522, 73 N. Y. Supp. 313, *aff'd* without opinion 173 N. Y. 616, 66 N. E. 1110.

⁴⁴ *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 679.

⁴⁵ *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 69 Neb. 220, 95 N. W. 819.

⁴⁶ *Tyson v. State Bank*, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139.

⁴⁷ *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L.

Ed. 349; *Louis Bletz & Co. v. Bank of Kentucky*, 21 Ky. L. Rep. 1554, 55 S. W. 697; *Bank of Michigan v. Niles*, 1 Doug. (Mich.) 401, 41 Am. Dec. 575, Walk. (Mich.) 99; *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14.

So a banking corporation cannot take a mortgage from a manufacturing company, and agree therein to carry on the latter's business. *Blitz v. Bank of Kentucky*, 21 Ky. L. Rep. 1554, 55 S. W. 697.

⁴⁸ *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *First Nat. Bank of Allentown v. Hoch*, 89 Pa. St. 324, 33 Am. Rep. 769.

business of an electric light company⁴⁹ or engage in lumbering.⁵⁰ Nor has such a corporation power to secure the payment of a particular depositor by the pledging of its assets.⁵¹ And it seems that a bank cannot pay money to a third person for the purpose of securing a customer.⁵² But the fact that a bank owns a building, and rents all of it except the portion which it occupies, does not show that the corporation is dealing in real estate.⁵³ Moreover, a corporation may conduct an independent business enterprise where necessary to protect itself from loss by securing a debt.⁵⁴

The power to make donations is considered hereafter.⁵⁵

In determining the powers of national banks, a state court will necessarily be governed by the decisions of the United States Supreme Court, since the powers of such bank under the National Banking Act are essentially matters to be ascertained by federal interpretation.⁵⁶

National banks have no power to deal in merchandise of any kind or in stocks or bonds,⁵⁷ nor to engage in the business of selling bonds on commission.⁵⁸ On the other hand, it is not ultra vires for a national bank which has become owner of certain notes secured by a mortgage to enter into an agreement with parties who hold other mortgages covering the same property to appear for all in an action to realize on the security, leaving the rights of the several parties to the proceeds to be determined later, the bank taking such course of action as conducive to the advancement of its own interests.⁵⁹

⁴⁹ *Home State Bank v. Vandolah*, 188 Ill. App. 123.

⁵⁰ *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 17 L. R. A. (N. S.) 526.

⁵¹ *Commercial Banking & Trust Co. v. Citizens' Trust & Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915 C 166, 156 S. W. 160.

⁵² *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567.

⁵³ *Manhattan Co. v. Eversz*, 171 Ill. App. 449.

⁵⁴ See § 861, *infra*.

⁵⁵ See §§ 1199-1202, *infra*.

⁵⁶ *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74.

⁵⁷ *Lewis Leonhardt & Co. v. W. H. Small & Co.*, 117 Tenn. 153, 6 L. R. A. (N. S.) 887, 119 Am. St. Rep. 994, 96 S. W. 1051.

⁵⁸ *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

⁵⁹ *Morris v. Third Nat. Bank of Springfield, Massachusetts*, 142 Fed. 25.

While a national bank cannot engage in the business of a trust company or act as the representative of others in which it otherwise has no corporate concern, "it does not follow that where its own interests, which have been acquired in the usual course of its business, are involved and have become the subject of controversy or litigation, it is not authorized to combine them with like interests of other persons and to contract to represent

A national bank may take an assignment of a judgment for the purpose of collecting it, and applying the proceeds as directed by the judgment creditor.⁶⁰ A national bank has implied power also to agree with the state to pay a tax on a specified class of interest bearing deposits, in order to relieve depositors from returning their deposits for taxation, notwithstanding the bank may be compelled itself to pay a part of the tax which could not be charged against the depositors because of withdrawals, etc.⁶¹

From the power given national banks to discount notes and other evidences of debt may be deduced the power to purchase notes at less than their face value.⁶²

It is the "usual practice for depositors and customers of a bank to refer others to the bank for information as to their financial responsibility. To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers."⁶³

§ 860. — Power to act as depositary. It has been held that a bank cannot receive bonds or other property for safe-keeping, where the charter does not authorize it to act as a mere depositary.⁶⁴ So in

the whole." *Morris v. Third Nat. Bank of Springfield, Massachusetts*, 142 Fed. 25.

⁶⁰ *Miller v. King*, 223 U. S. 505, 56 L. Ed. 528.

"It may do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt. It is both usual and proper for the legal title to negotiable instruments to be vested in a bank by mere indorsement for purposes of collection, holding the proceeds as the indorser directs. There is no difference in law if the title is conveyed by a lengthier and more formal instrument. In both cases the bank takes the legal title for the purpose of demand and collection." *Miller v. King*, 223 U. S. 505, 56 L. Ed. 528.

⁶¹ *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 58 L. Ed. 147, aff'g 84 Vt. 167, Ann. Cas. 1912 D 22, 78 Atl. 944.

Where the interest bearing credits of depositors in a bank are taxable by the state, the bank has power to agree to pay the tax upon the basis of average deposits, notwithstanding that the amount of deposits does not correspond precisely to the amounts on which interest was actually paid to the depositors and although the agreement does not contemplate a charge against the depositors' accounts of the amount paid by the bank. *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 58 L. Ed. 147, aff'g 84 Vt. 167, Ann. Cas. 1912 D 22, 78 Atl. 944.

⁶² *Morris v. Third Bank of Springfield, Massachusetts*, 142 Fed. 25.

⁶³ *Hindman v. First Nat. Bank of Louisville, Kentucky*, 98 Fed. 562, 48 L. R. A. 210.

⁶⁴ *Greeley v. Nashua Sav. Bank*, 63 N. H. 145; *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581.

Vermont, it is held that national banks have no power to receive special deposits of bonds, securities or other valuables, for safe-keeping.⁶⁵ However, it is held in New York that national banks have implied power to receive special deposits other than money, at least where in accordance with the custom;⁶⁶ and the question has been settled, as far as national banks are concerned, by a decision of the Supreme Court of the United States holding that national banks have such power.⁶⁷ But power of a national bank to receive "special deposits" does not include the allowing a stock of goods to be stored in the back end of the bank building, where the bank has no interest in the goods.⁶⁸

§ 861. — Engaging in other business to save debt. It has been held that a bank which has taken in property to secure it may run the business, at least for a reasonable time, in order to reimburse itself.⁶⁹ Thus, a bank has been held to be authorized, under such circumstances, to carry on a lumber business,⁷⁰ or a mill,⁷¹ or iron works,⁷² or to run a farm.⁷³ On the other hand, there are decisions of federal courts that a national bank which has acquired mining property in payment of a debt, while having authority to make reasonable repairs thereon in order to make it salable, has no power to prospect for mineral on such property;⁷⁴ and that where a bank acquired a cotton mill in payment of a debt, it has no power to operate the mill.⁷⁵

§ 862. Brewing companies. Of course, a brewing company is created primarily to brew beer and other malt liquors and to sell

⁶⁵ *Whitney v. First Nat. Bank*, 50 Vt. 388, 28 Am. Rep. 503, rev'd 154 U. S. 664, 26 L. Ed. 212 (app'x); *Wiley v. First Nat. Bank*, 47 Vt. 546, 19 Am. Rep. 122.

⁶⁶ *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582. Contra, *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

⁶⁷ *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750, aff'g 79 Pa. St. 106, 21 Am. Rep. 49. See also *Manhattan Bank of Memphis v. Walker*, 130 U. S. 267, 32 L. Ed. 959.

⁶⁸ *American Nat. Bank v. E. W. Adams & Co.*, 44 Okla. 129, L. R. A. 1915 B 542, 143 Pac. 508.

⁶⁹ See *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N. S.) 243, 115 N. W. 128.

⁷⁰ *John A. Roebling Sons' Co. v. First Nat. Bank of Richmond, Virginia*, 30 Fed. 744.

⁷¹ *Peterborough Hydraulic Power Co. v. McAllister*, 17 Ont. L. Rep. 145.

⁷² *Reynolds v. Simpson & Ledbetter*, 74 Ga. 454.

⁷³ *First Nat. Bank of Great Bend v. Bannister*, 7 Kan. App. 787, 54 Pac. 20.

⁷⁴ *Cooper v. Hill*, 94 Fed. 582.

⁷⁵ *Ockrill v. Abeles*, 86 Fed. 505.

its product. The questions which have arisen in regard to such companies relate almost entirely to their power to aid retailers of their products, in order to increase the sales of the company, such as by leasing premises, for the purpose of a saloon,⁷⁶ loaning money to aid retailers,⁷⁷ or guaranteeing the payment of debts by retailers.⁷⁸

It may be remarked that the decisions holding brewing companies have power to do such acts to increase their sales are in line with the trend of the more recent decisions in regard to powers of corporations in general.

Where a distilling company possesses power to maintain a warehouse and issue receipts for the goods stored therein, it may enter into a contract with a bank, unitedly with other similar companies, for the waiver of storage charges on receipts pledged to such bank.⁷⁹

§ 863. Building and loan associations. The powers of building and loan associations are generally expressly enumerated by statute.⁸⁰

It is not within the scope of this work to go into details regarding powers more or less peculiar to such companies, but reference should be made to standard textbooks on the subject.⁸¹ Suffice it to say in this connection that the terms of the articles of incorporation, where not conflicting with the statutes, govern the powers of such associations.⁸² Such a corporation cannot carry on a real estate business.⁸³

§ 864. Canal companies. The general rule that a corporation can exercise only such powers as are expressly mentioned in its charter or as may be necessary to execute those expressed is as applicable to canal companies as to other companies.⁸⁴

A canal company, not authorized by its charter to charge toll, has no power to make such charge.⁸⁵ However, a canal company has

⁷⁶ See Chap. 33, *infra*.

⁷⁷ See Chap. 25, *infra*.

⁷⁸ See Chap. 23, *infra*.

⁷⁹ *National Deposit Bank v. Louisville City Nat. Bank*, 23 Ky. L. Rep. 81, 62 S. W. 725.

⁸⁰ *Southwestern Surety Ins. Co. v. Davis*, — Okla. —, 156 Pac. 213.

As to the difference between a building and loan association and an ordinary corporation, see *Cobe v. Lohan*, 193 Mo. 235, 4 L. R. A. (N. S.) 439, 112 Am. St. Rep. 480, 92 S. W. 93.

⁸¹ See *Thompson on Building Associations*.

⁸² See *Meroney v. Atlanta Building & Loan Ass'n*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924.

⁸³ *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303.

⁸⁴ See *North Point Consol. Irrigation Co. v. Utah & S. L. Canal Co.*, 16 Utah 246, 40 L. R. A. 851, 67 Am. St. Rep. 607, 52 Pac. 168.

⁸⁵ *Perrine v. Chesapeake & D. Canal Co.*, 9 How. (U. S.) 172, 13 L. Ed. 92; *State v. Portland General Elec. Co.*, 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

power to contract to construct a basin on part of land acquired by it, as a part of the consideration for the land purchased.⁸⁶ So power to construct a canal and charge tolls includes power to superintend the passage of boats through the canal.⁸⁷

§ 865. Cemetery companies. A cemetery association need not admit for burial all persons on whose behalf application is made, since it is not a public service corporation.⁸⁸

§ 866. Charitable corporations. A charitable corporation may dispend part of its bounty outside the state.⁸⁹

The questions generally involved, as far as charitable corporations are concerned, are the power of such a corporation to act as trustee,⁹⁰ the power to hold property, including the power to take by devise,⁹¹ and the right to dispose of the property.⁹²

§ 867. Colleges and universities. Colleges and universities may acquire and hold property, except in so far as prohibited by their charters,⁹³ and may ordinarily sell their property where not held in trust.⁹⁴ They have implied authority to grant diplomas⁹⁵ and may prohibit students from joining secret societies.⁹⁶

Where a university has special authority to teach medicine, and in order to accomplish this result properly clinical instruction is necessary, the founding and maintenance of a clinical department and hospital is not ultra vires.⁹⁷

A college incorporated to educate persons in the art and science of curing diseases by the use of air, baths, electricity, heat, magnetism,

⁸⁶ "We can see no reason why the company could not have bound itself to make a basin along the canal, just as a railroad company can bind itself to erect a depot at a particular place, * * *." *Dawson v. Western Maryland R. Co.*, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678, 68 Atl. 301.

⁸⁷ *Muir v. Louisville & P. Canal Co.*, 8 Dana (Ky.) 161.

⁸⁸ *People v. Forest Home Cemetery Co.*, 258 Ill. 36, Ann. Cas. 1914 B 277, 101 N. E. 219.

⁸⁹ *Balch v. Shaw*, 174 Mass. 144, 54 N. E. 490.

⁹⁰ See Chap. 24, *infra*.

⁹¹ See Chap. 29, *infra*.

⁹² See Chap. 32, *infra*.

⁹³ General rules, see Chap. 29, *infra*.

⁹⁴ General rules, see Chap. 32, *infra*.

⁹⁵ *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565.

⁹⁶ *People v. Wheaton College*, 40 Ill. 186.

As to the validity of state legislation on this question, see *Waugh v. Board of Trustees*, 237 U. S. 589, 59 L. Ed. 1131.

⁹⁷ *Succession of Hutchinson*, 112 La. 656, 36 So. 639.

massage, "and all other resources of nature," may impart instruction concerning the administering of drugs.⁹⁸

§ 868. Department store company. A corporation for the purpose of carrying on a large department store has the power to enter into a contract with another corporation or person by which it lets to the latter the right to use space in its store for the sale of a particular article, also agreeing that no other articles of like character shall be sold in the store, in consideration of an agreement by the latter to pay it a certain percentage of the receipts.⁹⁹

§ 869. Electric light, heat and power companies. Electric light, heat or power companies are quasi public corporations. Electric companies have no power to deal in or furnish electricity except for the purposes enumerated in the charter. Thus authority to furnish electric light does not exist where a company is created merely to manufacture and operate dynamos, etc.,¹ nor where the corporation was created before electricity was used for lighting.² So a company incorporated to generate and deal in electricity has no power to manufacture or sell gas or to buy or control a gas plant.³

A corporation organized for the purpose of "manufacturing, storing, selling and distributing electricity for light, heat, power," etc., has no incidental power to manufacture and sell electrical appliances, apparatus and supplies.⁴ But an electric light company is not impliedly prohibited from contracting to furnish electricity for lighting purposes to an adjoining town because its charter expressly authorizes it to set poles and extend wires through the streets of certain named towns, not including the town contracted with.⁵ Generally, poles cannot be erected in the streets without the consent of the municipality.⁶

⁹⁸ *State v. Hygeia Medical College*, 60 Ohio St. 122, 54 N. E. 86.

⁹⁹ *Standard Fashion Co. v. Siegel-Cooper Co.*, 44 N. Y. App. Div. 121, 60 N. Y. Supp. 739.

¹ *Brush Elec. Light Co. v. Jones Bros. Elec. Co.*, 10 Ohio Dec. 767.

² *In re Scranton Elec. Light & Heat Co.'s Appeal*, 122 Pa. St. 154, 1 L. R. A. 285, 9 Am. St. Rep. 79, 15 Atl. 446. See also *Carthage v. Carthage Light Co.*, 97 Mo. App. 20, 70 S. W. 936.

³ *Covington Gas Light Co. v. Covington*, 22 Ky. L. Rep. 796, 58 S. W. 805; *Richards v. Dover*, 61 N. J. L. 400, 39 Atl. 705.

⁴ *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880. But see the next section, *infra*.

⁵ *Oakland Elec. Co. v. Union Gas & Electric Co.*, 107 Me. 279, 78 Atl. 288.

⁶ See § 1164, *infra*.

§ 870. Gas companies. Gas companies are quasi public corporations, with no rights in the streets or other public ways except such as are conferred by their charter or by special franchises granted by the state or by the municipal corporation. Moreover, a company incorporated under the general statutes of a state, instead of under the statute authorizing the incorporation of gas companies, has no power to engage in the gas business, either within or without the state.⁷

Power to construct and operate gas works, conferred when natural gas was unknown in the state, does not include power to drill or purchase gas wells and to construct pipe lines.⁸ Nor has a corporation chartered to drill for natural gas and to sell it power, after natural gas is exhausted, to manufacture artificial gas.⁹

A natural gas company with power to lay and maintain a pipe line has no implied power to construct and maintain on the same right of way a telegraph or telephone line to be used in the necessary operation of its pipe line.¹⁰ But it has been held that a gas and electric light corporation authorized by its articles "to make and perform contracts of any kind and description," which had a long term contract with a traction company to furnish it with electric power, may contract with a paving company to pave along the line of the street railway, in order to assist the traction company in its financial affairs, where the latter had no funds for paving and the municipality threatened to revoke the traction company's franchise if it did not carry out the paving.¹¹

A gas company, the charter of which states that its business shall consist of furnishing a certain city with gas for light according to the terms of a certain ordinance, may acquire a new franchise for supplying the city with gas and is not confined to operations under the franchise existing at the time of incorporating.¹² It has also been held that a gas company may incidentally deal in such patented gas fixtures and appliances as will induce new customers to use gas, or old customers to use more.¹³

⁷ *Seattle Gas & Electric Co. v. Citizens' Light & Power Co.*, 123 Fed. 588.

⁸ *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362.

⁹ *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882.

¹⁰ *Woods v. Greensboro Nat. Gas Co.*, 204 Pa. 606, 54 Atl. 470.

¹¹ *Derr v. Fisher*, 22 Okla. 126, 98 Pac. 978.

¹² *Keith v. Johnson*, 109 Ky. 421, 22 Ky. L. Rep. 947, 59 S. W. 487.

¹³ *Malone v. Lancaster Gas Light & Fuel Co.*, 182 Pa. St. 309, 37 Atl. 932. But compare section next, *supra*.

§ 871. **Hotels.** Power to carry on a hotel business “necessarily carries with it, as an incident, the power to adopt and promote all reasonable expedients directly calculated to increase the number of patrons of the hotel, such as advertising, employing agents to solicit patronage, running omnibuses and other vehicles to convey guests to and from the hotel, and other similar expedients. Donations of money to enterprises calculated to bring to the city large numbers of visitors from abroad would seem to fall within the same reason.”¹⁴

A company incorporated to do a general hotel business has power to purchase the business of a catering and cafe company, especially where the cafe and bar are in the hotel of the company.¹⁵ But a corporation created to build and operate a summer hotel plant and develop mineral springs is not authorized to subdivide certain of its property into lots and sell them and to dedicate other parts of its land to the public, where it is not necessary to engage in the real estate business to accomplish its purpose.¹⁶

§ 872. **Insurance and fraternal benefit companies.** It is not within the scope of this work to go into detail as to the powers of insurance companies. These powers are largely regulated by statutes to which reference should be made. However, a few applications of the general rules hereinbefore laid down as to corporate powers are valuable in this connection. Thus, it is well settled that an insurance company cannot engage in any other business than that of insurance, such as banking,¹⁷ or the business of a building and loan association.¹⁸ Nor can it lawfully engage in any other kind of insurance than that authorized by its charter.¹⁹ Thus, a corporation authorized to insure against accidents “in traveling” cannot lawfully insure against any and

¹⁴ *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268.

Donations, see § 814, *supra*.

¹⁵ *Judell v. Goldfield Realty Co.*, 32 Nev. 351, 108 Pac. 455.

¹⁶ *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 8 L. R. A. (N. S.) 966, 79 N. E. 133.

¹⁷ *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045.

¹⁸ Such power is not impliedly conferred upon a mutual insurance com-

pany by a grant of authority to invest or loan its funds. *Huter v. Union Trust Co. (Ind.)*, 51 N. E. 1071.

¹⁹ **Colorado.** *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

Maine. *Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 257.

Minnesota. *Rochester Ins. Co. v. Martin*, 13 Minn. 59.

Tennessee. *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

England. *In re Phoenix Life Assur. Co.*, 2 Johns. & H. 441.

all accidental injury;²⁰ and a corporation authorized to insure against damage by fire or lightning cannot lawfully insure against damage by hail.²¹

Power to insure automobiles "against any hazard" has been construed not to include the power to insure against personal liability.²² And if an insurance company is organized for the purpose of insurance on the assessment plan, it has no power to insure on any other plan.²³ But it seems that a company authorized to insure houses, buildings and all other kinds of property against loss or damage by fire or "other casualty" may issue burglary insurance.²⁴

An insurance company may issue profit sharing bonds which are in substance a contract to set apart annually from the earnings of the company and place in a special fund a sum of money equal to one dollar for each thousand dollars worth of insurance outstanding and in force.²⁵

The rule that the powers are limited to those expressed in the charter and the powers implied therefrom is equally applicable to fraternal benefit societies.²⁶ Thus, a fraternal beneficiary association has no corporate power to insure the lives of its members except where the power is expressly or impliedly granted.²⁷ So a fraternal society authorized by its charter to bestow substantial aid upon totally disabled members has no power to issue a certificate for the payment of a specified sum on the holder reaching the age of seventy years.²⁸

A fraternal benefit corporation has no authority to purchase the business or assume the risks of another corporation,²⁹ and it cannot enter into a contract with another similar association to pay accruing death losses upon consideration of the transfer to it by the other asso-

²⁰ *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

²¹ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

²² *American Automobile Ins. Co. v. Commissioner of Insurance*, 174 Mich. 295, 140 N. W. 557.

²³ *Smoot v. Bankers' Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719.

²⁴ *Bankers' Mut. Casualty Co. v. First Nat. Bank*, 131 Iowa 456, 108 N. W. 1046.

²⁵ *Jacobs v. Wisconsin Nat. Life Ins. Co.*, 162 Wis. 318, 156 N. W. 159.

²⁶ *Cerny v. Jednota Cesky Dam*, 146 Ill. App. 518; *McCartney v. Supreme Tent Knights of Maccabees of World*, 132 Ill. App. 15.

²⁷ *State v. Vandiver*, 213 Mo. 187, 15 Ann. Cas. 283, 111 S. W. 911.

²⁸ *Kirk v. Fraternal Aid Ass'n*, 95 Kan. 707, 149 Pac. 400. But see contra, *Guthrie v. Supreme Tent Knights of Maccabees of World*, 4 Cal. App. 184, 87 Pac. 405.

²⁹ *Starr v. Bankers' Union of World*, 81 Neb. 377, 129 Am. St. Rep. 684, 116 N. W. 61; *State v. Bankers' Union of World*, 71 Neb. 622, 99 N. W. 531.

ciation of its membership and offices.³⁰ Nor has a fraternal insurance society the power to operate a "locker club" or to contract for the purchase of intoxicating liquors.³¹

§ 873. Land and investment companies. Generally, the charter powers of land and investment companies are very broad, and in addition the courts have been liberal in their decisions in regard to the implied or incidental powers of such companies.³²

If a corporation is authorized by its charter to buy, sell, and improve or develop land, it may lawfully adopt any means that may be necessary or proper in order to accomplish this purpose. Thus, it may build and maintain sawmills if the land is timberland;³³ or, in order to enhance the value and salability of the land and add to its settlement, it may build a hotel or college,³⁴ or aid, by subscription or otherwise, in building a railroad.³⁵ Nor is it against public policy for such a corporation to agree with a town that it will pay part of the expense of the construction of a bridge, where the bridge will enhance the value of the property owned by the corporation.³⁶ Likewise, a corporation chartered to do a general real estate business may contract to take possession of certain real estate, offer it for sale, collect rents, and, at the expiration of a certain period, purchase the interest of a lienholder.³⁷ On the other hand, a land company cannot

³⁰ Bankers' Union of World v. Crawford, 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79.

³¹ Shifflett v. John W. Kelly & Co., 16 Ga. App. 91, 84 S. E. 606.

³² "The object of the creation of the corporation was the acquisition and sale of lands on subdivision, and it cannot successfully be denied that that object would be directly promoted by the use of legitimate business methods, to render the land accessible." Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167.

³³ In re Watts' Appeal, 78 Pa. St. 370.

A land company empowered to "aid in the development of the minerals and other materials" in and upon the lands, and "to promote the clearing and settlement of the country," where the land it owned was an al-

most unbroken forest, has power to build sawmills and a hotel to aid in the settlement of the country. In re Watts' Appeal, 78 Pa. St. 370.

³⁴ Fulton v. Sterling Land & Investment Co., 47 Kan. 621; Whetstone v. Ottawa University, 13 Kan. 320, 28 Pac. 720; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; In re Watts' Appeal, 78 Pa. St. 370.

³⁵ Louisville & N. R. Co. v. Literary Soc. of St. Rose, 91 Ky. 395, 15 S. W. 1065.

As to power to make donations in general, see § 814, *supra*.

³⁶ Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167; Trustees of Charlotte Tp. v. Piedmont Realty Co., 134 N. C. 41, 46 S. E. 723.

³⁷ Neosho Valley Inv. Co. v. Han-num, 10 Kan. App. 499, 63 Pac. 92.

operate a street railroad;³⁸ and of course a land company authorized to build "tramways or other roads, not meaning railways," cannot build or operate a railroad.³⁹ It has been held also, although the decision is of doubtful authority, that a land company cannot lawfully enter into a contract to pay a third person for inducing manufacturing companies to locate upon its land.⁴⁰

§ 874. Logging companies. It follows from the rule that the powers of a corporation are such only as are conferred by its charter, that a corporation created for the purpose of booming logs cannot lawfully engage in the business of driving logs.⁴¹ Moreover, power to erect and maintain a boom confers no right to or control over, the waters of the river than those incidental to the maintenance of the boom.⁴² Nor is power to drive or handle logs incidental to the power conferred on a corporation to improve a stream.⁴³

§ 875. Lumber companies. A lumber company, authorized by its charter to manufacture and sell lumber only, cannot lawfully engage in the business of constructing buildings, even as a means of disposing of its lumber.⁴⁴ However, there is some conflict as to the power of such companies to guarantee the performance of building contracts, in order to increase their sales.⁴⁵

§ 876. Manufacturing companies. A manufacturing company, authorized by its charter to manufacture only, cannot lawfully engage in buying and selling goods, where such business is not necessary or incidental to its manufacturing business. Nor can it engage in any other business not reasonably incidental to its manufacturing.⁴⁶ It

³⁸ *International Lumber Co. v. American Suburbs Co.*, 119 Minn. 77, 137 N. W. 395; *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

³⁹ *Beasley v. Aberdeen & R. R. Co.*, 145 N. C. 273, 59 S. E. 60.

⁴⁰ *Schurr v. New York & B. Suburban Inv. Co.*, 18 N. Y. Supp. 454, rev'g on this point 16 N. Y. Supp. 210.

⁴¹ *Bangor Boom Corporation v. Whiting*, 29 Me. 123.

⁴² *Citizens Elec. Co. v. Susquehanna Boom Co.*, 227 Pa. 448, 76 Atl. 203.

⁴³ *Northwestern Improvement &*

Boom Co. v. O'Brien, 75 Minn. 335, 77 N. W. 989.

⁴⁴ *Dalles Lumber & Manufacturing Co. v. Wasca Woollen Mfg. Co.*, 3 Ore. 527.

⁴⁵ See § 930, *infra*.

⁴⁶ *Kansas*. *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 281, 19 Pac. 617. *Massachusetts*. *Slater Woollen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823. *Michigan*. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

New York. *People v. Campbell*, 144 N. Y. 166, 38 N. E. 990.

cannot lawfully engage in manufacturing any other goods than those for the manufacture of which it was created.⁴⁷ It cannot, as a part of its every day business, buy goods similar to its own from another manufacturer and sell them in the same condition as when bought.⁴⁸ Nor can it engage in the business of a public warehouseman.⁴⁹

It is otherwise, however, when the act is necessary or incidental. Thus it has been held that a corporation authorized to operate an iron furnace may keep a supply store, when such a store is reason-

Pennsylvania. Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120.

Thus a corporation organized for the purpose of manufacturing and selling heating and ventilating apparatus cannot become a negotiator or broker of bonds on commission. Peck-Williamson Heating & Ventilating Co. v. Board of Education of Oklahoma City, 6 Okla. 279, 50 Pac. 236.

⁴⁷ Simmons v. Troy Iron-Works, 92 Ala. 427, 9 So. 160; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 38 N. Y. Super. Ct. 554.

But under a statute authorizing the formation of corporations for the transaction of any manufacturing, mining, mechanical, chemical, mercantile, and produce business, either separately or combined, it was held that a corporation authorized by its charter to manufacture sugar, syrup, starch, and glucose, and "for the transaction of manufacturing, mechanical and mercantile business," may carry on the business of manufacturing and selling matches and woodenware, in addition to the manufacture of sugar, etc. Parkinson Sugar Co. v. Bank of Ft. Scott, 60 Kan. 474, 57 Pac. 126.

⁴⁸ Teele v. Rockport Granite Co. (Mass.), 112 N. E. 497; People v. Campbell, 144 N. Y. 166, 38 N. E. 990 (sale by Tiffany of cheaper grade of gold and silverware, not manufactured by it).

A corporation organized solely for the manufacture of electric appliances has no power to engage in the business of selling electric supplies manufactured by others. Powell v. Murray, 157 N. Y. 717, 53 N. E. 1130, aff'g 3 N. Y. App. Div. 273, 38 N. Y. Supp. 233.

A corporation the articles of incorporation of which state that "its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing," is a manufacturing corporation exclusively, and has no power to deal also in clothing manufactured by others. Nicolle v. Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

A corporation organized "to build and operate a cottonseed oil mill, and ginnery in connection therewith, to compress cottonseed oil, to buy cottonseed, to sell their products, to manipulate and compound cottonseed meal, with other substances and elements, so as to make fertilizers to be sold for fertilizing lands, and to gin and compress cotton into bales for the market," does not have power to buy and sell a fertilizer made by another. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co., 126 Fed. 712, rev'g 119 Fed. 709.

⁴⁹ Thus a corporation organized for the purpose of manufacturing and sell-

ably necessary in carrying on the business of an iron furnace.⁵⁰ And it has been held that a corporation for the purpose of "manufacturing and selling glass" may lawfully purchase manufactured glass from another manufacturer for the purpose of keeping up its stock and supplying its customers while its factory is being repaired.⁵¹ And a corporation organized to manufacture pig iron, while it cannot erect machinery and engage in the business of grinding grain for the public generally, may do so in order to furnish such grain as may be necessary for the use of its laborers and of its animals employed in its business as a manufacturer of iron.⁵² Likewise, a shipbuilding company has the right to do the dredging necessary to render its property available for its charter purposes.⁵³

A corporation created to manufacture and sell musical instruments for practice and instruction in piano playing may maintain a piano school to advertise its invention for teaching the piano.⁵⁴

A fertilizer company may buy cotton for future delivery, where necessary in connection with the business.⁵⁵

§ 877. Mining and quarry companies. A mining company cannot engage in business other than mining. For instance, it cannot go into the manufacturing business.⁵⁶ Likewise, a corporation authorized by its charter "to have, purchase, receive, possess and enjoy lands, rights, tenements, hereditaments, goods, chattels and effects, in any amount the body corporate may deem necessary to carry all the objects of said corporation into full force and effect; which objects are to mine lime rock and manufacture the same, to keep up and run such machinery as may be necessary to saw lumber and make barrels for the packing of said lime, and the same to sell, devise, grant, alien,

ing nails, and other products of steel and iron, is not authorized to engage in the business of a public warehouseman, and has no power to issue warehouse receipts. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 4 N. E. 592. See also *Geilfuss v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166, 60 Am. St. Rep. 143, 70 N. W. 306.

⁵⁰ *Searight, Thornton & Co. v. Payne*, 6 Lea (Tenn.) 283. And see *Dauchy v. Brown*, 24 Vt. 197.

⁵¹ *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315. And see *Hawkes Glass Beveling & Sil-*

vering Co. v. Bohn Mfg. Co., 40 Ill. App. 649; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

⁵² *Cherokee Iron Co. v. Jones*, 52 Ga. 276.

⁵³ *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 503, 6 L. R. A. (N. S.) 247, 54 S. E. 314.

⁵⁴ *Virgil v. Virgil Practice Clavier Co.*, 33 N. Y. Misc. 200, 68 N. Y. Supp. 335.

⁵⁵ *Dublin Fertilizer Works v. Carter*, 6 Ga. App. 835, 65 S. E. 1082.

⁵⁶ *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882.

and dispose of," has no implied power to carry on a general mercantile business.⁵⁷ Nor can a corporation organized for the purpose of mining only establish a railroad or steamboat line and engage in transporting the goods of others for hire; but it may lawfully make any necessary arrangements for the purpose of conveying its own coal or ore to the market or to a smelter, even though it may involve the operation of a railroad for the purpose, or the purchase and use of a steamboat.⁵⁸

A mining corporation, in order to provide for the drainage of its own mine, may advance money to another mining corporation for the construction of a tunnel.⁵⁹ Of course, a corporation created to mine coal has power to sell the coal mined.⁶⁰

A stone company, authorized by statute to build lateral railroads, may build a road to connect with its lateral road already existing, where they are to be used as one road.⁶¹

Owning and operating a boarding house in the vicinity of its quarry may be regarded as incidental to the business of a corporation engaged in making cement and quarrying stone.⁶²

§ 878. Newspaper or other publication companies. A newspaper corporation has implied power to charter a yacht for several months for the purpose of collecting news.⁶³

It is within the powers of a corporation to publish a directory of the jewelry trade where its express authority is to publish a journal devoted to the interests of such trade, and to do any business, generally, connected with such corporate purpose.⁶⁴

But it has been held that a corporation created for the purpose of publishing a newspaper cannot lawfully offer to pay money to the heirs of any person who, when killed, has on his person a coupon cut from its paper, as this is in effect life insurance.⁶⁵

⁵⁷ *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122.

⁵⁸ *Calloway Min. & Mfg. Co. v. Clark*, 32 Mo. 305; *Moss v. Averell*, 10 N. Y. 455.

⁵⁹ *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121, 7 Pac. 271.

⁶⁰ *Hunter W. Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521, aff'g 146 Ill. App. 257.

⁶¹ *Westport Stone Co. v. Thomas*, 175 Ind. 319, 35 L. R. A. (N. S.) 646, 94 N. E. 406.

⁶² *Oklahoma Portland Cement Co. v. Anderson*, 28 Okla. 650, 115 Pac. 767.

⁶³ *Sun Prtg. & Pub. Ass'n v. Moore*, 183 U. S. 642, 46 L. Ed. 366, aff'g 101 Fed. 591.

⁶⁴ *Jewelers' Circular Pub. Co. v. Jacobs*, 109 Fed. 509.

⁶⁵ *Brisay v. Star Co.*, 13 N. Y. Misc. 349, 35 N. Y. Supp. 99.

§ 879. Political party. A political party is sometimes incorporated. In such a case it may maintain an action in the party name to enforce rights conferred upon the party in its corporate capacity.⁶⁶

§ 880. Public service companies in general. Public service corporations include, among others, gas, electric light, street railway, water, and general railroad companies.⁶⁷ The powers of such companies often depend not only on their charters, but also on the construction of special charters granted them by the legislature directly or through the medium of a municipality, such as the franchise to use the streets for pipes, wires, rails or the like.⁶⁸ Such corporations being given certain privileges by the state in addition to the right to exist as a corporation, are also subject to certain limitations on their powers not applicable to other corporations. In other words, it is the duty of a public service corporation to fulfil the public purpose on account of which the grant of special franchises was made.⁶⁹ For instance, the rates of such companies are subject to regulation by the state and municipality;⁷⁰ its contracts with patrons must not unjustly discriminate; it must furnish a supply or services to any applicant, within the prescribed territory, and cannot cut off the supply or service without good cause.⁷¹ Such companies may adopt reasonable rules and regulations for the conduct of their business, provided such rules and regulations are applicable to all patrons or consumers alike.⁷²

Generally, such a corporation cannot make a contract,⁷³ lease its property,⁷⁴ or otherwise transfer its property,⁷⁵ where the effect will be to prevent it from fulfilling its duties to the public.

§ 881. Racing associations. Power conferred on a racing association to hold horse races and offer purses does not permit it to authorize or allow betting, pool selling or bookmaking, especially where such acts are forbidden by law.⁷⁶ Such an association may permanently exclude from its tracks persons who have been ruled off for misconduct.⁷⁷

⁶⁶ *Independence League v. Taylor*, 154 Cal. 179, 97 Pac. 303.

⁶⁷ See chapter on Public Utility Regulations, *infra*.

⁶⁸ See Chap. 31, *infra*.

⁶⁹ *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 84, 77 Atl. 720.

⁷⁰ See chapter on Rate Regulations, *infra*.

⁷¹ See chapter on Public Utility Regulations, *infra*, and 4 *McQuillin on Municipal Corporations*, § 1639.

⁷² See § 496, *supra*. See, in this connection, *McQuillin on Municipal Corporations*, § 1711.

⁷³ See § 914, *infra*.

⁷⁴ See Chap. 33, *infra*.

⁷⁵ See Chap. 32, *infra*.

⁷⁶ *Opinion of Justices*, 73 N. H. 625, 6 Ann. Cas. 689, 63 Atl. 505.

⁷⁷ *Grannan v. Westchester Racing Ass'n*, 153 N. Y. 449, 47 N. E. 896, rev'g 16 N. Y. App. Div. 8, 44 N. Y. Supp. 790.

§ 882. Railroads—In general. A railroad company is a quasi public corporation, classed among the public service companies. While it may engage in any business authorized by its charter,⁷⁸ it has no implied power to engage in another business, not incidental to the business for which it was created. Thus, a railroad company has no power to engage in buying and selling goods,⁷⁹ or to speculate in land.⁸⁰ It cannot run a real estate business.⁸¹

Power to transport passengers does not include power to carry freight.⁸² And it cannot carry on an express business as an incidental power where not expressly authorized.⁸³ Likewise, it cannot carry on a warehouse business as a separate business.⁸⁴

On the other hand, power to operate a railroad includes power to construct and operate telegraph and telephone lines.⁸⁵

A railroad company may also own and operate a coal mine to furnish coal for its own use⁸⁶ or may own and operate an elevator for the handling of grain which it transports.⁸⁷ And it has been held that a railroad company may maintain a weighing machine in its yard for the use of customers in weighing coal carried over its road, and make a charge therefor, as this is reasonably incidental to its business as a common carrier of coal.⁸⁸

A railroad company created to operate an interurban railway with the right to employ "horse power and electricity, or such other power

⁷⁸ *Rogers v. Oxford, etc., Ry. Co.*, 2 De G. & J. 662.

⁷⁹ *Attorney General v. Great Northern Ry. Co.*, 1 Dr. & Sm. 154.

⁸⁰ *Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513.

See also Chap. 29, *infra*.

⁸¹ *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90.

⁸² *Baltimore & F. Turnpike Road v. United Ry. & Elec. Co.*, 93 Md. 138, 48 Atl. 723.

⁸³ *Dinsmore v. Louisville, C. & L. Ry. Co.*, 2 Fed. 465.

⁸⁴ *People v. Illinois Cent. R. Co.*, 233 Ill. 378, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181, 13 Ann. Cas. 285, 84 N. E. 368, 369.

State v. Morgan's Louisiana & T. R. & S. S. Co., 106 La. 513, 31 So. 115; *State v. Southern Pac. Co.*, 52 La. Ann. 1822, 28 So. 372.

"To be incidental business, the

storage must be preliminary either to immediate transportation or immediate removal." *State v. Southern Pac. Co.*, 52 La. Ann. 1822, 28 So. 372.

⁸⁵ *Logansport v. Smith (Ind. App.)*, 93 N. E. 883.

"A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon, to its fullest and most uninterrupted and beneficial use." *Western U. Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159.

⁸⁶ *State v. Missouri Pac. R. Co.*, 237 Mo. 338, 141 S. W. 643.

⁸⁷ *State v. Missouri Pac. R. Co.*, 237 Mo. 338, 141 S. W. 643.

⁸⁸ *London & Northwestern Ry. Co. v. Price*, 11 Q. B. Div. 485.

or motor as may now or hereafter prove practicable or desirable," may use steam power.⁸⁹

§ 883. — Location of road. A corporation created for the purpose of constructing and operating or maintaining a railroad between certain points or along a certain route cannot lawfully construct and maintain a road between other points or along another route.⁹⁰ Thus, a railroad company, authorized by its charter to construct and operate a road between certain termini only, cannot lawfully use its funds to extend its road beyond such termini.⁹¹ From power to construct a main line and an east branch, power to construct a west branch is not deducible.⁹² Where the railroad terminal is specified in the corporate articles, it is an excess of power for the corporation to condemn a crossing at a point fifteen miles beyond.⁹³

On the other hand, a charter authorizing the construction of a railroad to a place for shipping lumber on a tidewater river, gives the right of extending the road across the flats and over the tidewater, to a point at which the lumber may be conveniently shipped.⁹⁴

Where a railroad corporation is authorized to build its line on a most practicable route from a certain point "passing near" a village named, it may pass through such village.⁹⁵ Of course, there is no implied power to cross a city street, without municipal consent, although the company owns the land on both sides of the street.⁹⁶ Power to use city streets for constructing and operating its tracks does not necessarily authorize it to use such streets for switching its cars.⁹⁷ Statutes sometimes expressly authorize railroad companies to construct their road along or on a street on certain conditions and with the consent of the municipal authorities.⁹⁸

From power to construct terminal yards and roundhouses, a railroad corporation does not possess power to select a location therefor

⁸⁹ *Lewis v. Omaha & C. B. S. R. Co.*, 158 Iowa 137, 138 N. W. 1092.

⁹⁰ *North Eastern R. Co. v. Payne*, 8 Rich. (S. C.) 177; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

⁹¹ *Baltimore United Fire Department v. Creamer*, 17 Md. 243; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

⁹² *Boca & L. R. Co. v. Sierra Valleys R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

⁹³ *Boca & L. R. Co. v. Sierra Valleys R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

⁹⁴ *Peavey v. Calais R. Co.*, 30 Me. 498.

⁹⁵ *Hill v. Southern Ry.*, 67 S. C. 548, 46 S. E. 486.

⁹⁶ *Pittsburg Rys. Co. v. Pittsburg*, 226 Pa. 498, 75 Atl. 681, holding charter power to cross street does not extend to leased road.

⁹⁷ *Atlantic & B. R. Co. v. Montezuma*, 122 Ga. 1, 49 S. E. 738.

⁹⁸ *Gillette v. Aurora Rys. Co.*, 228 Ill. 261, 81 N. E. 1005.

destructive to private property.⁹⁹ Nor from power to occupy a street and sidewalk with a spur track may a railroad deduce power to lay and operate its tracks on the property of a private shipper to the irreparable injury of contiguous property.¹

§ 884. — Running boats or conveyances in connection with line.

It is held that a railroad company, in the absence of express authority in its charter, has no power to run a line of steamboats in connection with its railroad, but beyond its terminus, even though by so doing it may increase the business over its road.² But a railroad company may lawfully own boats for the purpose of transporting freight or passengers across navigable waters on its line, or across such waters at the end of its road and separating it from the substantial terminus;³ although even in such a case, and even where the right to establish a ferry was expressly granted, it was held that the railroad company could not run a ferry for others than the passengers on its railroad.⁴ Of course, steamboats may be run in connection with the line where expressly authorized by statute.⁵

The power of a railroad company to make necessary arrangements for conveying baggage or freight to and from its stations or depots, either by employing others or by running wagons itself has been upheld.⁶ But it seems that a railroad company has no incidental

⁹⁹ *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 368, 1 L. R. A. (N. S.) 49, 85 S. W. 881.

¹ *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201, 77 Pac. 849.

² *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *St. Joseph v. Saville*, 39 Mo. 460; *Hoagland v. Hannibal & St. Joseph R. Co.*, 39 Mo. 451. And see *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1. But see *Graham v. Macon, D. & S. R. Co.*, 120 Ga. 757, 49 S. E. 75, where the court said: "The railroad company either had, or, as matter of course, could have obtained the charter power to own and operate this boat on this river."

³ *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46, 89 Am. Dec. 147; *Shaw-*

mut Bank v. Plattsburgh & M. R. Co., 31 Vt. 491; *South Wales Ry. Co. v. Redmond*, 10 C. B. (N. S.) 675.

⁴ *Fitch v. New Haven, N. L. & S. R. Co.*, 30 Conn. 38; *Aikin v. Western R. Corporation*, 20 N. Y. 370.

⁵ *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. Ed. 413.

⁶ *Camblos v. Philadelphia & R. R. Co.*, Fed. Cas. No. 2,331, 4 Brewst. (Pa.) 563; *Attorney General v. Grand Trunk Ry. Co.*, 16 L. C. Rep. 91. But see *Macon v. Macon & W. R. Co.*, 7 Ga. 221.

In England, however, it has been held in a comparatively recent case that a railroad cannot run omnibuses to distribute and collect passengers on its line. *Attorney General v. Mersey Ry. Co.*, [1906] 1 Ch. 811, 4 Ann. Cas. 906.

power to run stages from its terminus to towns lying at a great distance from it.⁷

§ 885. — Refreshment houses, dining cars, hotels and Y. M. C. A. Eating houses and dining cars operated upon and along the lines of a railroad company are within its incidental powers, and this is also true as to hotels and lodging houses which are necessary for the convenience of the traveling public.⁸ And if a hotel and eating house is reasonably convenient and appropriate to the operation and maintenance of the road, it may be built or operated by the railroad company, although depending for part of its patronage upon the general public.⁹ And it has been held that if "the hotel or eating house is reasonably convenient and appropriate to the maintenance and operation of the road, it does not matter that it may come in competition with other places of like character."¹⁰ So it has been held that a contract by a railroad company for the building of a hotel by another at its depot, and to encourage the owners of the hotel with the patronage of the company and to dissuade all other parties from erecting hotels at that point, is neither in restraint of trade nor beyond the power of the corporation.¹¹ And the Supreme Court of the United States has held that a corporation operating a

⁷ Hood v. New York & N. H. R. Co., 22 Conn. 1.

⁸ United States. Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515.

⁹ Illinois. State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814.

¹⁰ Kentucky. Louisville Property Co. v. Com., 146 Ky. 827, 38 L. R. A. (N. S.) 830, 143 S. W. 412.

¹¹ Maryland. State v. Baltimore & O. R. Co., 48 Md. 49. Compare Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 3 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351, holding that such power did not go to the extent of authorizing the company to build and conduct a summer resort which, though it attracted travel, was in no sense essential to the operation of the road.

Oregon. Abraham v. Oregon & C.

R. Co., 37 Ore. 495, 64 L. R. A. 391, 82 Am. St. Rep. 779, 60 Pac. 899.

Virginia. National Car Advertising Co. v. Louisville & N. R. Co., 110 Va. 413, 24 L. R. A. (N. S.) 1010, 66 S. E. 88.

Wisconsin. Chicago, M. & St. P. R. Co. v. Board Sup'rs of Crawford, 48 Wis. 666, 5 N. W. 3.

England. Flanagan v. Great Western Ry. Co., L. R. 7 Eq. 116.

The charter of the Pullman Company has been construed to authorize to sell intoxicating liquors to the patrons of its cars. People v. Pullman's Palace Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

⁹ Abraham v. Oregon & C. R. Co., 41 Ore. 550, 69 Pac. 653.

¹⁰ Abraham v. Oregon & C. R. Co., 41 Ore. 550, 69 Pac. 653.

¹¹ Texas & St. Louis R. Co. v. Ro-

railroad in Florida could lease and maintain a hotel at the terminus of its road on a beach distant from any town.¹²

However, it seems that if a hotel is not necessary nor an addition to the comfort, convenience or safety of the railroad employees or passengers, but merely for the accommodation of the general public, the maintenance thereof is beyond the powers of a railroad company.¹³ And it was held in Maryland that hotels built and used primarily as places of summer resort, although as such they might attract travel over the road, were in no sense necessary to the operation of the road and were unauthorized.¹⁴

It would seem that there is no question as to the power of a railroad company to build and run Y. M. C. A. rooms at points along the line where employees congregate in considerable numbers.¹⁵

§ 886. — Relief funds and hospitals for employees. A railroad company may lawfully employ a surgeon to attend employees who may be injured in the course of their employment, or it may otherwise incur expense or liability on such account.¹⁶ Moreover, it is well settled that a railroad company may establish, or assist in establishing, a relief and hospital department from which injured employees may receive medical treatment and be paid weekly benefits, with a stipulated sum to the family of the employee in case of death.¹⁷

bards, 60 Tex. 545, 48 Am. Rep. 268.

¹² Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515.

¹³ Abraham v. Oregon & C. R. Co., 37 Ore. 495, 64 L. R. A. 391, 82 Am. St. Rep. 779, 60 Pac. 899.

¹⁴ Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 3 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351.

¹⁵ Louisville Property Co. v. Com., 146 Ky. 827, 38 L. R. A. (N. S.) 830, 143 S. W. 412.

¹⁶ Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

¹⁷ United States. Vickers v. Chicago, B. & Q. R. Co., 71 Fed. 139; Otis v. Pennsylvania Co., 71 Fed. 136. Contra, Miller v. Chicago, B. & Q. Ry. Co., 65 Fed. 305, so far as exempting railroad from liability for negligence is concerned.

Alabama. Harrison v. Alabama Midland R. Co., 144 Ala. 246, 6 Ann. Cas. 804, 40 So. 394.

Iowa. Maine v. Chicago, B. & Q. R. Co., 109 Iowa 260, 80 N. W. 315, 70 N. W. 630.

New Jersey. Beck v. Pennsylvania R. Co., 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908.

Ohio. State v. Pittsburgh, C., C. & St. L. R. Co., 68 Ohio St. 9, 64 L. R. A. 405, 9 Am. St. Rep. 635, 67 N. E. 93.

In Indiana railroad companies are forbidden by statute to maintain a relief association the rules of which require employees becoming members to surrender any right to sue for personal injuries. Acton v. Baltimore & O. S. W. R. Co., 59 Ind. App. 280, 108 N. E. 535.

The objection most often urged against the power of the railroad company is that it thereby engages in the insurance business, but it is held that there is a marked difference between such an undertaking and a regular insurance business. The reasons are forcibly presented by Justice Price in an Ohio decision as follows: "The railroad company is the depository of the fund so raised and is responsible for its management and safe-keeping, and agrees to make good any deficit in the fund, which becomes necessary to meet the proper demands of the relief department. This management is by the general manager of the company, and the advisory board, the latter being composed of persons mutually selected by members of the fund and the companies. Moreover, the railway company defrays all the expenses of the management, and the emergency services of the surgeons are rendered free by the company surgeons. Not a dollar of the fund ever belongs to the railway company, and it primarily is made up of a certain part of the wages of the employee, retained for that purpose by his direction. The concern has no capital stock. The doors to membership in this fund are not open to the general public. While an employee is not required to become a member, none but employees can do so. While it is true that the railroad company is the depository of the fund, and stands good for its safe-keeping and proper disbursement, it is after all, but the custodian of a certain portion of wages, which the employee directs shall be retained to produce the benefit fund, from which he may draw in times of sickness or other disablement. Is this an insurance business? It is not held out to be such. The objects stated in the organization and regulations are clearly otherwise. Neither the railway company nor its relief department advertises for, or in any other way solicits patronage. The members of the fund are volunteers. * * * Another marked distinction between the relief department and insurance business is, that there is no profit to the railway company, and no profit, in the business or commercial sense, to the members of the fund, except such increase of the fund as may arise by way of interest on its investment in case of a surplus."¹⁸

§ 887. Religious societies. The powers of an incorporated religious society are to be determined by its articles and the governing statutes.¹⁹

¹⁸ *State v. Pittsburgh, C., C. & St. L. R. Co.*, 68 Ohio St. 9, 64 L. R. A. 405, 9 Am. St. Rep. 635, 67 N. E. 93.

¹⁹ *Clark v. Brown* (Tex. Civ. App.), 108 S. W. 421.

A church, even for the purpose of raising money to help pay for the erection of its church building, cannot enter into a contract to hire a steamboat for the purpose of conducting a steamboat excursion for a day's pleasure.²⁰

Repairs and improvements of the parsonage property are clearly within the powers of an incorporated church, and it seems that the maintenance of a church sociable and aiding missionary societies connected with the church are also within its powers.²¹

A corporation organized to establish and conduct "Christian missions among the unevangelized or pagan nations" and for "the general diffusion of Christianity" has power to maintain secular schools and colleges in localities where it is attempting to spread the Gospel, and also to maintain a home for the returned, needy and worthy missionaries.²²

Power granted Spiritualists to erect and hold buildings includes power to carry on camp meetings in buildings erected for the purpose by the corporation;²³ and where the corporation was created to hold property and construct or erect a wharf, hotel and other public buildings, it was held to have implied authority to use its property as a summer resort and for camp meetings for Spiritualists.²⁴

A Sabbath committee, incorporated, cannot apply to revoke a theatre license where such an act is not within the powers conferred on the corporation.²⁵

²⁰ "A church incorporated as such cannot engage, even for a day, in merchandising, or in spinning or weaving, or in banking or booking, or in transporting freight or passengers. It must derive its income, not from the conduct of any worldly business, but from such property as it may happen to own, and from voluntary contributions. However urgent its needs for money, it cannot rent a farm to make a crop of corn or cotton, nor a store to buy and sell goods, nor a livery stable to let out horses and carriages, nor can it hire a vessel to transport the public upon rivers or the ocean. To charter a steamer, and sell tickets to the public for an excursion, is to enter into the responsibilities and hazards of a business, for

gain and profit, not mentioned or hinted at in 'the more efficient worship of God, the preservation and perpetuation of said church, and the better control and regulation of the property thereof.' " *Harriman v. First Bryan Bapt. Church*, 63 Ga. 186, 36 Am. Rep. 117.

²¹ *First Presb. Church in Village of Waterford v. McKallor*, 35 N. Y. App. Div. 98, 54 N. Y. Supp. 740.

²² *Boardman v. Hitchcock*, 136 N. Y. App. Div. 253, 120 N. Y. Supp. 1039.

²³ *Nye v. Whittemore*, 193 Mass. 208, 79 N. E. 253.

²⁴ *Nye v. Whittemore*, 193 Mass. 208, 79 N. E. 253.

²⁵ *In re New York Sabbath Committee*, 44 N. Y. Misc. 442, 89 N. Y. Supp. 992.

§ 888. Schools. Private schools, where incorporated, have the powers granted by the charter and such others as are reasonably necessary properly to conduct the school. But a corporation created to organize a school to support orphan and destitute children and to teach them trades and professions has no power to establish a pay-pupil department.²⁶

The powers of colleges and universities have already been noticed.²⁷

§ 889. Selling co-operative society. In Massachusetts, the members of a number of plumbing supply firms formed a corporation without stock for the purpose of "promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings." It was held that the corporation had no power to put on a blacklist so that none of the members would sell, except for cash, to those who owed any of the members an overdue bill and who failed to settle or give a good reason for not settling, after due notice given. The court said: "Assuming that a corporation might be formed to prosecute the business of collecting debts due to the persons who are members of the defendant corporation and of protecting them from selling upon credit to irresponsible customers, such a corporation would be a business enterprise, and, to be chartered, must have a capital stock and must comply with the provisions of Pub. Stat. c. 106, in order to obtain legal existence and have corporate rights and privileges."²⁸

§ 890. Sleeping car companies. The powers of sleeping car companies received a somewhat exhaustive review by the Supreme Court of Illinois in a case involving the powers of the Pullman Palace Car Company.²⁹ The power of the company to own and run a city of its own was denied;³⁰ but it was held that it could sell wines and liquors on its cars, and also that provision could be made in the plant for future growth in business by putting in boilers of sufficient capacity to generate steam required for future enlargements of the plant, and that the company could dispose of the steam not needed for immediate use to neighboring manufactories.

²⁶ Rankine v. De Veaux College, 41 N. Y. Misc. 655, 85 N. Y. Supp. 239.

²⁷ See § 867, *supra*.

²⁸ Hartnett v. Plumber's Supply Ass'n of New England, 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002.

²⁹ People v. Pullman Palace-Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

³⁰ See § 1092, *infra*.

§ 891. Steamboat companies. A steamboat company cannot buy and sell grain or other produce.³¹ Such a company does not engage in the hotel business merely by purchasing a hotel and leasing it to a third person; and this is so although the rent is to some extent dependent on the amount of business done by the lessee.³²

§ 892. Street railroads. Street railroads may do any act required by the reasonable necessities of the corporation and in furtherance of the public convenience.³³ For instance, they may use a city street for hauling cars to and from a car storehouse, where a majority of the abutting owners consent and the storehouse is located upon the only vacant land available.³⁴

Power to carry "persons and property in cars for compensation" is construed to authorize the operating of cars exclusively for carrying express matter, freight or property;³⁵ and the tendency of recent statutes is to confer on street railroad companies the power to carry merchandise for hire, at least so far as interurban companies are concerned.³⁶ In any event, it seems that a street railroad company, although limited in the use of its tracks to the transportation of passengers and their ordinary baggage, may run utility cars for carrying material and supplies for its own use in maintaining its railway system.³⁷ But power to construct a street railroad does not confer power to construct a freight belt railroad in and around a city, for the sole purpose of transferring freight cars to and from factories and other railroads.³⁸

A corporation formed under a general act relating to electric railways has been held to have power to operate a street railway system within a city although the articles of association state the purpose to be the operation of an interurban railway, where the statute provides that electric railway corporations may, "with the consent of the authorities of any city or town * * *, located along or upon its lines, construct a system of street railways upon such streets

³¹ *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

³² *Nantasket Beach Steamboat Co. v. Hinkel Brewing Co.*, 182 Mass. 147, 65 N. E. 57.

³³ *Brooklyn Heights R. Co. v. Brooklyn*, 152 N. Y. 244, 46 N. E. 509.

³⁴ *Brooklyn Heights R. Co. v. Brooklyn*, 152 N. Y. 244, 46 N. E. 509.

³⁵ *De Grauw v. Long Island Elec.*

Ry. Co., 43 N. Y. App. Div. 502, 60 N. Y. Supp. 163.

³⁶ *State v. Dayton Traction Co.*, 64 Ohio St. 272, 60 N. E. 291.

³⁷ *Waszkiewicz v. Milwaukee Elec. Railway & Light Co.*, 147 Wis. 422, 133 N. W. 596.

³⁸ *South & N. W. R. Co. v. Highland Ave. & Belt R. Co.*, 119 Ala. 105, 24 So. 114.

* * *.”³⁹ It would seem that a street railroad company may place advertisements in its cars.⁴⁰

It has been held that the New York City subway has power to maintain in its stations automatic weighing and vending machines.⁴¹

A street railway company has no power, by virtue of its own charter, to pave city streets, outside and independently of the consent of the city itself.⁴²

It has been held that a street railway company running to a suburb of the city cannot aid a land company in such suburb, although its tendency is to increase the business of the street railway, “for the reason that the benefit which was to accrue was not the direct result of the means employed.”⁴³ On the other hand, it has been held that a street railway company may agree to pay a certain sum if baseball grounds are changed to a place on its line and the game conducted in the new location for a certain number of years.⁴⁴

Where the municipal authorities do not object, power to lay double tracks upon the streets of a municipality is embraced within a general power to build a line of street railway in the city.⁴⁵

§ 893. Telegraph and telephone companies. The powers of telegraph and telephone corporations are very similar.⁴⁶ A telephone company has implied power to erect poles, string wires, operate exchanges, etc.;⁴⁷ and this is true although the statute merely provides for incorporating for the purpose of “manufacturing electricity for telephone purposes, etc.,” since “etc.” will be construed as importing other purposes of like character.⁴⁸ A telegraph company may, it seems, engage in the “ticker” business.⁴⁹

³⁹ Overholser v. Oklahoma Interurban Traction Co., 29 Okla. 571, 119 Pac. 127.

⁴⁰ See Burns v. St. Paul City R. Co., 101 Minn. 363, 12 L. R. A. (N. S.) 757, 112 N. W. 412, and see § 813, *supra*.

⁴¹ New York v. Interborough Rapid Transit Co., 53 N. Y. Misc. 126, 104 N. Y. Supp. 157. To the same effect, see London & Northwestern Ry. Co. v. Price, L. R. 11 Q. B. D. 485.

⁴² Farson v. Fogg, 205 Ill. 326, 68 N. E. 755, rev'g 105 Ill. App. 572.

⁴³ Northside Ry. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

⁴⁴ Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634, 37 Pac. 530.

⁴⁵ Brown v. Atlanta Railway & Power Co., 113 Ga. 462, 39 S. E. 71.

⁴⁶ See People v. Ellison, 188 N. Y. 523, 81 N. E. 447 (construction of subways for laying conduits).

⁴⁷ Doty v. American Telephone & Telegraph Co., 123 Tenn. 329, Ann. Cas. 1912 C 167, 130 S. W. 1053.

⁴⁸ Doty v. American Telephone & Telegraph Co., 123 Tenn. 329, Ann. Cas. 1912 C 167, 130 S. W. 1053.

⁴⁹ Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 N. E. 107, aff'g 137 Ill. App. 131.

Power to conduct a telegraph line, under the general provisions of the statutes applying to both alike, usually authorizes the doing of a telephone business, and vice versa;⁵⁰ but there are recent decisions holding that a telegraph company is not authorized to do a telephone business.⁵¹ Of course, where expressly authorized by statute, such a company may also do an electric light business.⁵²

§ 894. Trading companies. A trading company authorized to deal in certain goods only cannot lawfully engage in buying and selling other goods.⁵³

A corporation created for the purpose of "buying, selling, leasing and dealing in lands, securities, bonds, notes, stocks and other negotiable paper, and also buying and selling general merchandise" cannot construct and operate a cotton gin.⁵⁴

It is not ultra vires for a trading corporation to acquire the good-will of a certain business and protect that good-will against unfair encroachments of competitors.⁵⁵

§ 895. Trust companies. The powers of trust companies are generally expressly defined by statute.⁵⁶

The implied powers of a trust company are even more limited than those of other corporations; and it has been said that "the legislature intended, and the public interests demand, that trust companies shall be confined not only within the words, but also within

⁵⁰ *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; *Duke v. Central New Jersey Tel. Co.*, 53 N. J. L. 341, 11 L. R. A. 664, 21 Atl. 460.

⁵¹ *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 43 L. Ed. 1162; *Home Tel. Co. v. Nashville*, 118 Tenn. 1, 11 Ann. Cas. 824, 101 S. W. 770.

⁵² *Brown v. Maryland Telephone & Telegraph Co.*, 101 Md. 574, 61 Atl. 338.

⁵³ *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665 (where it was held that a corporation for buying and selling dairy products could not buy and sell oysters).

In a Pennsylvania case it was held that a corporation authorized by its

charter to engage in "any work or works, public or private, which might tend or be designed to improve, increase, facilitate or develop trade," might engage in the business of producing and supplying natural gas, under the Natural Gas Act, the preamble of which declares that natural gas has become "a prime necessity for use as a fuel and otherwise in the development of trade." *Carothers v. Philadelphia Co.*, 118 Pa. St. 468, 12 Atl. 314.

⁵⁴ *Harrill v. Davis*, 168 Fed. 187, 22 L. R. A. (N. S.) 1153.

⁵⁵ *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879.

⁵⁶ *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140 (New York statute).

the spirit of the statutory provision which declared that a corporation shall not possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given.”⁵⁷ Thus a trust company cannot “enter into speculative and uncertain schemes”; and its “authority to buy and sell stocks and bonds does not authorize it to indulge in hazardous promoting schemes, although it may hope from the successful launching of such schemes to make large commissions and receive large bonuses.”⁵⁸ And a trust company has no power to enter into a pooling agreement to protect the securities of another corporation in the market,⁵⁹ nor to make a contract to promote a business corporation.⁶⁰ In like manner, it has no power to purchase a controlling interest in the stock of a bank, for the purpose of managing and operating such bank, since it has no authority to engage in a banking business.⁶¹ But power to sell bonds of another company includes power to publish a prospectus of the bonds offered for sale.⁶²

A trust company which is authorized to receive money on deposit has power to issue certificates of deposit in the usual form.⁶³

The execution of a note for the benefit of a railroad corporation which it is financing is within the power of a trust company clothed with statutory power, among other things, to act as agent or attorney in fact in the management of property, to execute trusts, to loan money on pledge, and to buy and sell securities.⁶⁴

§ 896. Turnpike companies. A turnpike company has no power to purchase wagons and horses, and engage in transporting passengers

⁵⁷ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N. S.) 967, 89 N. E. 476, aff'g 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080.

⁵⁸ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N. S.) 967, 89 N. E. 476, aff'g 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080.

⁵⁹ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N. S.) 967, 89 N. E. 476, aff'g 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080.

⁶⁰ *Richard v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359.

⁶¹ *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S. W. 669.

⁶² *Kavanaugh v. Gould*, 147 N. Y. App. Div. 281, 131 N. Y. Supp. 1059, rev'g 64 N. Y. Misc. 303, 118 N. Y. Supp. 758, which held that the company could not issue a prospectus to further the purchase of securities in a shipbuilding combination, which would involve the company in liability for damages in case false statements should be contained therein.

⁶³ *Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania*, 105 Fed. 491.

⁶⁴ *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 70 L. R. A. 79, 86 S. W. 109.

for hire, even over its own road.⁶⁵ Nor has it power to contract for carrying the United States mail.⁶⁶

§ 897. Warehouse companies. A warehouse corporation has power to agree to collect for a cotton ginner the ginning charges when the customers of the warehouse take their cotton out, in consideration of the ginner agreeing to deliver to the warehouse company all cotton ginned by him, on the theory that it increases business.⁶⁷

§ 898. Water companies. A water company has power to do what is necessary to carry out the purposes authorized by its charter,⁶⁸ but has no right to take or make use of the property of other persons or of the state until it has acquired such property in a legal way.⁶⁹ So it has no lawful right to put its water into, or to maintain it upon, the premises of another, without the consent of the owner or occupant.⁷⁰ It has incidental power to cut and store ice from its reservoirs.⁷¹

Power to take water for the extinguishment of fires, and for domestic, sanitary and "other purposes" does not authorize a water company to take and furnish water for polishing granite.⁷²

A water supply company may make contracts with a manufacturing company to furnish it water in consideration of a grant of certain water rights.⁷³

The rights of water companies to use streets and highways is considered in a subsequent chapter.⁷⁴ Powers of such a company outside the state have already been noticed.⁷⁵

⁶⁵ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Wiswall v. Greenville & R. Plank Road Co.*, 56 N. C. 183.

⁶⁶ *Wiswall v. Greenville & R. Plank Road Co.*, 56 N. C. 183.

⁶⁷ *Farmers' Union Warehouse Co. v. Hollis*, 8 Ga. App. 339, 69 S. E. 33.

⁶⁸ *Niagara Co. Irrigation & Water Supply Co. v. College-Heights Land Co.*, 111 N. Y. App. Div. 770, 98 N. Y. Supp. 4.

⁶⁹ *Niagara Co. Irrigation & Water Supply Co. v. College-Heights Land Co.*, 111 N. Y. App. Div. 770, 98 N. Y. Supp. 4.

⁷⁰ *City Water Co. v. Silverfarb*, 128 Ill. App. 215.

⁷¹ *People v. Kirk*, 65 N. Y. Misc. 657, 122 N. Y. Supp. 604.

To the same effect, see *Shaaber v. Angelica Water Co. (Pa.)*, 17 Atl. 209.

⁷² *Smith v. Barre Water Co.*, 73 Vt. 310, 50 Atl. 1055, following *In re Barre Water Co.*, 62 Vt. 27, 9 L. R. A. 195, 20 Atl. 109.

"Other purposes" means other like purposes, i. e., such as are for a public use. In *re Barre Water Co.*, 62 Vt. 27, 9 L. R. A. 195, 20 Atl. 109.

⁷³ *S. O. & C. Co. v. Ansonia Water Co.*, 83 Conn. 611, 78 Atl. 432.

⁷⁴ See Chap. 31, *infra*.

⁷⁵ See § 808, *supra*.

CHAPTER 22

CONTRACTS IN GENERAL

- § 899. Scope of chapter.
- § 900. General rule.
- § 901. Contracts foreign to objects for which corporation created—General rule.
- § 902. — Contracts beneficial to corporation.
- § 903. — Consent or ratification by stockholders.
- § 904. Illegal contracts—In general.
- § 905. — Contracts prohibited by charter or statute.
- § 906. — Contracts against public policy.
- § 907. Contracts between corporation and its officers, agents or stockholders.
- § 908. Contracts as binding on other corporations.
- § 909. Contracts before incorporation or organization.
- § 910. Contracts in anticipation of authority.
- § 911. Assumption of pre-existing debts.
- § 912. Assumption of contracts of predecessors.
- § 913. Contracts between different corporations.
- § 914. Contracts by quasi public corporations.
- § 915. Employment of agents, attorneys and servants.
- § 916. Implied contracts.
- § 917. Limitation of indebtedness—In general.
- § 918. — Increase in indebtedness.
- § 919. — Debts to which the prohibition applies.
- § 920. — Mere change in form of indebtedness.
- § 921. Construction of contracts.
- § 922. Presumptions and evidence.

§ 899. Scope of chapter. Questions relating to the right to enforce or liability on contracts not within the power of a corporation,¹ or contracts which are not only ultra vires but also illegal,² as well as questions as to the powers of particular officers or agents of corporations to enter into particular contracts on behalf of the corporation³ are treated of in subsequent chapters.

Likewise, the form, contents, requisites, manner of making, etc., of corporate contracts,⁴ as well as the necessity and effect of a seal,⁵ are the subjects of other chapters.

The power to become a partner is also treated of elsewhere.⁶

¹ See Chap. 37, *infra*.

⁴ See Chap. 35, *infra*.

² See Chap. 38, *infra*.

⁵ See Chap. 19, *supra*.

³ See chapter on Officers and Agents, *infra*.

⁶ See § 841, *supra*.

Furthermore, many decisions relating to the power to make a particular contract, where in reality reducible to the power to do a certain act and where the contract feature is merely incidental, have been considered in a preceding chapter.⁷

So the right to contract to purchase⁸ or to sell⁹ property, being considered as in effect the right to purchase or sell property, are treated of in other chapters.

§ 900. General rule. The power to make valid contracts is measured by the charter.¹⁰ But the power to contract like an individual need not be expressly conferred upon a corporation by its charter. It is always implied, in the absence of express restrictions, subject to the qualification that the contract must not be foreign to the purposes for which the corporation was created. The general rule is that a corporation, in the absence of express restrictions, has the same power as a natural person to enter into any contract which is necessary to enable it to carry on the business and accomplish the objects for which it was created, or which, though not necessary, in the sense of indispensable, is reasonably incidental to such business.¹¹ In other

⁷ See Chap. 21, *supra*.

⁸ See Chap. 28 and Chap. 29, *infra*.

⁹ See Chap. 32, *infra*.

¹⁰ *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 69 Neb. 220, 95 N. W. 819, 62 Neb. 472, 87 N. W. 156.

¹¹ *United States. Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. Ed. 413; *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843.

Alabama. *Alabama Gold Life Ins. Co. v. Central Agricultural & Mechanical Ass'n*, 54 Ala. 73.

Arkansas. *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W. 162.

District of Columbia. *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473.

Illinois. *Venner v. Chicago City Ry. Co.*, 236 Ill. 349, 86 N. E. 266; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, *aff'g* 41 Ill. App. 268.

Indiana. *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

Maine. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573, 74 Am. Dec. 507.

Massachusetts. *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *William R. Bush Const. Co. v. Bambrick-Bates Const. Co.*, 176 Mo. App. 608, 159 S. W. 738.

New York. *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *Moss v. Averill*, 10 N. Y. 449.

Ohio. *Cleveland & M. R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321, 41 Am. Rep. 509.

Oklahoma. *Southwestern Surety*

words, "in the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation, and it is always presumed that any proper contract may be made whose scope and tendency are manifestly to further the design and purposes of its creation."¹²

The power to contract "inheres in every corporation and is co-extensive with its corporate powers."¹³ Thus, railroad companies may lawfully make all necessary contracts for increasing their own business and for expeditiously and economically carrying it on.¹⁴ So banking corporations, including national banks, owning real estate for use in the transaction of their business, may, for the purpose of securing light and air, make a contract to prevent the erection of buildings on the adjoining land.¹⁵

While a manufacturing company cannot go into the insurance business, it may, as incidental to a contract for a sprinkler equipment to its plant, agree to assume the risk for any loss by fire to the contractor's property while engaged in the work.¹⁶

Ins. Co. v. Davis, — Okla. —, 156 Pac. 213.

Oregon. *Killingsworth v. Portland Trust Co.*, 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

Pennsylvania. *Hand v. Clearfield Coal Co.*, 143 Pa. St. 408, 22 Atl. 709.

Virginia. *Norfolk & W. R. Co. v. Shippers' Compress Co.*, 83 Va. 272, 2 S. E. 139.

Wisconsin. *Jacobs v. Wisconsin Nat. Life Ins. Co.*, 162 Wis. 318, 156 N. W. 159.

England. *Simpson v. Directors of Westminster Palace Hotel Co.*, 8 H. L. Cas. 712; *London & N. W. Ry. Co. v. Price*, 11 Q. B. D. 485.

¹²*Spangler v. Butterfield*, 6 Colo. 356, 364.

"In deciding, therefore, whether a corporation can make a particular contract, it must be considered in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as

directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose." *Weckler v. First Nat. Bank of Hagerstown*, 42 Md. 581, 590, 20 Am. Rep. 95.

¹³*Portland Lumbering & Manufacturing Co. v. East Portland*, 18 Ore. 21, 6 L. R. A. 290, 22 Pac. 536.

¹⁴*Delaware, L. & W. R. Co. v. Kutter*, 147 Fed. 51; *United States v. Delaware, L. & W. R. Co.*, 40 Fed. 101.

A contract for a term of years to build up and conduct the business of transportation of milk over the lines of the contracting railroad, in consideration of twenty per cent. of the freight charges, is not ultra vires, where no shippers of milk were injured thereby and the contract was not in restraint of trade. *Delaware, L. & W. R. Co. v. Kutter*, 147 Fed. 51.

¹⁵*Trustees of First Presbyterian Church in Newark v. National State Bank*, 57 N. J. L. 27, 29 Atl. 320.

¹⁶*Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co.*, 148 Fed. 159.

A railroad company, in consideration of financial aid by a municipality, may contract to operate towboats, with convenient barges, at points on the river along which its line runs, so as to furnish transportation to freight and produce in seasons of low water.¹⁷

A distilling company authorized to maintain a warehouse and issue receipts has power to contract with a purchaser or pledgee of such receipts that it will not assert as against it any claim for storage.¹⁸

Further illustrations of contracts held to be within the powers of particular corporations are given in a preceding chapter.¹⁹

Moreover, as stated in subsequent chapters, a corporation, in the absence of express restrictions, and so long as it is acting for a legitimate corporate purpose, has the power to borrow money,²⁰ to become a party to negotiable instruments,²¹ to issue bonds,²² to enter into contracts jointly with another,²³ and to take security.²⁴ So, under some circumstances, although not generally, it may loan money²⁵ and may become guarantor or surety.²⁶ And a corporation may submit matters to arbitration,²⁷ or may enter into a compromise,²⁸ or may offer a reward in a proper case.²⁹

A de facto corporation may make contracts which will be enforced against it the same as if it was de jure.³⁰ So where a statute requires that before a corporation shall commence business, it shall file an affidavit that not less than a certain per cent. of the stock has been paid in, contracts made before such filing are valid as between the parties.³¹

Corporations are capable of making contracts even with the power that creates them, or with subsequent legislatures, and such contracts, when made, are under the same protection as other contracts.³²

§ 901. Contracts foreign to objects for which corporation created—General rule. On the other hand, a corporation has no power to

¹⁷ *Atkins v. Shreveport & R. R. Val. Ry. Co.*, 106 La. 568, 31 So. 166.

¹⁸ *National Deposit Bank v. Louisville City Nat. Bank*, 23 Ky. L. Rep. 81, 62 S. W. 725.

¹⁹ See Chap. 21, *supra*.

²⁰ See Chap. 25, *infra*.

²¹ See Chap. 26, *infra*.

²² See Chap. 27, *infra*.

²³ See § 906, *infra*. Contracts of partnership, however, are generally unauthorized. See § 841, *supra*.

²⁴ See Chap. 25, *infra*.

²⁵ See Chap. 25, *infra*.

²⁶ See Chap. 23, *infra*.

²⁷ See § 816, *supra*.

²⁸ See § 823, *supra*.

²⁹ See § 845, *supra*.

³⁰ *Doty v. Patterson*, 155 Ind. 66, 56 N. E. 668; *Leader Realty Co. v. Lakeview Land Co.*, 127 La. 1059, 54 So. 350, statutory reiteration of rule. See also Chap. 10, *supra*.

³¹ *Murdock v. Lamb*, 92 Kan. 857, 142 Pac. 961.

³² *State v. Bank of Smyrna*, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

enter into any contract which is foreign to the objects for which it was created.³³

"A corporation and an individual," said the Missouri court in an early case, "do not stand upon the same footing in regard to the

³³ **United States.** *Pearce v. Madison & I. R. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184.

Alabama. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122.

California. *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855.

Connecticut. *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560.

Illinois. *Best Brewing Co. v. Klasse*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626.

Indiana. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592.

Iowa. *Twiss v. Guaranty Life Ass'n*, 87 Iowa 733, 43 Am. St. Rep. 418, 55 N. W. 8; *Bathe v. Decatur Co. Agr. Society*, 73 Iowa 11, 5 Am. St. Rep. 651, 34 N. W. 484; *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771.

Maine. *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

Maryland. *Weckler v. First Nat. Bank of Hagerstown*, 42 Md. 581, 20 Am. Rep. 95.

Massachusetts. *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

Michigan. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 552, 23 N. W. 628.

Minnesota. *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 46 Am. Dec. 129.

New Hampshire. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

New York. *People v. Campbell*, 144 N. Y. 166, 38 N. E. 990; *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12 N. E. 583; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14.

Ohio. *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425.

Tennessee. *Buckeye Marble & Free-stone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

Wisconsin. *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781; *Rock River Bank v. Sherwood*, 10 Wis. 230, 78 Am. Dec. 669.

England. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

Where a brick manufacturing company was authorized, among other things, to enter into contracts to do work to construct improvements wherein clay products were used, it has no implied power to contract with another company to not "ship to a specified locality materials in which it has no interest, in competition with which it deals in no commodity, and in contracts contemplated involving the use of which it had no concern." *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co. (Iowa)*, 126 N. W. 190.

right of contracting. The latter may make all contracts which in the eye of the law are not inconsistent with the interests of society; whereas, the former, being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. It can not only make no contracts forbidden by its charter, but it can only make those which are necessary to effectuate the purposes of its creation."³⁴

For example, it has been held that a manufacturing and trading company, authorized by its charter to make and sell particular articles only, cannot lawfully contract to sell other property.³⁵ An insurance company cannot lawfully insure against risks other than those against which its charter authorizes it to insure.³⁶ And a boom company, authorized by its charter to boom lumber, cannot contract to drive lumber.³⁷ A corporation created for the purpose of manufacturing and leasing railway carriages, etc., cannot lawfully purchase a concession for the construction of a railroad, and contract for the construction and operation of the same.³⁸ Nor can a corporation created for the purpose of constructing and maintaining a toll road engage in the business of transporting passengers over the road for hire, or contract for the purchase of vehicles for such purpose.³⁹ Nor can a national bank contract to obtain on property of other persons, and turn over to a person, a certain amount of fire insurance, in consideration of such person's promise to procure it a customer.⁴⁰ And it has been held in Georgia that a fire company or a religious corporation (and the same reasoning would apply to other corporations) cannot contract for the use of a steamer to convey its members and their families, or other persons, on an excursion, or engage in selling tickets for such an excursion.⁴¹ So a contract by which one corporation surrenders the management and control of its affairs to another corporation, is *ultra vires* where there are conflicting interests existing

³⁴ *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 565, 47 Am. Dec. 129.

³⁵ *Simmons v. Troy Iron Works* 92 Ala. 427, 9 So. 160, where it was held *ultra vires* for a corporation authorized to manufacture, sell, and operate machinery of all kinds, and to carry on such other business as pertains or belongs to machine shops or foundries, to contract to furnish a person with ice. See also § 828, *supra*.

³⁶ See § 872, *supra*.

³⁷ *Bangor Boom Corporation v. Whiting*, 29 Me. 123.

³⁸ *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

³⁹ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

⁴⁰ *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567.

⁴¹ *Harriman v. First Bryan Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117; *Screven Hose Co. v. Philpot*, 53 Ga. 625.

between the two corporations which are formed for a different purpose and carry on a wholly different business.⁴² Further illustrations of want of authority to contract have been noticed in a preceding chapter.⁴³

As a general rule, a corporation has no power to enter into a contract for the purpose of aiding other enterprises; but there may be circumstances under which a donation or subscription in aid of another enterprise would be a legitimate mode of accomplishing its own objects, and in such a case the contract is authorized. This question has been considered in treating of the power of corporations to transfer their property.⁴⁴

§ 902. — Contracts beneficial to corporation. The fact that a particular contract will be beneficial to a corporation, and increase its business and profits, is entitled to consideration in determining whether the contract is necessary or proper in the conduct of its business;⁴⁵ but this fact does not render *intra vires* a contract which is clearly foreign to the objects of its creation.⁴⁶ Thus, the fact that its business and profits will be increased does not give a corporation created for the purpose of manufacturing and leasing railroad carriages, etc., the power to purchase a concession for the construction of a railroad and to contract for constructing and operating the same;⁴⁷ or give a corporation created for the purpose of constructing and maintaining a turnpike or road, and taking tolls for travel thereon, power to run vehicles over its road for the carriage of passengers or freight, or to contract for the purchase of vehicles for such purpose.⁴⁸ So a building stone company, in order to effect

⁴² *Holt v. California Development Co.*, 161 Fed. 3.

⁴³ See Chap. 21, *supra*.

⁴⁴ See § 872, *supra*.

⁴⁵ *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; *Sherman Center Town Co. v. Russell*, 46 Kan. 382, 26 Pac. 715.

⁴⁶ *United States. Pearce v. Madison & I. R. R. Co.*, 21 How. 441, 16 L. Ed. 184.

Illinois. See *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, *rev'd* 85 Ill. App. 464.

Massachusetts. *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep.

221. And see *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567.

New Hampshire. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

New York. See *People v. Campbell*, 144 N. Y. 166, 38 N. E. 990.

Washington. *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047.

England. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

⁴⁷ *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

⁴⁸ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

a sale of building material, has no power to contract to do the excavation and groundwork for a building, at least where the amount to be paid for the work is as large as the price of the material to be furnished by it.⁴⁹

§ 903. — Consent or ratification by stockholders. The fact that all the stockholders of a corporation consent to a contract which is foreign to the objects of the corporation does not make it any the less *ultra vires*, since the powers of a corporation depend, not upon the consent of its stockholders, but upon the powers granted by the state.⁵⁰ And it follows that an *ultra vires* contract by a corporation does not become binding because of ratification by all the stockholders.⁵¹

§ 904. Illegal contracts—In general. A contract may be beyond the power of a corporation but not illegal on the part of an individual. On the other hand, a contract made by a corporation may be actually illegal even if made by an individual. The rule is that any contract which would be illegal if entered into between natural persons is illegal when entered into between corporations, or between a corporation and a natural person, unless the charter of the corporation renders the law inapplicable to it.⁵² This matter is treated of at greater length in a subsequent chapter.⁵³

§ 905. — Contracts prohibited by charter or statute. In a broad sense, every contract by a corporation which is not within the powers conferred upon it by its charter is in violation of law and contrary to public policy, but these expressions are generally used in a narrower sense. A contract by a corporation may be illegal for other reasons than because it is not authorized by its charter. A corporation is on substantially the same footing as a natural person with respect to agreements which are unlawful because of their being in violation of positive law. Unless expressly authorized by its charter, it can enter into no agreement which would be void on such a ground

⁴⁹ *Mitchell v. Hydraulic Bldg. Stone Co.*, 61 Tex. Civ. App. 131, 129 S. W. 148.

⁵⁰ See § 801, *supra*.

⁵¹ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Ash-*

bury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, rev'g L. R. 9 Exch. 224.

⁵² *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

⁵³ See Chap. 38, *infra*.

if entered into by an individual.⁵⁴ So a corporation cannot enter into any contract which is expressly prohibited by its statutory charter. Such a contract is not only ultra vires as in excess of the powers conferred upon the corporation by its charter, but it is illegal because it is in violation of an express statutory prohibition.⁵⁵

Thus, a corporation is within a statute prohibiting any person from exercising banking privileges without authority from the legislature, and a contract entered into by a corporation in the course of conducting a banking business without such authority is void.⁵⁶ The same is true of contracts in violation of the Sunday laws,⁵⁷ or of the statutes against usury,⁵⁸ etc.

Where the statute provides for the issuance of certificates of indebtedness of a certain nature and for a certain purpose, it impliedly prohibits the corporation from issuing certificates for any other purposes.⁵⁹

A statutory provision that "it shall not be lawful for the corporation, or directors, to contract any debt or liability against the corporation for any purpose whatever" is to be construed according to its intent rather than literally; and where the corporation is expressly authorized by the same statute to buy land for its business, employ and compensate help, do a banking business, buy bonds, etc., the bank is merely prohibited from incurring liabilities not authorized by the latter provisions.⁶⁰

A corporation cannot, by ratifying an agreement with promoters or otherwise, provide for the management of its affairs in a manner different from that prescribed by the statute under which the corporation was organized.⁶¹

Whether or not a corporation can be held liable upon, or enforce, a contract prohibited by law, is considered at length in another chapter.⁶²

⁵⁴ See Chap. 38, *infra*.

⁵⁵ *Canton Masonic Mut. Benev. Society v. Rockhold*, 26 Ill. App. 141, *aff'd* 129 Ill. 440, 21 N. E. 794; *Plummer v. Penobscot Lumbering Ass'n*, 67 Me. 363; *Rendall v. Crystal Palace Co.*, 4 Kay & J. 326.

⁵⁶ *People v. Utica Ins. Co.*, 15 Johns. (N. Y.), 358, 8 Am. Dec. 243.

⁵⁷ *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 4 L. R. A. 466, 16 Am. St. Rep. 695, 42 N. W. 872.

⁵⁸ *Commercial Bank of Manchester v. Nolan*, 7 How. (Miss.) 508.

⁵⁹ *Bade v. Ferncliff Cemetery Ass'n*, 91 N. Y. Misc. 26, 154 N. Y. Supp. 161.

⁶⁰ *Laidlow v. Pacific Bank* (Cal.), 67 Pac. 897, *rev'd* 137 Cal. 392, 70 Pac. 277.

⁶¹ *Bond v. Atlantic Terra Cotta Co.*, 137 N. Y. App. Div. 671, 122 N. Y. Supp. 425, 66 N. Y. Misc. 546, 123 N. Y. Supp. 1085.

⁶² See Chap. 38, *infra*.

§ 906. — **Contracts against public policy.** A contract which is against public policy cannot be entered into by a corporation.⁶³ Thus, a corporation is just as much subject as an individual to the rule which forbids and renders void a lobbying contract, or contract contemplating the use of improper means to influence or prevent legislation;⁶⁴ or an unlawful agreement to withdraw opposition to the passage of a bill pending before the legislature;⁶⁵ or a contract contemplating the use of improper means to procure a contract from public officers;⁶⁶ or an agreement contemplating the commission of a fraud upon another corporation or person, or a breach of trust by an officer or agent of a corporation or other person.⁶⁷

A corporation is also within the rule prohibiting a contract in unreasonable restraint of trade or tending to create a monopoly and prevent competition.⁶⁸ Thus, a statute authorizing street railway

⁶³ *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

⁶⁴ *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314, 14 L. Ed. 953; *Reed v. Peper Tobacco Warehouse Co.*, 2 Mo. App. 82; *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; *Chippewa Valley & S. Ry. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. 17.

⁶⁵ *Scottish Northeastern Ry. Co. v. Stewart*, 3 Macq. H. L. 382.

A corporation cannot grant privileges to individuals in consideration of their withdrawal of opposition, on public grounds, to the passage of an act affecting the interests of the corporation. *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676. This does not apply, however, where the opposition is of a private character, and for the protection of purely private interests, and there is no design to conceal the arrangement from the legislature. *Low v. Connecticut & Passumpsic Rivers R. Co.*, 46 N. H. 284.

A contract by a corporation collecting lawful fees due public officers, by which it is to retain a portion of such

fees in consideration of forbearance to take steps to procure the repeal of the law by which the offices were created, is illegal on grounds of public policy. *Reed v. Peper Tobacco Warehouse Co.*, 2 Mo. App. 82.

⁶⁶ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868.

⁶⁷ Thus a contract is illegal and void where its object is to influence directors of a corporation to act for the benefit of others, and to the prejudice of the corporation. *Bliss v. Matteson*, 52 Barb. (N. Y.) 335, aff'd 45 N. Y. 22.

⁶⁸ *McCarter v. Firemen's Ins. Co.* (N. J.), 73 Atl. 80.

United States. *Oliver v. Gilmore*, 52 Fed. 562.

Illinois. *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349; *Distilling & Cattle-Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188.

Nebraska. *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155.

New Hampshire. *Manchester & L. R. R. Co. v. Concord R. R. Co.*, 66 N. H. 100, 9 L. R. A. 689, 49 Am. St. Rep. 582, 20 Atl. 383.

companies to sell or lease their property to other companies does not authorize a contract prohibiting one company operating its road in territory occupied by the other.⁶⁹

What are known as "trust" agreements between corporations for the purpose of stifling competition and creating a monopoly are illegal, and not merely ultra vires. A corporation created for the purpose of distilling and selling whisky cannot buy up all the distilleries in the state, and thus acquire a monopoly in the business, for such a transaction is not only beyond the powers conferred upon it by its charter, but is contrary to public policy and void because it is in restraint of trade, and prevents competition.⁷⁰ The same is true of a contract between railroad companies for the purpose of preventing fair competition and creating a monopoly.⁷¹

On the other hand, no public policy is violated by a contract be-

New York. *Diamond Match Co. v. Roerber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

Ohio. *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660.

Pennsylvania. *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 24 L. R. A. 247, 41 Am. St. Rep. 894, 29 Atl. 102.

A contract in restraint of trade is not rendered lawful by the fact that the articles affected by it are not necessities of life. It has been held, therefore, that a pool or combination among corporations to control the price of beer in a city or county is unlawful. *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 24 L. R. A. 247, 41 Am. St. Rep. 894, 29 Atl. 102. See also *Distilling & Cattle-Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188.

A charter authorizing a corporation to engage in a general distilling business, and to own property necessary for that purpose, does not authorize it to form a trust or combination, and thus create a monopoly of such business. *Distilling & Cattle-Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188.

But contracts of corporations, like contracts of individuals, are not illegal because of their being in restraint of trade, if the restraint is reasonable under the circumstances. *Diamond Match Co. v. Roerber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

In a New York case it was held that a contract by a steamship company to pay a certain sum of money monthly to the owner of a competing line in consideration of his discontinuing running his vessels over that route, and agreeing not to sell or charter his vessels for use thereon, nor to be in any way connected with or interested in steamships running over it, was neither ultra vires nor contrary to public policy, as being in unreasonable restraint of trade. *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363.

⁶⁹ *Evansville, S. & N. R. Co. v. Evansville & E. Elec. Ry.*, 50 Ind. App. 502, 98 N. E. 649.

⁷⁰ *Distilling & Cattle-Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188.

⁷¹ *State v. Hartford & N. H. R. Co.*, 29 Conn. 538.

tween a railroad corporation and a firm by which the firm agrees to secure and operate a boat, each of the parties to receive and deliver goods for transportation to the other party, the railroad corporation further agreeing as part of the contract to make certain further expenditures for the purpose of expediting the handling of goods.⁷²

The law relating to monopolies and corporate trusts⁷³ and the question as to whether any rights and liabilities can arise out of contracts with corporations which are contrary to public policy are considered elsewhere.⁷⁴

§ 907. Contracts between corporation and its officers, agents or stockholders. Contracts between a corporation and its officers are, as a general rule, not void, but only voidable where not in good faith or injurious to the corporation.⁷⁵ Likewise, stockholders of a corporation may contract with it, although majority stockholders will not be permitted to make contracts in their own interest which are unfair and oppressive to the minority.⁷⁶

§ 908. Contracts as binding on other corporations. A contract made by one corporation is sometimes binding on another corporation by reason of the latter having assumed it,⁷⁷ or by reason of its having succeeded to the business and liabilities of the contracting corporation.⁷⁸ However, contracts executed by one corporation are not ordinarily binding on another corporation, although the stock is owned by the same persons.⁷⁹

§ 909. Contracts before incorporation or organization. Whether a corporation is liable for services or supplies rendered or furnished prior to its actual incorporation or organization has already been treated of in a preceding chapter.⁸⁰

§ 910. Contracts in anticipation of authority. A contract by a corporation need not necessarily have been authorized at the time it

⁷² *Graham v. Macon, D. & S. R. Co.*, 120 Ga. 757, 49 S. E. 75.

⁷³ See chapter on Monopolies and Trusts, *infra*.

⁷⁴ See Chap. 38, *infra*.

⁷⁵ See chapter on Officers and Agents, *infra*.

⁷⁶ See chapter on Stock and Stockholders, *infra*.

⁷⁷ See § 912, *infra*.

⁷⁸ See chapter on Consolidation, *infra*.

⁷⁹ *Waycross Air-Line R. Co. v. Offerman & W. R. Co.*, 109 Ga. 827, 35 S. E. 275.

⁸⁰ See Chap. 5, *supra*.

was made. A corporation may enter into a contract in anticipation of authority from the legislature, with the condition that such authority shall be obtained, and when it is obtained the contract will be binding. Thus, a railroad company, with a view to altering one of the branches of its road, may enter into a contract for the purchase of land conditioned upon its obtaining legislative authority to make the change and purchase the land.⁸¹

§ 911. Assumption of pre-existing debts. A corporation has no power to assume the debt of another corporation or person for a consideration moving to the original debtor,⁸² except perhaps where a person or partnership becomes incorporated and assumes his individual debts or the debts of the firm as the case may be.⁸³ Thus, a promise by a lumber company to pay for goods sold to a boarding house keeper is not authorized although it was indirectly benefited in that the boarding house afforded its employees a place to board.⁸⁴

However, if a corporation purchases property which is subject to the conditions of certain contracts, with knowledge of such conditions, it assumes the obligation of such contracts.⁸⁵ So in purchasing property the corporation may assume debts connected with the property, as a part of the consideration.⁸⁶ And, of course, if several corporations are in fact merely branches of a single organization, one of them may agree to reimburse indorsers of the notes of another of the corporations for loss from their indorsements.⁸⁷

§ 912. Assumption of contracts of predecessors. Of course, a manufacturing or trading corporation, authorized by its charter to

⁸¹ *Scottish Northeastern Ry. Co. v. Stewart*, 3 Macq. H. L. Cas. 382. See also *Portage County Sup'rs v. Wisconsin Cent. R. Co.*, 121 Mass. 460; *New Haven & N. R. Co. v. Hayden*, 107 Mass. 525; *Sussex R. Co. v. Morris & E. R. Co.*, 19 N. J. Eq. 13; *Taylor v. Chichester & M. Ry. Co.*, L. R. 4 H. L. 628.

⁸² *Kentucky Citizens' Building & Loan Ass'n v. Lawrence*, 106 Ky. 88, 49 S. W. 1059; *Morris v. Ernest Wiener Co.*, 65 N. Y. Misc. 18, 119 N. Y. Supp. 163.

⁸³ *Burke Land & Livestock Co. v. Wells, Fargo & Co.*, 7 Idaho 42, 60 Pac. 87.

⁸⁴ *Gulf Yellow Pine Lumber Co. v. Chapman & Co.*, 159 Ala. 444, 48 So. 662.

⁸⁵ *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 86 Fed. 929. To same effect, see *Thorn v. Volunteer St. Gregory Hospital*, 59 N. Y. Misc. 442, 110 N. Y. Supp. 931.

⁸⁶ *Farmers' Bank of Kentucky v. Ohio River Line Steamboat Co.*, 108 Ky. 447, 22 Ky. L. Rep. 132, 56 S. W. 719.

⁸⁷ *Kendall v. Klapperthal Co.*, 202 Pa. 596, 52 Atl. 92.

manufacture and sell a certain article, may assume a contract made by another person, to whose business the corporation has succeeded, for the sale of such article.⁸⁸ So a smelting company, authorized by its charter to raise and smelt ore, may, on purchasing property necessary to carry on its business, assume a contract made by its vendors for carrying the ore to market.⁸⁹

§ 913. Contracts between different corporations. Wherever a corporation has power to make a contract, it can make it with another corporation as well as an individual or partnership. However, it has been held that contracts between two corporations, in order to bind either of them, must be within the powers of both.⁹⁰

If the right to contract exists, it is immaterial that the same officers and stockholders control both contracting corporations, if there is no bad faith.⁹¹

§ 914. Contracts by quasi public corporations. A quasi public corporation, such as a railroad or canal company, or waterworks or gaslight company, which is given the power of eminent domain or other special privileges in return for the benefit which is to accrue to the public, and which for this reason owes special duties to the public, cannot enter into any contract, not expressly authorized by its charter, which will render it wholly or partially unable to perform such duties. Aside from any question as to whether such a contract is foreign to the business for which the corporation was created, it is void as being contrary to public policy, and therefore illegal. "The principle is," said Mr. Justice Miller in the Supreme Court of the United States, "that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to

⁸⁸ *Louis Cook Mfg. Co. v. Randall*, 62 Iowa 244, 17 N. W. 507.

⁸⁹ *Moss v. Averell*, 10 N. Y. 449.

⁹⁰ *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

⁹¹ *Smith v. Chase & Banker Piano Mfg. Co.*, 197 Fed. 466.

"Corporations controlled and man-

aged by the same officers and stockholders have a right to deal with each other and courts will not interfere in their internal affairs unless the actions of the majority in control are dishonest or fraudulently oppressive to the minority." *Smith v. Chase & Banker Piano & Manufacturing Co.*, 197 Fed. 466.

relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy.”⁹²

This rule has been stated or applied in many decisions.⁹³ For instance, a contract to locate a railroad depot upon plaintiff's land and at no other point in the town, is void as against public policy.⁹⁴ So a street railroad company cannot enter into a contract with the owner of property on the street, by which, in consideration of his consent to its laying a track in the street, it binds itself not to lay an additional track in the future, if an additional track may be necessary to enable it to properly serve the public.⁹⁵ So a gas company created for the purpose of supplying a city and its inhabitants with gas and vested with the power of eminent domain, cannot make a contract with another company transferring its right to furnish gas in a particular part of the city, and disabling itself to this extent from performing its duties to the public.⁹⁶ However, the most frequent application of the rule is in connection with transfers of the property of such a company,⁹⁷ or a lease thereof.⁹⁸

Contracts by a public service corporation with patrons are not invalid because discriminating, but only when the discrimination is unjust.⁹⁹

⁹² *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

⁹³ *United States. Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 35 L. Ed. 55.

Illinois. *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, rev'g 20 Ill. App. 473; *Archer v. Terre Haute & I. R. Co.*, 102 Ill. 493; *Peoria & R. I. Ry. Co. v. Coal Valley Min. Co.*, 68 Ill. 489.

Maryland. *Sapp v. Northern Cent. Ry. Co.*, 51 Md. 126; *State v. Consolidation Coal Co.*, 46 Md. 1.

Massachusetts. *Com. v. Smith*, 10 Allen 448, 87 Am. Dec. 672.

Missouri. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69.

New York. *Abbott v. Johnston, G. & K. Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572.

Virginia. *Roper v. McWhorter*, 77 Va. 214.

West Virginia. *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

Wisconsin. *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, 70 Am. Dec. 479.

England. *Ayr Harbor Trustees v. Oswald*, 8 App. Cas. 623; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare 306.

⁹⁴ *Marsh v. Fairbury, P. & N. W. R. Co.*, 64 Ill. 414, 16 Am. Rep. 564.

⁹⁵ *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 353, aff'd 160 Ill. 22, 45 N. E. 507.

⁹⁶ *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, rev'g 20 Ill. App. 473.

⁹⁷ See Chap. 32, *infra*.

⁹⁸ See Chap. 33, *infra*.

⁹⁹ *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023.

§ 915. **Employment of agents, attorneys and servants.** It is certainly within the implied powers of a corporation, just as it is within the powers of a natural person, to appoint or employ an agent or servant to do any act or enter into any contract which is within the powers expressly or impliedly conferred upon it by its charter,¹ such as to sell its property,² or to procure a loan of money,³ or to procure subscribers to or purchasers of its stock.⁴ It has no power, however, to appoint or employ an agent or servant for a purpose which is foreign to the objects for which it was created.⁵ Thus, it has been held that an agricultural society has no power to employ others to run a conveyance for the purpose of transporting persons to and from its fair grounds,⁶ and that a railroad company cannot employ a person to examine and report on a mine of which its road was the outlet.⁷ However, both of the last two holdings are of doubtful authority on the theory that it seems that such acts could be performed by the corporation itself. A manufacturing or trading company may enter into a contract of apprenticeship.⁸

A corporation may contract with an employee, in consideration of monthly deductions from his wages, to furnish a physician in case of accident or sickness occurring while in its service.⁹ So it may

¹ Georgia. Kelsey v. Jackson, 123 Ga. 113, 50 S. E. 951.

Illinois. Gibson v. O'Gara Coal Co., 151 Ill. App. 424; Sloan v. Hanson Mfg. Co., 150 Ill. App. 544.

Montana. McConnell v. Combination Mining & Milling Co., 31 Mont. 563, 79 Pac. 248.

New Jersey. Lillard v. Oil Paint & Drug Co. (N. J. Eq.), 56 Atl. 254.

New York. Dupignac v. Bernstrom, 76 App. Div. 105, 78 N. Y. Supp. 705.

A corporation may employ a broker to secure for it a foreign location and franchise and may agree to pay him a certain per cent. for selling preferred stock. Seamless Pressed Steel & Manufacturing Co. v. Monroe, 57 Ind. App. 136, 106 N. E. 538.

² Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 Atl. 91; Sistare v. Best, 88 N. Y. 527.

³ Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534, 22 Pac. 823.

⁴ Metropolitan Coal Consumers' Ass'n v. Scrimgeour, [1895] 2 Q. B. 604. See also Alabama & Tennessee Rivers R. Co. v. Kidd, 29 Ala. 221; Cincinnati, I. & C. R. Co. v. Clarkson, 7 Ind. 595; Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Kitchen v. Cape Girardeau & State Line R. Co., 59 Mo. 514.

⁵ George v. Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441; In re Phoenix Life Assur. Co., 1 Hem. & M. 433.

⁶ Bathe v. Decatur Co. Agr. Society, 73 Iowa 11, 5 Am. St. Rep. 651, 34 N. W. 484.

⁷ George v. Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441.

⁸ Burnley Equitable Co-operative & Industrial Society v. Casson, [1891] 1 Q. B. 75.

⁹ Neil v. Flynn Lumber Co., 71 W. Va. 708, 77 S. E. 324.

contract to give an injured employee employment for life or for so long as he is competent.¹⁰

A contract to pay the president of the corporation a certain sum per year for the rest of his life in consideration of his agreement not to engage in any business competing with the corporation for ten years next after the severance of his employment with the corporation, is within its powers.¹¹

Employing a lecturer to create public sentiment for the advancement of the objects of the corporation has been held within the power of a corporation created to advance the cause of prohibiting the sale of intoxicating liquors.¹²

A contract employing a treasurer for a corporation for a term of years is not ultra vires merely because the by-laws provide that the treasurer shall be elected each year.¹³

An agreement to pay an employee a percentage of the profits of the business as compensation for his services will be sustained against the objection that the arrangement constitutes a division of the "accumulated profits" to which the stockholders are entitled.¹⁴

Like other contracts, the corporation is not bound to continue the employment for the period fixed by the contract where the employee does not fulfil his covenants.¹⁵

A manufacturing company may appoint a commission firm as its exclusive selling agent in consideration of the purchase by the firm of a certain amount of stock of the corporation, under an agreement by the latter to repurchase it on the termination of the agency.¹⁶

The contract may be an implied one as well as express.¹⁷

A corporation may employ an attorney to prosecute or defend suits, whether the transactions out of which the suits arise are ultra vires or not.¹⁸

¹⁰ *Cox v. Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 50 L. R. A. (N. S.) 453, 103 N. E. 337.

¹¹ *Stover v. Gamewell Fire Alarm Tel. Co.*, 164 N. Y. App. Div. 155, 149 N. Y. Supp. 650.

¹² *Sawyer v. Iowa Constitutional Prohibitory Amendment Ass'n*, — Iowa —, 158 N. W. 679.

¹³ *Reiss v. Usona Shirt Co.*, 159 N. Y. Supp. 1031.

¹⁴ *Bennett v. Millville Improvement Co.*, 67 N. J. L. 320, 51 Atl. 706, holding that the amount paid under such

an arrangement was no more than wages or salary.

¹⁵ *Badere v. Goodrich*, 63 Wash. 650, 116 Pac. 274.

¹⁶ *Fleitmann v. John M. Stone Cotton Mills*, 186 Fed. 466.

¹⁷ See following section.

¹⁸ *National Bank of Guthrie v. Earl*, 2 Okla. 617, 39 Pac. 391. And see *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Winter v. Rosemont Realty Co.*, 101 N. Y. App. Div. 30, 91 N. Y. Supp. 452.

Thus a corporation may employ at-

The mode of appointing an agent, the estoppel of the corporation to deny his authority to act as an agent, and ratification of his acts, are all treated of in subsequent chapters.¹⁹

§ 916. Implied contracts. A corporation may be bound by an implied contract²⁰ as well as a natural person.²¹ Thus, a promise to pay the reasonable value of services rendered or materials furnished the corporation may be implied as against it in the same manner as against individuals under like circumstances.²² In other words, duties imposed upon corporations by law, and benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie; and a corporation, like a natural person, may incur implied and quasi contractual obligations—as for services rendered or other benefits conferred at its request, for money had and received by it for the use of another, for money paid to its use, etc. This

torneys to defend a suit brought against it by minority stockholders or members. *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 610, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353, applying rule to a religious society.

¹⁹ See chapter on Officers and Agents, *infra*.

²⁰ *United States*. *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552.

Alabama. *Selma v. Mullen*, 46 Ala. 411.

Connecticut. *Tryon v. White & Corbin Co.*, 62 Conn. 161, 20 L. R. A. 291, 25 Atl. 712.

Illinois. *Greenburg v. S. D. Childs & Co.*, 242 Ill. 110, 89 N. E. 679.

Kentucky. *Frankfort Bridge Co. v. Frankfort*, 57 Ky. 41.

Maine. *Abbott v. Hermon*, 7 Me. 118.

Maryland. *Kennedy v. Baltimore Ins. Co.*, 3 Harr. & J. 367, 6 Am. Dec. 499.

New York. *Rider v. Union India Rubber Co.*, 28 N. Y. 379, aff'g 18 N. Y. Super. Ct. 85.

Wisconsin. *First Trust Co. v. Mil-*

ler, 160 Wis. 336, 151 N. W. 813; *Lowe v. Ring*, 115 Wis. 575, 92 N. W. 238.

“A business corporation may be bound by inferences from facts and corporate acts, which point to the existence of an implied agreement as their rational explanation, as well as by a formal vote. In this respect it does not differ from a natural person. By accepting all the benefits of a negotiation made in its behalf and by taking advantage of arrangements which are in its interest, an implication of adoption of the incidental burdens may arise against a corporation.” *North Anson Lumber Co. v. Smith*, 209 Mass. 333, 95 N. E. 838.

Municipal corporations, rule as to implied contracts, see 3 McQuillin, *Municipal Corporations*, §§ 1262-1267.

²¹ *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899.

²² *Mahoney v. Hartford Inv. Corporation*, 82 Conn. 280, 73 Atl. 766; *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899; *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969.

doctrine is well settled both in England²³ and in the United States.²⁴ Moreover, statutory provisions that no contract shall be binding unless in writing or certain formalities are complied with or it is signed and countersigned by a particular officer, do not ordinarily preclude a recovery on an implied promise,²⁵ since contracts implied by law or quasi-contracts are not within a charter or statutory requirement that the contracts of a corporation shall be entered into in a certain manner or form, or by certain officers.²⁶ Thus, a by-law that certain agreements should not be valid without vote of the board of directors does not prevent the establishment of a contract by inference from corporate acts, which may be presumed to have been performed under appropriate authority.²⁷ So acceptance by a corporation of beneficial services raises an implied contract although the by-laws of the company provide that no debt can be contracted except by order of the directors.²⁸ Moreover, where a contract is ultra vires, an action to recover from the corporation the property or

²³ *Beverly v. Lincoln Gas Light & Coke Co.*, 6 A. & E. 829; *East London Water Works Co. v. Bailey*, 4 Bing. 283.

²⁴ *United States*. *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107; *Bank of Columbia v. Patterson*, 7 Cranch 299, 3 L. Ed. 351.

Connecticut. *Philadelphia Loan Co. v. Towner*, 13 Conn. 249.

Illinois. *Town of New Athens v. Thomas*, 82 Ill. 259; *Gowen Marble Co. v. Tarrant*, 73 Ill. 608.

Kentucky. *Underwood v. Newport Lyceum*, 5 B. Mon. 129, 41 Am. Dec. 260.

Maryland. *Maryland Hospital v. Foreman*, 29 Md. 524.

Massachusetts. *Hayden v. Middlesex Turnpike Corporation*, 10 Mass. 397, 6 Am. Dec. 143; *White v. Franklin Bank*, 22 Pick. 181.

Michigan. *Cicotte v. Corporation of Catholic, A. & R. Church*, 60 Mich. 552, 27 N. W. 682; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

New Hampshire. *Goodwin v. Union Screw Co.*, 34 N. H. 378.

New York. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Danforth v. Schoharie & D. Turnpike Road*, 12 Johns. 227.

A corporation may hold as tenant from year to year. *Crawford v. Longstreet*, 43 N. J. L. 325. But see *Garland Mfg. Co. v. Northumberland Paper & Electric Co.*, 31 Ont. 40.

²⁵ *Foulke v. San Diego & G. Southern Pac. R. Co.*, 51 Cal. 365; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

"The fact that a formal vote to employ and pay the plaintiff was not taken by the society is no defense to his claim. The circumstances show an assent on the part of the society, which was equivalent to a formal vote." *Eudakaitis v. St. George's Lithuanian Society (Conn.)*, 86 Atl. 562.

²⁶ See Chap. 35, *infra*.

²⁷ *North Anson Lumber Co. v. Smith*, 209 Mass. 333, 95 N. E. 838.

²⁸ *Donovan v. Halsey Fire-Engine Co.*, 58 Mich. 38, 24 N. W. 819.

money parted with on the faith of the unlawful contract, or to obtain compensation therefor, is based on an implied contract.²⁹

However, there can be no implied contract where there can be no express contract because of want of power in the corporation to make the particular contract.³⁰ And if it is sought to bind a corporation by an implied promise, the evidence must show acts of the corporation, or acts of an agent authorized to make the promise, from which the promise may be implied.³¹

The right of an officer of a corporation to recover on a quantum meruit for services rendered to the corporation is considered in a subsequent chapter.³²

§ 917. Limitation of indebtedness—In general. Independently of statute, the amount of indebtedness is not limited to the amount of the capital stock.³³

While debt limit provisions govern the right of most municipal corporations to incur indebtedness,³⁴ there are generally no debt limits provided by constitutional provisions, statutes, or charter provisions as to private corporations. However, corporations³⁵ or at least certain kinds of corporations such as railroad companies,³⁶ are sometimes prohibited from incurring indebtedness beyond the amount of their capital stock or beyond a certain proportion of their capital stock.³⁷

²⁹ *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917 A 1021, 138 Pac. 392.

³⁰ *New York & H. R. Co. v. New York*, 1 Hilt. (N. Y.) 562. See also 3 *McQuillin, Municipal Corporations*, §§ 1172, 1263, where same rule is laid down as to municipal corporations.

³¹ *Mt. Sterling & J. Turnpike Road Co. v. Looney*, 1 Mete. (Mass.) 550, 71 Am. Dec. 491.

³² See chapter on Compensation of Officers, *infra*.

³³ *Rogers v. Danby Universalist Society*, 19 Vt. 187.

³⁴ See chapter on "Debt Limits of Municipalities," in 5 *McQuillin, Municipal Corporations*, §§ 2205-2240.

³⁵ *Cunningham v. German Ins. Bank*, 101 Fed. 977; *Randolph v. Ballard*

County Bank, 142 Ky. 145, 134 S. W. 165.

³⁶ *Barnes v. Eastern Iowa R. Co.*, 155 Iowa 721, 136 N. W. 1053, 134 N. W. 90.

³⁷ It was held in Pennsylvania that a statute limiting the amount of indebtedness which a corporation might incur to the par value of its "capital stock" meant, not authorized capital stock, but capital stock actually paid up. *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414, 498. But see *English Channel Steamship Co. v. Rolt*, 17 Ch. Div. 715.

That stock issued in payment of dividends is to be considered in determining whether a debt contracted by the corporation is in violation of a statute prohibiting it from contracting debts in excess of one-half of the

Constitutional provisions in some states forbid the "increase of indebtedness" unless by consent of the stockholders,³⁸ and in some states the articles of incorporation may or must fix the debt limits of the corporation.³⁹

When the charter of a corporation limits the amount of indebtedness which it may incur, it prohibits and renders ultra vires a contract which will increase its indebtedness beyond the limit,⁴⁰ unless the provision, as is sometimes the case, may be regarded as merely directory to the officers of the corporation, and not as affecting the powers of the corporation itself,⁴¹ as where a statute merely makes the directors personally liable for debts contracted in excess of the capital stock, in which case a contract increasing the indebtedness beyond such limit is not ultra vires with respect to the corporation.⁴²

A statute which provides that the directors must not "create" any debts in excess of the capital stock, does not justify the refusal of the secretary of state to file a certificate showing the adoption of a resolution to create a bonded debt, since the debt is not "created" when the certificate is filed.⁴³

Where a corporation gives a note at the time its indebtedness exceeds the amount authorized by its articles of incorporation, it is held in Iowa that the action need not be upon the original consideration for the note, instead of on the note itself.⁴⁴

amount of its "paid-up capital stock," see *Cunningham v. German Ins. Bank*, 101 Fed. 977.

³⁸ See § 918, *infra*.

³⁹ See § 198, *supra*.

⁴⁰ *First Nat. Bank of Covington v. D. Kiefer Milling Co.*, 95 Ky. 97, 23 S. W. 675; *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414, 498; *English Channel Steamship Co. v. Rolt*, 17 Ch. Div. 715; *In re Pooley Hall Colliery Co.*, 21 L. T. R. (N. S.) 690.

⁴¹ *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

"We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law. The statute of the state provides that the charter of an ordinary private corporation shall set forth the amount of its capital stock,

but does not require its indebtedness shall have other limit. The limitation, therefore of \$500 is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract." *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

⁴² *Hawke v. California Realty & Construction Co.*, 28 Cal. App. 377, 152 Pac. 959; *Sells v. Rosedale Grocery & Commission Co.*, 72 Miss. 590, 17 So. 236. And see *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295.

⁴³ *Merced River Elec. Co. v. Curry*, 157 Cal. 727, 109 Pac. 264.

⁴⁴ *Marshall Field Co. v. Oren Ruffcorn Co.*, 117 Iowa 157, 90 N. W. 618.

It will be noticed, in a subsequent chapter treating of the effect of ultra vires contracts, that some courts treat a contract as absolutely void when it increases the indebtedness of the corporation beyond the limit fixed by its charter, while others do not.⁴⁵

§ 918. — Increase in indebtedness. A constitutional provision prohibiting the increase of indebtedness of a corporation without the consent of the holders of a majority of the stock, does not apply to an indebtedness incurred in the ordinary course of the business for which the corporation has come into existence.⁴⁶ Thus, it does not apply to debts for rent, for the services of clerks and servants, for the purchase of materials by a manufacturing company, etc.⁴⁷

Where it is provided that the bonded indebtedness shall not be increased except by a majority vote at a specially called meeting of the stockholders, on notice, the notice of the meeting may be waived by express agreement or by all attending the meeting without such notice.⁴⁸

§ 919. — Debts to which the prohibition applies. It has been held that a limitation of the amount of indebtedness which a corporation may incur does not apply to indebtedness arising out of implied contract, such as an indebtedness implied from the receipt of money which ought to be repaid.⁴⁹

A limitation of the amount of a particular kind of indebtedness does not apply to other kinds of indebtedness.⁵⁰ Thus, a limitation on the amount of the "bonded indebtedness" does not apply to other indebtedness,⁵¹ as, for example, to non-negotiable notes secured by

⁴⁵ See Chap. 35, *infra*.

⁴⁶ *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61, 85 N. Y. Supp. 413, *aff'd* 181 N. Y. 543, 73 N. E. 1122 (construing Pennsylvania Constitution).

For other decisions construing the provision of the Pennsylvania Constitution, see *West v. Dyson*, 230 Pa. 619, 79 Atl. 782; *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211.

⁴⁷ *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428.

⁴⁸ *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238.

⁴⁹ *Weber v. Spokane Nat. Bank*, 64 Fed. 208, *rev'g* 50 Fed. 735; *Humph-*

rey v. Patrons' Mercantile Ass'n, 50 Iowa 607.

It is otherwise in the case of municipal corporations. *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132.

The liability of a bank implied from the receipt of deposits is not within a limitation of indebtedness. *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428; *Ahl v. Rhoads*, 84 Pa. St. 319.

⁵⁰ *Underhill v. Santa Barbara Land, Building & Improvement Co.*, 93 Cal. 300, 28 Pac. 1049.

⁵¹ *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 26 Ky. L. Rep. 401, 111 Am. St. Rep. 302, 81 S. W. 927.

a mortgage.⁵² But a statute limiting the bonded indebtedness of railroads for "location, construction and equipment" of the road has been construed as a limit on all bonded indebtedness.⁵³

Of course, the limitation does not apply to debts expressly excepted.⁵⁴

A by-law providing that "no indebtedness over one thousand dollars shall be incurred by the company" is not violated by the allowance of a claim of an officer for salary due him at the rate of fifty dollars per month, although the aggregate sum is in excess of one thousand dollars.⁵⁵

§ 920. — Mere change in form of indebtedness. A prohibition against an increase of the indebtedness of a corporation is not violated by a mere change in the form of an existing debt, as by giving a mortgage or bond and mortgage to secure a pre-existing debt,⁵⁶ or by borrowing money to pay off an existing debt, and actually using it for such purpose.⁵⁷

§ 921. Construction of contracts. The construction of corporate contracts is governed by the same rules applicable to contracts of

⁵² Underhill v. Santa Barbara Land, Building & Improvement Co., 93 Cal. 300, 28 Pac. 1049.

⁵³ Barnes v. Eastern Iowa R. Co., 155 Iowa 721, 136 N. W. 1053, 134 N. W. 90.

⁵⁴ See cases cited *infra* in this note.

A mortgage by a corporation of its own real estate to secure a debt is within a provision that a limitation of indebtedness shall not apply to debts secured "by an actual transfer of real estate securities." First Nat. Bank of Montpelier v. Sioux City Terminal Railroad & Warehouse Co., 69 Fed. 441.

Under the National Bank Act, which prohibits a national bank from contracting liabilities in excess of its paid-up capital stock, except upon notes of circulation, moneys deposited with it or collected by it, bills of exchange or drafts drawn against money actually on deposit to its credit, and liabilities to stockholders for divi-

dends and reserved profits, the items thus excepted are to be excluded in determining the indebtedness of a national bank at the time of its contracting a debt. Weber v. Spokane Nat. Bank, 64 Fed. 208, rev'g 50 Fed. 735.

⁵⁵ Haynes v. Griffith, 16 Idaho 280, 101 Pac. 728.

⁵⁶ West v. Dyson, 230 Pa. 619, 79 Atl. 782; Powell v. Blair, 133 Pa. St. 550, 19 Atl. 559, 7 Pa. Co. Ct. 492; Ahl v. Rhoads, 84 Pa. St. 319; King County Land & Live Stock Co. v. Thomson, 21 Tex. Civ. App. 473, 51 S. W. 890.

⁵⁷ Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa 607.

A mortgage loan obtained by a corporation does not increase its indebtedness, within the meaning of a prohibition against an increase of indebtedness without the consent of a majority of the stockholders, where the money borrowed is applied in pay-

individuals.⁵⁸ Thus, a resolution by a board of directors, considered as a contract, must be construed according to its intent which must be gathered from the language of the resolution, read in the light of the circumstances existing at the time.⁵⁹

The intention of the parties is to be collected not only from the terms of the agreement, but also from the subject-matter to which it relates.⁶⁰

When the terms of a contract are equivocal, the practical construction given to it by the parties themselves is very persuasive of its real meaning.⁶¹

It will be construed, if possible, as having been made for a legal rather than for an illegal purpose.⁶²

§ 922. Presumptions and evidence. In accordance with the maxim, *omnia rite acta esse praesumuntur*, a contract entered into by a corporation will be presumed to be within the powers conferred upon it by its charter unless the contrary appears, the burden of proof being upon one who attacks the contract as ultra vires.⁶³ Conversely, there is no presumption that a contract is ultra vires,⁶⁴ or that parties intended to make an illegal contract.⁶⁵

ment of a purchase money indebtedness of the company on the property mortgaged. *Powell v. Blair*, 133 Pa. St. 550, 19 Atl. 559.

⁵⁸ See *Lyon v. Dailey Copper, Mining & Smelting Co.*, 46 Mont. 108, 126 Pac. 931.

⁵⁹ *Schleus v. Poe* (Md.), 97 Atl. 649.

⁶⁰ *West v. Guaranty Trust Co.* of New York, 162 N. Y. App. Div. 301, 147 N. Y. Supp. 421.

⁶¹ *Delaware, L. & W. R. Co. v. Kutter*, 147 Fed. 51.

⁶² *Delaware, L. & W. R. Co. v. Kutter*, 147 Fed. 51.

⁶³ *United States. Ohio & M. Ry. Co. v. McCarthy*, 96 U. S. 267, 268, 24 L. Ed. 693; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859; *Choctaw, O. & G. R. Co. v. Bond*, 160 Fed. 403.

Indiana. International Building &

Loan Ass'n, No. 2 v. Wall, 153 Ind. 554, 55 N. E. 431.

Iowa. West v. Averill Grocery Co., 109 Iowa 488, 80 N. W. 555.

New Jersey. Ellerman v. Chicago Junct. Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

Washington. Belch v. Big Store Co., 46 Wash. 1, 89 Pac. 174.

Wisconsin. Howard v. Boorman, 17 Wis. 459.

England. Shrewsbury & B. Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 125; *Scottish Northeastern Ry. Co. v. Stewart*, 3 Macq. H. L. Cas. 382.

⁶⁴ *Edwards v. National Window Glass Jobbers' Ass'n* (N. J. L.), 68 Atl. 800.

⁶⁵ *Richards v. Ernst Wiener Co.*, 145 N. Y. App. Div. 353, 129 N. Y. Supp. 951.

CHAPTER 23

POWERS AS TO SURETYSHIP AND GUARANTY

I. EXPRESS POWER

§ 923. Nature and extent.

II. IMPLIED POWER

§ 924. General rule.

§ 925. Applicability of rule to particular corporations.

§ 926. Where in furtherance of business—General rule.

§ 927. — As part of business.

§ 928. — For purpose of transfer of corporate property.

§ 929. — To protect indebtedness or pay debt.

§ 930. — To increase business.

§ 931. — Guaranty of dividends.

I. EXPRESS POWER

§ 923. Nature and extent. The power to act as surety or guarantor exists, of course, in the case of surety and guaranty companies, created for the express purpose of entering into such contracts as a business or as a part of their business.¹ However, even a corporation authorized to enter into contracts of "guaranty" cannot enter into "indemnity" contracts.²

Statutes allowing surety companies to execute as surety bonds in judicial proceedings, and bonds of guardians, trustees, etc., are constitutional.³

By statute in some states, corporations, pursuant to the unanimous vote of their stockholders, may "guarantee the bonds of any other domestic corporation engaged in the same general line of business."⁴

Statutes in other states sometimes authorize railroad companies to guarantee the bonds of other companies, upon a petition of the majority of the stockholders.⁵

¹ *Gutzeit v. Pennie*, 95 Cal. 598, 30 Pac. 836; *Gans v. Carter*, 77 Md. 1; *Ausplund v. Aetna Indemnity Co.*, 47 Ore. 10, 81 Pac. 577. See *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 385, holding in particular case that there was no guaranty.

² *Texas Fidelity & Bonding Co. v.*

General Bonding & Casualty Ins. Co., — Tex. Civ. App. —, 184 S. W. 238.

³ *Steel v. Auditor General*, 111 Mich. 381, 69 N. W. 738.

⁴ *Gay v. Hudson River Elec. Power Co.*, 191 Fed. 828, 190 Fed. 773, decided under New York statute.

⁵ *Louisville, N. A. & C. R. Co. v.*

There is no express power to make a contract of guaranty because the articles of incorporation provide that the corporation shall have power "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy," where in subsequent provisions the business which the corporation may do is defined, and as so defined does not include the making of a guaranty.⁶

II. IMPLIED POWER

§ 924. General rule. Ordinarily, in the absence of express authority, a corporation has no power to enter into a contract as surety or guarantor and thus lend its credit to another corporation or person, at least where not in furtherance of its business.⁷ This general rule is too well settled to admit of any controversy.

Louisville Trust Co., 174 U. S. 552, 43 L. Ed. 1081 (Indiana statute).

⁶ *Greene v. Middlesborough Town & Lands Co.*, 28 Ky. L. Rep. 303, 89 S. W. 228.

⁷ *United States. Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081, modifying 75 Fed. 433; *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Ward v. Joslin*, 105 Fed. 224; *Park Hotel Co. v. Fourth Nat. Bank of St. Louis*, 86 Fed. 742; *Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co.*, 62 Fed. 356.

Alabama. Bailey Iron Works Co. v. Mobile & O. R. Co., 4 Ala. App. 660, 59 So. 191.

Arkansas. Simmons Nat. Bank v. Dilley Foundry Co., 95 Ark. 368, 130 S. W. 162.

Connecticut. Aetna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167.

Illinois. Best Brewing Co. v. Klasse, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464; *Rogers, Brown & Meacham v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E. 1017, rev'g 84 Ill. App. 249; *Hoof Bros. Co. v. Jiffy Auto*

Curtain Co., 189 Ill. App. 596 (mem. dec.); *Schneider v. Chicago Vulcanizing Co.*, 159 Ill. App. 622.

Iowa. Twiss v. Guaranty Life Ass'n, 87 Iowa 733, 43 Am. St. Rep. 418, 55 N. W. 8; *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771.

Kentucky. M. V. Monarch Co. v. Farmers' & Drovers' Bank (Ky.), 49 S. W. 317.

Maryland. Savage Mfg. Co. v. Worthington, 1 Gill 284.

Massachusetts. Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

Michigan. Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

Missouri. Ellett-Kendall Shoe Co. v. Western Stores Co., 132 Mo. App. 513, 112 S. W. 4.

New Hampshire. Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334.

New York. Gause v. Commonwealth Trust Co., 55 Misc. 110, 106 N. Y. Supp. 288; *Koehler v. Reinheimer*, 20 Misc. 62, 45 N. Y. Supp. 337; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 19 How. Pr. 51.

The objection to such a contract, said Judge Taft, "is that it risks the funds of the company in a different enterprise and business under the control of another and different person or corporation, contrary to what its stockholders, its creditors and the state have the right from its charter to expect."⁸

It can make no difference that the corporation is indirectly benefited by the contract, or receives a consideration, if the contract is not within the scope of its business.⁹ Moreover, even if all the stock-

Pennsylvania. *Culver v. Reno Real Estate Co.*, 91 Pa. St. 376.

Tennessee. *Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

Texas. *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055; *Gaston & A. v. J. I. Campbell Co.* (Tex. Civ. App.), 130 S. W. 222; *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.), 110 S. W. 978.

Washington. *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

Wisconsin. *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, 71 N. W. 101; *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7 Wis. 59.

England. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1.

Canada. *Johansen v. Chaplin*, 6 Montreal Q. B. 111.

Compare *Venner v. New York Cent. & H. R. R. Co.*, 81 N. Y. Misc. 298, 143 N. Y. Supp. 211 (holding equipment agreement between railroad companies not a guaranty).

"A corporation has no corporate power to become the mere surety of another, or to pledge its property for the payment of the debt of another, in which it has no interest, or for which it is in no wise responsible, and for mere accommodation. Its charter is the measure of its powers, and all power not expressed or fairly to be implied is denied to it. The

power to lend its credit to another or pledge its property to secure the debt of another in a matter in which it has no interest or is not for its benefit, cannot, as a general rule, be implied." *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161, rev'g 85 Ill. App. 28.

⁸ *Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co.*, 62 Fed. 356. And see *Tod v. Kentucky Union Land Co.*, 57 Fed. 47, 51.

⁹ *Illinois.* *Best Brewing Co. v. Klasen*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464.

Massachusetts. *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

New York. *Filon v. Miller Brewing Co.*, 60 Hun 582, 15 N. Y. Supp. 57.

Texas. *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055 (where general subject of implied power to do acts indirectly beneficial to corporation is discussed at length and with much ability).

England. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1.

"If the act to be done was ultra vires, the consideration in no wise changed the quality of the act." *Greene v. Middlesborough Town & Lands Co.*, 28 Ky. L. Rep. 303, 89 S. W. 228.

"Whether an act is within corporate powers depends upon the char-

holders consent to a guaranty of the debt of another, the obligation created is subject to the claims of creditors.¹⁰

The power to guaranty all of the stock of another corporation is not implied from express power to take and hold stock in such a corporation nor from express power to promote its interests by donating lands to it.¹¹

A corporation cannot act as surety for the benefit of a stockholder.¹² Thus, a corporation cannot bind itself as surety or guarantor to pay debts owing by its stockholders to third persons wherein the corporation has no interest, direct or indirect, since such action is plainly not for the benefit of the corporation nor within its corporate objects.¹³ Nor can an industrial or mercantile corporation guaranty a private debt of one of its officers, employees or stockholders.¹⁴

§ 925. Applicability of rule to particular corporations. This rule that a corporation cannot, where not directly interested, become a surety or guarantor applies equally well to banking companies,¹⁵

acter of the act itself, and not upon the consideration for which it is performed." *Filon v. Miller Brewing Co.*, 60 Hun (N. Y.) 582, 15 N. Y. Supp. 57.

It is immaterial that the contract of suretyship is based on an independent consideration. *Rogers, Brown & Meacham v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E. 1017, rev'g 84 Ill. App. 249.

So a mercantile corporation has no power to execute an appeal bond as surety, in order to delay other creditors of its debtor, in order that it may collect its own claim. *Kelley, Maus & Co. v. O'Brien Varnish Co.*, 90 Ill. App. 287.

¹⁰ *In re Prospect Worsted Mills*, 126 Fed. 1011.

¹¹ *Greene v. Middlesborough Town & Lands Co.*, 89 S. W. 228, 28 Ky. L. Rep. 303.

¹² *Hunter v. Garaffo*, 246 Mo. 131, 151 S. W. 741.

¹³ *In re Romadka Bros. Co.*, 216 Fed. 113, rev'g 206 Fed. 944.

¹⁴ *Houser v. Farmers' Supply Co.*, 6 Ga. App. 102, 64 S. E. 293.

¹⁵ *Mine & Smelter Supply Co. v.*

Stockgrowers' Bank, 173 Fed. 859; *Cottondale State Bank v. Oskamp Nolting Co.*, 64 Fla. 36, Ann. Cas. 1916 D 564, 59 So. 566; *Ayer v. Hughes*, 87 S. C. 382, 69 S. E. 657.

"A bank can lend its money but not its credit." *First Nat. Bank of Tallapoosa v. Monroe*, 135 Ga. 614, 32 L. R. A. (N. S.) 550, 69 S. E. 1123.

Thus a bank cannot execute undertakings in judicial proceedings merely as a matter of accommodation; *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 62 Neb. 472, 87 N. W. 156, aff'd on rehearing in 69 Neb. 220, 95 N. W. 819; nor guarantee a mortgage loan. (*Kiggins v. Munday*, 19 Wash. 233, 52 Pac. 855); nor can it guaranty a contract between other parties for the delivery of building materials. (*Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334); nor the payment by a customer of the hire of a steamship under a charter party (*Johansen v. Chaplin*, 6 Montreal Q. B. 111); nor become surety on the bond of a public officer (*In re Miners' Bank of Summit Hill*, 13 Wkly. Notes Cas. (Pa.) 370).

including national banks;¹⁶ trust companies;¹⁷ mercantile and trading companies;¹⁸ ice companies;¹⁹ and land and irrigation companies.²⁰

¹⁶ Third Nat. Bank of St. Louis v. St. Charles Sav. Bank, 244 Mo. 554, 149 S. W. 495; First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059; Appleton v. Citizens' Cent. Nat. Bank, 116 N. Y. App. Div. 404, 101 N. Y. Supp. 1027; National Bank of Brunswick v. Sixth Nat. Bank, 212 Pa. 238, 61 Atl. 889; Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas, 48 Tex. Civ. App. 301, 106 S. W. 782; Groos v. Brewster (Tex. Civ. App.), 55 S. W. 590. Compare, however, Hutchins v. Planters' Nat. Bank, 128 N. C. 72, 38 S. E. 252, where decision not altogether clear but which is really decided on the question as to the effect of ultra vires contracts.

"A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of notes or other obligations which it rediscounts or sells because to do so is incidental to the business it is authorized to transact, and to the disposition of property it has lawfully acquired. But it cannot lend its credit to another by becoming surety, indorser, or guarantor for him. It cannot for the accommodation of another indorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of its charter, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction." Merchants' Bank of Valdosta v. Baird, 160 Fed. 642, 17 L. R. A. (N. S.) 526.

A national bank may execute a guaranty in connection with the transfer (1) of a chose in action, or (2) other property belonging to the bank (3) but not otherwise. Thil-

many v. Iowa Paper Bag Co., 108 Iowa 333, 338, 79 N. W. 68.

"Defendant's power to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a bank to guarantee the payment by one of its debtors of a larger sum in order that the bank might receive or retrieve a lesser sum would be to permit it to enter upon very hazardous speculation and authorize very wild and unsafe banking." Appleton v. Citizens' Cent. Nat. Bank of New York, 190 N. Y. 417, 420, 32 L. R. A. (N. S.) 543, 83 N. E. 470.

Thus a national bank cannot guaranty the genuineness of signatures to commercial paper in which it has no interest. Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601; nor guaranty a draft on a customer by a third person to be drawn at a subsequent time. (National Bank of Brunswick v. Sixth Nat. Bank, 212 Pa. 238, 61 Atl. 889.)

¹⁷ Ward v. Joslin, 186 U. S. 142, 46 L. Ed. 1093, aff'g 105 Fed. 224; Gause v. Commonwealth Trust Co., 196 N. Y. 134, 156, 24 L. R. A. (N. S.) 967, 89 N. E. 476. Compare First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 70 L. R. A. 79, 86 S. W. 109, where this question is incidentally discussed.

¹⁸ Kellogg-Mackay Co. v. Havre Hotel Co., 199 Fed. 727; Mapes v. German Bank of Tilden, Nebraska, 176 Fed. 89; Deaton Grocery Co. v. International Harvester Co. of America, 47 Tex. Civ. App. 267, 105 S. W. 556.

¹⁹ Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S. E. 45.

²⁰ Carla Land & Irrigation Co. v.

In accordance with this rule a loan company, organized to do a general brokerage business, cannot become a surety.²¹ And there is no implied power to become a surety on an appeal bond, where a company is incorporated to buy and sell land, notes, bonds and other choses in action, and to borrow and loan money on mortgages and other securities.²² Likewise, a railroad company cannot guaranty the bonds of another corporation, unless authorized so to do by statute.²³

§ 926. Where in furtherance of business—General rule. The general rule that a corporation has no implied power to become guarantor or surety is based upon the ground that such a transaction is foreign to the objects of its creation, and not upon the ground that there is an absolute want of power on the part of a corporation to bind itself by such a contract. The power to act as surety or guarantor exists in the case of corporations, though not expressly conferred, whenever it is necessary to enable them to accomplish the objects for which they are created, or whenever the particular transaction is reasonably necessary or proper in the conduct of their business.²⁴

§ 927. — As part of business. Of course, if a contract of guaranty or suretyship is directly connected with the business of the corporation, it may become liable as such because the contract is intra

Asherton State Bank, — Tex. Civ. App. —, 164 S. W. 1066.

²¹ Richeson v. National Bank of Mena, 96 Ark. 594, 132 S. W. 913.

²² Eagan v. Mahoney (Colo.), 121 Pac. 108.

²³ Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. Ed. 1081, modifying 75 Fed. 433.

Construction of Indiana statute authorizing such a guaranty, see Central Trust Co. of New York v. Indiana & L. M. R. Co., 98 Fed. 666.

²⁴ United States. Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 98, 27 L. Ed. 413; Tod v. Kentucky Union Land Co., 57 Fed. 47.

California. Low v. California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629.

Georgia. Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S. E. 358.

Indiana. Smead v. Indianapolis, P. & C. R. Co., 11 Ind. 104.

Nebraska. Thomas v. City Nat. Bank of Hastings, 40 Neb. 501, 24 L. R. A. 263, 58 N. W. 501.

New York. Arnot v. Erie Ry. Co., 67 N. Y. 315; Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co., 41 Barb. 10.

Rhode Island. J. P. Morgan & Co. v. Hall & Lyon Co., 34 R. I. 273, 83 Atl. 113.

Texas. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Tex. Civ. App.), 111 S. W. 417.

A railroad company may guaranty the fulfilment by a construction company of a contract with third persons. Mathesius v. Brooklyn Heights R. Co., 96 Fed. 792.

vires. Thus, a corporation expressly or impliedly authorized to aid another, such as a railroad company authorized to aid another such company in constructing its road, may extend aid by guarantying the bonds of the other company to enable it to raise money thereon.²⁵ Likewise, where a short line of railroad was necessary to enable a lumber corporation to reach its timber lands, it was held that it had the implied power to aid a railroad company in constructing the road by guarantying the interest on its bonds.²⁶ The same is true of a corporation created for the purpose of acquiring mining and timber lands and rights of way for the purpose of exporting its products.²⁷

Under a statute giving mining and manufacturing companies power to purchase or subscribe for so much stock of transportation companies as they may deem necessary to procure proper transportation facilities, such a corporation may guaranty the bonds of a railroad company, and mortgage its property to secure the same, in consideration of transportation facilities, and to enable the company to provide the same.²⁸ In like manner, a railroad company authorized to make any contract with any other railroad company which its directors may deem proper, "for the transportation of freight and passengers, or for the use of its road," may guaranty payment of the expense of altering the gauge of another company's road, so as to enable it to use the same.²⁹ Moreover, a corporation needing a boarding place for its workmen may, to induce a person to erect and keep a boarding house, guaranty a certain number of boarders.³⁰

A corporation may guaranty the payment of all money drawn on a letter of credit, in connection with its business.³¹

A bond given by a national bank to secure deposits made with it by a county is not ultra vires,³² and a national bank may promise another bank to honor a draft of a customer.³³

²⁵ *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 10.

²⁶ *Mercantile Trust Co. v. Kiser*, 91 Ga. 636, 18 S. E. 358.

²⁷ *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335; *Tod v. Kentucky Union Land Co.*, 57 Fed. 47.

²⁸ *Central Trust Co. of New York v. Columbus, H. V. & T. Ry. Co.*, 87 Fed. 815.

²⁹ *Smead v. Indianapolis, P. & C.*

R. Co., 11 Ind. 104. And see *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 10.

³⁰ *Smith v. Norwich Board of Water Com'rs*, 38 Conn. 208.

³¹ *J. P. Morgan & Co. v. Hall & Lyon Co.*, 34 R. I. 273, 83 Atl. 113.

³² *Board Sup'rs Gratiot Co. v. Munson*, 157 Mich. 505, 122 N. W. 117.

³³ *Farmers' & Merchants' National Bank, Illinois National Bank*, 146 Ill. App. 136.

It would seem that where one corporation owns and controls another corporation, the former may guaranty the debts of the latter.³⁴ And, a banking company may guaranty the bonds of a railroad company of which it owns a majority of the stock, where the guaranty is for its own benefit.³⁵ But it has been held that the fact that the stockholders of two corporations are practically the same, does not authorize one corporation to guaranty the contracts of the other.³⁶

§ 928. — For purpose of transfer of corporate property. A corporation may guaranty the payment of bonds, notes and other evidences of debt owned by it, in order to negotiate or sell the same.³⁷ Thus, a company may guaranty the payment of bonds sold by it after lawfully acquiring such bonds in the conduct of its business.³⁸ And a loan and trust company may guaranty the payment of bonds sold by it in the ordinary course of its business.³⁹ And a national bank may guaranty the payment of notes transferred by it in the course of its business.⁴⁰ But a national bank, on selling stock of another company, cannot guaranty the purchaser against loss.⁴¹

§ 929. — To protect indebtedness or pay debt. A corporation may guaranty or become surety upon the obligation of another when such a transaction is necessary in order to procure the payment of a debt due to it, or when, by such means, it pays a debt which it owes.⁴²

³⁴ Hunter v. Baker Motor Vehicle Co., 190 Fed. 665.

³⁵ Central Railroad & Banking Co. v. Farmers' Loan & Trust Co., 114 Fed. 263.

³⁶ Robert Gair Co. v. Columbia Rice Packing Co., 124 La. 193, 50 So. 8.

³⁷ United States. People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago, 101 U. S. 181, 25 L. Ed. 907; Mississippi & M. R. Co. v. Howard, 7 Wall. 392, 19 L. Ed. 117.

Kansas. Atchison, T. & S. F. R. Co. v. Fletcher, 35 Kan. 236, 10 Pac. 596.

Massachusetts. Broadway Nat. Bank v. Baker, 76 Mass. 294, 57 N. E. 603.

Nebraska. Thomas v. City Nat. Bank of Hastings, 40 Neb. 501, 24 L. R. A. 263, 58 N. W. 943.

New Jersey. Ellerman v. Chicago

Junct. Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

New York. Arnot v. Erie Ry. Co., 67 N. Y. 315.

South Carolina. Dabney v. State Bank, 3 S. C. 124.

³⁸ Boone v. Louisville Gas Co., 118 Ky. 588, 111 Am. St. Rep. 302, 26 Ky. L. Rep. 401, 81 S. W. 927.

³⁹ Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; McCauley v. Ridgewood Trust Co., 81 N. J. L. 86, 79 Atl. 327.

⁴⁰ Thilmany v. Iowa Paper Bag Co., 108 Iowa 333, 79 N. W. 68.

⁴¹ Barron v. McKinnon, 179 Fed. 759.

⁴² In re West of England Bank, 14 Ch. Div. 317.

Thus a corporation organized to carry on a mercantile business has

Accordingly, a guaranty executed to protect the corporation from a probable loss of a debt due it, and to aid in its collection, is within its power.⁴³ And where a hotel keeper has bought a large amount of goods from a mercantile company, the latter may become a surety to enable him to secure money to run his business so as to be able to pay for such goods.⁴⁴ Moreover, when the charter of a railroad company or other corporation authorizes it to purchase or lease the property of another corporation or person, it has the power to guaranty the bonds or other obligations of the other as a consideration for the purchase or lease.⁴⁵ Likewise, when a partnership is incorporated, the corporation may take the property of the firm and guaranty its obligations.⁴⁶ In like manner, a cattle company may guaranty a debt due from the owner of cattle to a third person as a part of the purchase price of cattle bought from such owner.⁴⁷

A contract by which a street railroad company, in order to procure a right of way over streets running through lands owned by a land company, guarantied that certain lots of the latter would become worth a certain price, and agreed to pay the difference between such price and what the lots would bring at auction, was held to be within the powers of the company.⁴⁸

As part of the consideration for the purchase of stock of one corporation by another, the purchaser may guaranty the payment of dividends at a certain rate on such stock.⁴⁹ Moreover, a corporation may guaranty the payment of any debt which it may directly contract to pay.⁵⁰

power to indorse notes of a third person, from whom it buys merchandise, in payment for such merchandise. *National Bank of Commerce in Denver v. Allen*, 90 Fed. 545. And where a corporation, in acquiring land for its legitimate purposes, causes its employee to give his note in payment, it may properly guaranty its payment. *Lake St. El. R. Co. v. Carmichael*, 82 Ill. App. 344, *aff'd* 184 Ill. 348, 56 N. E. 372.

⁴³ *North Texas State Bank v. Crowley-Southerland Commission Co.*, — Tex. Civ. App. —, 145 S. W. 1027.

⁴⁴ *Hess v. W. & J. Sloane*, 66 N. Y. App. Div. 522, 73 N. Y. Supp. 313, *aff'd* without opinion in 173 N. Y. 616, 66 N. E. 1110.

⁴⁵ *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629.

⁴⁶ *In re Waterman's Appeal*, 26 Conn. 96; *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321.

⁴⁷ *North Texas State Bank v. Crowley-Southerland Commission Co.*, — Tex. Civ. App. —, 145 S. W. 1027.

⁴⁸ *Vanderveer v. Asbury Park & B. St. Ry. Co.*, 82 Fed. 355.

⁴⁹ *Windmuller v. Standard Distilling & Distributing Co.*, 106 N. Y. App. Div. 246, 94 N. Y. Supp. 52, *aff'd* without opinion in 186 N. Y. 572, 79 N. E. 1119.

⁵⁰ *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629.

§ 930. — **To increase business.** The authorities are more or less conflicting as to the power of a corporation to become a surety or guarantor to help out a customer or to extend the business by adding a new patron or customer. It is practically impossible to lay down any general rule applicable to all cases, and each case must be determined largely according to its particular facts. Of course a corporation cannot always become a surety or guarantor merely because by so doing it will indirectly increase its business. The border line between those acts which will directly increase the business and those which will indirectly do so is, however, very shadowy and in dispute as between the courts of the different jurisdictions. For instance, it has been held in Massachusetts that a railroad company or a manufacturing and trading company cannot, in order to increase its business and profits, guaranty the payment of the expenses of a musical festival or other gathering to be held in the city in which it does business,⁵¹ although in other states subscriptions for such general purposes—which are governed by the same general rules—have been upheld where the corporation would directly and necessarily benefit in the shape of increased business.⁵²

In a leading English case, it was held that a railroad company had no power to guaranty the payment of dividends on the stock of a steamship company organized for the purpose of transporting passengers beyond the terminus of its road, however much it might be benefited by the operation of the steamboat line, as the contract was altogether foreign to the business of the railroad company.⁵³ For the same reason, a railroad company cannot guaranty dividends on the stock of a grain elevator company, to induce persons to subscribe for such stock.⁵⁴ Likewise, it has been held that a plank road company cannot guaranty the payment of a loan made to another plank road company, to enable the latter to build its road, although it

⁵¹ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

⁵² *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044, aff'g 41 Ill. App. 268; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702.

⁵³ *Colman v. Eastern Counties R. Co.*, 10 Beav. 1. And see *Tomkinson v. Southeastern Ry. Co.*, 35 Ch. Div. 677.

It is otherwise if the charter of a railroad company authorizes it to make contracts with a steamboat company in relation to the carriage of passengers beyond its terminus. *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. Ed. 413.

⁵⁴ *Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

would be benefited thereby.⁵⁵ And it has been held that a railroad company has no implied power to guaranty the interest and dividends on stock and bonds necessary for the construction of a summer hotel, although the operation of the hotel may increase its business.⁵⁶

There is also a conflict in the decisions as to whether a corporation created for the purpose of manufacturing or trading may guaranty or become surety on contracts for the purpose of selling its goods. Thus, it has been held in the federal courts that a corporation created to manufacture and sell iron work for mining plants had no power to guaranty the performance of another's contract for the erection of a mining plant, although it thereby made a sale of iron work;⁵⁷ and also that a company engaged in buying and selling building materials cannot guaranty the performance of a building contract by another, although by so doing it sold the lumber for the contract.⁵⁸ And in Texas it has been held that a lumber company has no power to guaranty the performance by a contractor of a building contract, at least where the lumber had already been sold to the contractor.⁵⁹

On the other hand, it has been held in Illinois,⁶⁰ Washington⁶¹ and Wisconsin⁶² that a bond executed by a lumber company to guaranty the contractor's completion of a building contract, for the purpose of securing a sale of lumber to the contractor, is within the powers of the corporation.

It is generally held that a brewing company may guaranty the payment of rent by a saloon keeper in consideration of his selling its beer,⁶³ although there is some authority to the contrary.⁶⁴ Likewise,

⁵⁵ Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 7 Wis. 59.

⁵⁶ Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 3 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351.

⁵⁷ Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co., 62 Fed. 356.

⁵⁸ In re S. P. Smith Lumber Co., 132 Fed. 620.

⁵⁹ W. C. Bowman Lumber Co. v. Pierson, — Tex. Civ. App. —, 139 S. W. 618.

⁶⁰ Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543, aff'g 102 Ill. App. 333.

⁶¹ Wheeler, Osgood & Co. v. Everett Land Co., 14 Wash. 630, 45 Pac. 316.

⁶² Interior Woodwork Co. v. Prasser, 108 Wis. 557, 84 N. W. 833.

⁶³ Standard Brewery v. Kelly, 66 Ill. App. 267; National Brewing Co. v. Ahlgren, 63 Ill. App. 475; H. Koehler & Co. v. Reinheimer, 26 N. Y. App. Div. 1, 49 N. Y. Supp. 755, rev'g 20 N. Y. Misc. 62, 45 N. Y. Supp. 337; Holm v. Claus Lipsius Brewing Co., 21 N. Y. App. Div. 204, 47 N. Y. Supp. 518; Field v. Burr Brewing Co., 18 N. Y. Supp. 456; Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101. And see Brewer & Hofmann Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49; 80 Ill. App. 353.

⁶⁴ Filon v. Miller Brewing Co., 60

a brewing company may become a surety on a liquor license bond executed to induce the licensee to lease a building from the company and deal exclusively in its products.⁶⁵ So where a brewing company owns a hotel with a bar, it may agree to indemnify a surety on a bond of the person running the bar.⁶⁶ And a corporation whose business is the buying and selling of liquor at wholesale and retail has power to sign a saloon keeper's bond as surety,⁶⁷ this having been held to be true although the saloon keeper does not expressly or impliedly agree to buy liquors from the corporation.⁶⁸ Likewise, a brewing company may guaranty a loan to enable one to pay for a saloon license and to establish himself in business, where he agrees to purchase his beer from such company.⁶⁹

On the other hand, it has been held in Illinois that a brewing company cannot become a surety on an appeal bond, although the bond was to enable the principal to continue in the business of selling beer.⁷⁰ And it has been held by a federal court that a wholesale liquor company has no power to guaranty a debt of a customer;⁷¹ the court pointed out that there was a difference between a guaranty "directly" calculated to increase the number of patrons of the business and a guaranty to secure the good-will of a customer which may "indirectly" increase the customer's business.⁷²

§ 931. — Guaranty of dividends. Whether a corporation may guaranty the payment of dividends on its own stock is not proper for

Hun (N. Y.) 582, 15 N. Y. Supp. 57; Aaronson v. David Meyer Brewing Co., 26 N. Y. Misc. 655, 56 N. Y. Supp. 387.

⁶⁵ Horst v. Lewis, 71 Neb. 365, 103 N. W. 460, 98 N. W. 1046.

⁶⁶ Timm v. Grand Rapids Brewing Co., 160 Mich. 371, 27 L. R. A. (N. S.) 186, 125 N. W. 357, 17 Det. L. N. 122.

⁶⁷ Munoz v. Brassel (Tex. Civ. App.), 108 S. W. 417.

⁶⁸ Munoz v. Brassel (Tex. Civ. App.), 108 S. W. 417. To same effect, see Horst v. Lewis, 71 Neb. 365, 103 N. W. 460, 98 N. W. 1046.

⁶⁹ Blue Island Brewing Co. v. Fraatz, 123 Ill. App. 26.

⁷⁰ Best Brewing Co. of Chicago v. Klassen, 185 Ill. 37, 50 L. R. A. 765,

76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464.

A corporation organized to manufacture and sell beer, etc., and carry on a general brewing business, has no implied power to become a surety on an appeal bond in a suit between third parties, unless the act is reasonably necessary to accomplish a purpose for which it was formed. Best Brewing Co. v. Klassen, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464.

⁷¹ In re Liquor Dealers' Supply Co., 177 Fed. 197.

⁷² In re Liquor Dealers' Supply Co., 177 Fed. 197, distinguishing Illinois decisions.

consideration in this connection.⁷³ Whether it may guaranty the payment of certain dividends on the stock of another company has already been noticed.⁷⁴

⁷³ See chapter on Stock and Stock-
holders, *infra*.

⁷⁴ See § 929, *supra*.

CHAPTER 24

POWER TO ACT IN A REPRESENTATIVE OR FIDUCIARY CAPACITY

§ 932. Power to act as agent or attorney in fact.

§ 933. Power to act as trustee—General rule.

§ 934. — Express authority.

§ 935. — Where trust prohibited or foreign to objects of corporation.

§ 936. — Power to delegate authority.

§ 937. Power to act as executor or administrator.

§ 938. Power to act as guardian or committee.

§ 932. Power to act as agent or attorney in fact. A corporation may become an agent as to matters in furtherance of the object of its organization,¹ but it has no power to act as agent or attorney for another if the transaction is foreign to the objects for which it was created. Thus, a manufacturing company, unless the power is conferred upon it by its charter, cannot lawfully act as agent for another in selling goods, bonds, or stocks on commission.² So a corporation organized solely for the manufacture of electric appliances has no power to purchase the right to act as agent for the sale of electric supplies manufactured by another corporation.³ Furthermore, neither a national bank nor a savings bank can act as agent or broker in buying and selling bonds or stocks on commission.⁴

There may be circumstances, however, under which a corporation may act as agent for another. Thus, it has been held that a national bank may, as an incident to its power to collect a debt due it, and for which it holds notes of the debtor as collateral, act as the debtor's agent in selling the notes.⁵ In fact, a bank may often act as an

¹ See *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495.

² *Westinghouse Mach. Co. v. Wilkinson & Cole*, 79 Ala. 312; *Peck-Wilkinson Heating & Ventilating Co. v. Board of Education*, 6 Okla. 279, 50 Pac. 236.

³ "An agency to sell is in no sense a business of manufacturing." *Powell v. Murray*, 3 N. Y. App. Div. 273, 38 N. Y. Supp. 233, *aff'd* without

opinion in 157 N. Y. 717, 53 N. E. 1130.

⁴ *Farmers' & Merchants' Nat. Bank of Fremont v. Smith*, 77 Fed. 129; *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; *First Nat. Bank of Allentown v. Hoch*, 89 Pa. St. 324, 33 Am. Rep. 769.

⁵ *Anderson v. Grand Forks First Nat. Bank*, 5 N. D. 451, 67 N. W. 821.

agent,⁶ as in collecting and transmitting funds.⁷ But a savings bank has no implied authority to furnish clerks for public sales to keep the account of the sales and to take notes with good security, and to be responsible for the exercise of care on the part of such clerks.⁸

The relation between two corporations may be such that one will be deemed to be the agent of the other;⁹ but a contract between two corporations whereby one is to receive the net income of the other after payment of expenses, in consideration of a guaranty of dividends, the guarantor to have no control over nor right to interfere with the other company, does not establish any agency.¹⁰

There is nothing in the nature of a corporation to render it incapable of acting as attorney in fact for another, if the transaction is within the powers conferred upon it by its charter. Where the general law authorizes corporations to be formed for any lawful enterprise, business, pursuit or occupation, a corporation may be formed for the purpose of acting "as the general or special agent, or attorney in fact, for any public or private corporation, or person, in the management or control of real estate or other property, its purchase, sale, or conveyance, etc." And when the articles of a corporation give it such authority, it has the same power as a natural person to execute a valid deed of conveyance of real property as the attorney in fact of another person or corporation. The exercise of such power involves no delegation of powers.¹¹

⁶ *Porter v. Packers' Nat. Bank of South Omaha*, 95 Neb. 223, 145 N. W. 255; *First Nat. Bank of Knox v. Bakken*, 17 N. D. 224, 116 N. W. 92.

⁷ *Knapp v. Saunders*, 15 S. D. 464, 90 N. W. 137.

⁸ *Willett v. Farmers' Sav. Bank*, 107 Iowa 69, 77 N. W. 519.

⁹ *Mitchell v. Lea Lumber Co.*, 43 Wash. 195, 9 L. R. A. (N. S.) 900, 10 Ann. Cas. 231, 86 Pac. 405.

The subordinate lodge of a benefit association may be deemed to be the agent of the general organization. *Wagner v. Supreme Lodge Knights & Ladies of Honor*, 128 Mich. 660, 87 N. W. 903; *Johanson v. Grand Lodge A. O. U. W. of Utah, Wyoming & Idaho*, 31 Utah 45, 86 Pac. 494.

¹⁰ *United Press v. A. S. Abell Co.*, 58 N. Y. App. Div. 611, 68 N. Y. Supp. 613.

¹¹ *Killingsworth v. Portland Trust Co.*, 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

"When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being, or artificial person, in the performance of its engagement, and involves no delegation of powers. So that, when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that, in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of

An incorporated collection agency may act as agent in collecting claims, and may employ attorneys for such purpose.¹²

§ 933. Power to act as trustee—General rule. For several technical reasons it was formerly thought that corporations aggregate could not hold either real or personal property in trust for another. One of the reasons given was that, since a corporation aggregate had no soul or conscience, no trust or confidence could be reposed in it, and a court of equity, which acted upon the conscience of a trustee in compelling the execution of a trust, could not compel it to execute the trust. Other reasons were that a corporation, being impersonal, could not be imprisoned for contempt in refusing to obey the decrees of the court, and could not take the oath required of trustees.¹³

This view, however, has long since been abandoned, and it is now settled beyond any question that corporations aggregate have the same capacity and power as a natural person to act as trustee, and to hold property in trust, provided the purpose is not foreign to the objects of its creation, and provided there are no charter or statutory prohibitions.¹⁴ "Although it was in early times held," said Mr.

the corporation, and, as such, must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained." *Killingsworth v. Portland Trust Co.*, 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

¹² *Snow, Church & Co. v. Hall*, 19 N. Y. Misc. 655, 44 N. Y. Supp. 427. ¹³ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232.

¹⁴ *United States. Jones v. Habersham*, 107 U. S. 174, 189, 27 L. Ed. 401; *Vidal v. Philadelphia*, 2 How. 127, 11 L. Ed. 205.

Connecticut. Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; *South-*

ington First Congregational Society v. Atwater, 23 Conn. 34.

Delaware. *Fidelity Insurance, Trust & Safe Deposit Co. v. Niven*, 5 Houst. 416, 1 Am. St. Rep. 150.

Michigan. *White v. Rice*, 112 Mich. 403, 70 N. W. 1024.

Minnesota. *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232.

Mississippi. *Sinking Fund Com'rs v. Walker*, 6 How. 143, 38 Am. Dec. 433.

New York. *Wetmore v. Parker*, 52 N. Y. 450; *Farmers' Loan & Trust Co. v. Harmony Fire & Marine Ins. Co.*, 41 N. Y. 619, 51 Barb. 33.

Ohio. *Morris v. Way*, 16 Ohio 469.

Oregon. *Killingsworth v. Portland Trust Co.*, 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

Tennessee. *Lincoln Sav. Bank v. Ewing*, 12 Lea 598; *Union Bank & Trust Co. v. Wright* (Tenn. Ch. App.), 58 S. W. 755.

Virginia. *Protestant Episcopal Edu-*

Justice Story, "that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, namely, the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where a corporation has a legal capacity to take real and personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do."¹⁵ In other words, if the trusts are within the general scope of the purposes for which the corporation was created, or relate to matters which will promote and aid the general purpose of such corporation, it may take and hold land in trust.¹⁶ Thus, eleemosynary or charitable corporations, like incorporated hospitals, colleges, and the like, and religious corporations, can hold property on the trusts which are within the objects of their creation.¹⁷ But a charitable corporation to which property is devised for its use in general does not hold it in trust, in the technical sense of the word, but "such a holding is sometimes called a quasi trust."¹⁸

Even a manufacturing corporation, or a bank, or insurance company, or any other modern business corporation may take property in trust to secure a debt due to it, or for any other purpose which is

cation Society v. Churchman, 80 Va. 718.

¹⁵ Vidal v. Philadelphia, 2 How. (U. S.) 187, 11 L. Ed. 205.

It is well settled that a corporation may act as trustee for any purpose within the scope of the objects for which it was created. Conley v. Daughters of Republic, 106 Tex. 80, 157 S. W. 937, 156 S. W. 197, rev'g on other grounds, — Tex. Civ. App. —, 151 S. W. 877.

¹⁶ Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N. E. 439.

¹⁷ Connecticut. Southington First Congregation Society v. Atwood, 23 Conn. 34.

Massachusetts. Phillips Academy v. King, 12 Mass. 546.

Mississippi. Wade v. American Colonization Society, 7 Smedes & M. 663, 45 Am. Dec. 324.

New Jersey. Mason's Ex'rs v.

Tuckerton M. E. Church, 27 N. J. Eq. 47.

New York. Wetmore v. Parker, 52 N. Y. 450.

Oregon. Liggett v. Ladd, 23 Ore. 26, 31 Pac. 81.

Tennessee. Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825.

Virginia. Protestant Episcopal Education Society v. Churchman, 80 Va. 78.

England. Attorney General v. Ironmongers' Co., 2 Beav. 313.

A charitable corporation may act as trustee for parties having an interest either in the principal or income of an endowment where it itself has an interest therein. Robb v. Washington & Jefferson College, 103 N. Y. App. Div. 327, 93 N. Y. Supp. 92.

¹⁸ Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513.

not foreign to its legitimate objects.¹⁹ And the validity of a trust deed to a corporation is not affected by its inability to comply with a statute requiring trustees to make an oath and give a bond.²⁰

A national bank "cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children." But it may "act as a fiduciary and occupy a trust relation in matters connected with" the business of banking.²¹

In many states statutes have been enacted creating or authorizing corporations for the express purpose of acting as trustees, and have been sustained.²²

Whenever property is devised or granted to a corporation, partly for its own use and partly for the use of others, its power to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that portion of the trust which relates to others.²³

§ 934. — Express authority. It is well settled that a corporation may be authorized by law to act as trustee,²⁴ and of course a trust company may act as trustee.²⁵ Moreover, the fact that the statute requires no bond to act as trustee except in the discretion of the court does not constitute unjust discrimination, where it requires the depositing of securities with the state treasurer.²⁶

¹⁹ *Farmers' Loan & Trust Co. v. Harmony Fire & Marine Ins. Co.*, 41 N. Y. 619, 51 Barb. (N. Y.) 33; *Morris v. Way*, 16 Ohio 469; *Lincoln Sav. Bank v. Ewing*, 12 Lea (Tenn.) 598. And see *White v. Rice*, 112 Mich. 403, 70 N. W. 1024.

²⁰ *Lincoln Sav. Bank v. Ewing*, 12 Lea (Tenn.) 598.

²¹ *Miller v. King*, 223 U. S. 505, 510, 56 L. Ed. 628.

²² *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232. See also in this connection:

Connecticut. *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

Delaware. *Fidelity Insurance, Trust & Safe Deposit Co. v. Niven*, 5 *Houst.* 416, 1 *Am. St. Rep.* 150.

Kentucky. *Johnson v. Johnson*, 88 Ky. 275, 11 S. W. 5.

Michigan. *In re Rice*, 42 Mich. 528.

Missouri. *Glaser v. Priest*, 29 Mo. App. 1.

Tennessee. *Union Bank & Trust Co. v. Wright* (Tenn. Ch. App.), 58 S. W. 755.

²³ *Chancellor Walworth*, in *In re Howe*, 1 Paige (N. Y.) 214.

²⁴ *White School House v. Post*, 31 Conn. 240; *Roane Iron Co. v. Wisconsin Trust Co.*, 99 Wis. 273, 67 *Am. St. Rep.* 856, 74 N. W. 818.

²⁵ *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 385; *Madison Trust Co. v. Carnegie Trust Co.*, 167 N. Y. App. Div. 4, 152 N. Y. Supp. 517.

²⁶ *Roane Iron Co. v. Wisconsin*

In Iowa, where the articles of incorporation are broad enough to authorize it, it seems that any corporation may act as trustee, where the trust is not foreign to the business for which the corporation was created.²⁷

§ 935. — Where trust prohibited or foreign to objects of corporation. Except as stated above, no corporation can lawfully take property, real or personal, in trust for a purpose which is foreign to the objects for which it was created.²⁸ In other words, the general rule is that corporations cannot act as trustees in matters in which they are not interested, or in matters that are inconsistent with and repugnant to the purposes for which they are created.²⁹ And of course a corporation which is prohibited by its charter or by statute from taking a conveyance or devise of property, cannot take a conveyance or devise in trust for another.³⁰ So where a railroad corporation owns lands no longer available for railroad purposes, it cannot create a trust to carry on the business of developing and using the property for profit.³¹

Statutory prohibitions against a corporation acting as trustee are generally applicable only to corporations thereafter formed.³²

Even if corporations organized under a general statute are forbidden to carry on a trust company business, a land company may enter into a joint adventure by which it holds title to land in trust to collect and pay over a portion of the proceeds to the grantor.³³

It is a general rule "that a charitable corporation cannot act as

Trust Co., 99 Wis. 273, 67 Am. St. Rep. 856, 74 N. W. 818.

²⁷ *State v. Higby Co.*, 130 Iowa 69, 114 Am. St. Rep. 409, 106 N. W. 382, where real estate company held authorized to act as trustee.

²⁸ *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Farmers' Loan & Trust Co. v. Carroll*, 5 Barb. (N. Y.) 613; *Jackson v. Hartwell*, 8 Johns. (N. Y.) 330. See also *Chapin v. School Dist. No. 2*, 35 N. H. 445 (where it was held ultra vires for a school district to take property in trust for the support of the ministry).

Thus, a corporation authorized by its charter to establish and maintain an institution "for the instruction of

youth" cannot take property in trust to pay over the income thereof for the support of missionaries. *South New Market Methodist Seminary v. Peaslee*, 15 N. H. 317.

²⁹ *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 91 N. E. 439.

³⁰ *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 91 N. E. 439; *United States Trust Co. of New York v. Lee*, 73 Ill. 142, 24 Am. Rep. 236.

³¹ *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90.

³² *Culver v. Lompoc Valley Sav. Bank*, 22 Cal. App. 379, 134 Pac. 355.

³³ *Latshaw v. Western Townsite Co.*, 91 Wash. 575, 158 Pac. 248.

trustee in a matter in which it has no interest, but, where it has an interest either in the principal or in the income, it may act as trustee for another or others having an interest in the whole or part of the income for life."³⁴

If property is conveyed, devised or bequeathed to a corporation in trust, when it has no power under its charter to hold the same or to execute the trust, it not only cannot be compelled to execute it, but it cannot lawfully do so. The trust, however, does not fail, since a court of equity will appoint a competent trustee to execute the same.³⁵

Where a charitable corporation was not able to take property devised to it, at the time of the probate of the will, but a statute subsequently gave it such power, it may be appointed trustee to execute the trust.³⁶

Quo warranto proceedings will not lie to bar a corporation from acting as trustee of an express trust. The matter is not one of such general interest as to warrant the use of the remedy.³⁷

§ 936. — Power to delegate authority. The rule that a trustee cannot delegate powers involving the exercise of discretion does not apply where the trustee is a corporation, since the element of trust in the judgment and discretion of an individual is entirely wanting.³⁸

§ 937. Power to act as executor or administrator. By the decisions at common law it was held that a corporation could not act as executor

³⁴ *Robb v. Washington & Jefferson College*, 103 N. Y. App. Div. 327, 93 N. Y. Supp. 92.

³⁵ *United States. Jones v. Habersham*, 107 U. S. 174, 189, 27 L. Ed. 401; *Vidal v. Philadelphia*, 2 How. 127, 11 L. Ed. 205.

Massachusetts. Winslow v. Cummings, 3 Cush. 358.

Mississippi. Wade v. American Colonization Society, 7 Smedes & M. 663, 45 Am. Dec. 324.

New Hampshire. Chapin v. School Dist. No. 2, 35 N. H. 445.

New Jersey. Mason's Ex'rs v. Tuckerton M. E. Church, 27 N. J. Eq. 47.

New York. Sheldon v. Chappell, 47 Hun 59.

Even if a corporation is without authority to execute a trust, equity will not permit the trust to fail by reason of such fact. *Culver v. Lompoe Valley Sav. Bank*, 22 Cal. App. 379, 134 Pac. 355.

³⁶ *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025, 80 N. E. 490.

³⁷ *State v. Higby Co.*, 130 Iowa 69, 114 Am. St. Rep. 409, 106 N. W. 382.

³⁸ *Chicago Title & Trust Co. v. Zinser*, 264 Ill. 31, Ann. Cas. 1915 D 931, 105 N. E. 718, holding consolidated corporation entitled to execute trust conferred on constituent company.

or administrator,³⁹ and this seems to be the rule at the present time⁴⁰ unless the statute dispenses with the oath,⁴¹ except in those jurisdictions where the right has been conferred by statute on particular corporations.⁴² Such statutes have generally been upheld as constitutional.⁴³ So the legislature may enact that where a trust company lawfully designated as an executor is merged into another company subsequent to the making and prior to the probate of the will, the latter shall be the transferee of the privilege of being the executor.⁴⁴

A statute authorizing a trust company to act as "executor" and to execute "any other trust," confers power to act as "administrator."⁴⁵

³⁹ Killingsworth v. Portland Trust Co., 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

"The reason given by Blackstone why a corporation aggregate could not act as an executor or administrator is that it could not take the necessary oath; but even at common law, in England, this technical difficulty was evaded by the corporation naming an agent, called a 'syndic,' to whom letters were issued." Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232.

⁴⁰ Farmers' Loan & Trust Co. v. Smith, 74 Conn. 625, 51 Atl. 609, holding that New York corporation authorized to act as executor in that state cannot be appointed executor in Connecticut; Fidelity Insurance Trust & Safe Deposit Co. v. Niven, 5 Houst. (Del.) 163; Georgetown College v. Browne, 34 Md. 450; Continental Trust Co. v. Peterson, 76 Neb. 411, 110 N. W. 316, 107 N. W. 786.

⁴¹ "The reason why a corporation was unable to perform the office of executor or administrator, as stated by Blackstone, was that it could not take an oath for the due execution of the office. 1 Bl. Com. 477. But, to enable a corporation to act as executor or administrator, the statute may dispense with the oath, or provide that some one of its officers may take it, or the law of the state may not

require any oath for the due execution of the office, and in such case, when no other impediment intervenes, a corporation may act as administrator when the law of the state does not require the administrator to take an oath." Killingsworth v. Portland Trust Co., 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

⁴² In re Kilborn's Estate, 5 Cal. App. 161, 89 Pac. 985; Old Colony Trust Co. v. Wallace, 212 Mass. 335, 98 N. E. 1035 (statute authorizing trust companies to act as executors).

⁴³ Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232; Union Bank & Trust Co. v. Wright (Tenn. Ch.), 58 S. W. 755.

⁴⁴ In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714, aff'g 149 N. Y. App. Div. 529, 133 N. Y. Supp. 1012. But see In re Stikeman's Will, 48 N. Y. Misc. 156, 96 N. Y. Supp. 460.

⁴⁵ Union Bank & Trust Co. v. Wright (Tenn. Ch.), 58 S. W. 755.

Where a note was executed to a corporation as administrator of a decedent's estate, it was held that the maker was estopped to deny the capacity of the corporation to act as administrator, in an action on the note brought by it in its representative character. Union Bank & Trust Co. v. Wright (Tenn. Ch. App.), 58 S. W. 755.

§ 938. Power to act as guardian or committee. A statute granting to annuity, safe deposit and trust companies the power to act as guardians is constitutional,⁴⁶ although it does not require the corporation to take an oath or give a bond, as is required in the case of natural persons.⁴⁷

A trust company given power to "execute trusts of every description" may act as committee of a lunatic.⁴⁸ So a trust company may be appointed as a committee of the estate of an habitual drunkard where it is expressly authorized to execute all trusts of every description committed to it by a person or persons or transferred to it by a surrogate or any court of record.⁴⁹

⁴⁶ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232.

⁴⁷ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232.

⁴⁸ *Equitable Trust Co. v. Garis*, 190 Pa. St. 544, 70 Am. St. Rep. 644, 42 Atl. 1022.

⁴⁹ *Glaser v. Priest*, 29 Mo. App. 1.

CHAPTER 25

POWER TO BORROW AND LOAN

I. POWER TO BORROW

- § 939. General rules.
- § 940. As dependent on purpose for which borrowed.
- § 941. As dependent on nature and kind of corporation.
- § 942. Charter, constitutional or statutory prohibition or restrictions.
- § 943. Extent of power to borrow.
- § 944. Limitation as to amount.
- § 945. Defenses to actions to recover back.

II. POWER TO LOAN

- § 946. Implied power—In general.
- § 947. — To further corporate interests.
- § 948. — To obtain interest on surplus funds.
- § 949. Constitutional charter or statutory prohibition or restriction.

I. POWER TO BORROW

§ 939. General rules. The borrowing of money by a corporation is an act "in the transaction of its ordinary business."¹

Subject to the qualifications that the money must be borrowed for an authorized purpose,² and that there are no statutory prohibitions or restrictions,³ it is settled beyond doubt that a corporation has power to borrow money, not only when such power is expressly conferred on the corporation,⁴ but also even when the power is not expressly conferred, the power being implied in the latter case whenever the borrowing is necessary or proper⁵ in the conduct of the business for

¹ *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

² See § 940, *infra*.

³ See § 942, *infra*.

⁴ *Brown v. State*, 62 Md. 439.

⁵ *United States v. Mahoney Min. Co. v. Anglo-California Bank*, 104 U. S. 192, 26 L. Ed. 707.

Colorado. Union Gold-Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

Illinois. Peoria Star Co. v. Cutright, 115 Ill. App. 492.

Iowa. Thompson v. Lambert, 44 Iowa 239.

Kentucky. Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, 26 Ky. L. Rep. 401, 111 Am. St. Rep. 302, 81 S. W. 927; *Commercial Bank v. Newport Mfg. Co.*, 40 Ky. 13, 35 Am. Dec. 171.

Maine. Johnson v. Johnson Bros.,

which it was created, unless the corporation is of a class the funds for which are otherwise raised.⁶

The power to contract includes the power to borrow money for legitimate purposes; and the power to purchase includes power to borrow money to pay for the thing purchased.⁷ In fact, it may be laid down as a general rule that whenever the charter of a corporation gives it the power, expressly or impliedly, to purchase property or otherwise incur a debt, it has the implied power, in the absence of restrictions in its charter, to borrow money to pay for the property or to pay the debt. It was said in an Alabama case: "Having the power to acquire and hold personal and real estate, by purchase, it has, as an incident, the power to borrow money to make the purchase. The

108 Me. 272, Ann. Cas. 1913 A 1303, 80 Atl. 741.

Maryland. *Heironimus v. Sweeney*, 83 Md. 146, 33 L. R. A. 99, 55 Am. St. Rep. 333, 34 Atl. 823.

Massachusetts. *Bradbury v. Boston Canoe Club*, 153 Mass. 77, 26 N. E. 132; *Morville v. American Tract Society*, 123 Mass. 126.

New Hampshire. *Richards v. Merimack & C. R. R.*, 44 N. H. 127.

New Jersey. *Lucas v. Pitney*, 27 N. J. L. 221; *Stratton v. Allen*, 16 N. J. Eq. 229.

New York. *National Park Bank v. German-American Mut. Warehousing & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567, 53 N. Y. Super. Ct. 367; *Hope Mut. Life Ins. Co. v. Perkins*, 38 N. Y. 404; *Smith v. Law*, 21 N. Y. 296.

North Carolina. *Commissioners of Craven v. Atlantic & North Carolina R. Co.*, 77 N. C. 292.

Ohio. *Hays v. Galion Gas Light & Coal Co.*, 29 Ohio St. 330.

Tennessee. *Turner v. Kingston Lumber & Manufacturing Co. (Tenn.)*, 59 S. W. 410; *Union Bank of Knoxville v. Jacobs*, 6 Humph. 515.

Texas. *Taylor Feed Pen Co. v. Taylor Nat. Bank*, — Tex. Civ. App. —, 181 S. W. 534.

Virginia. *Burr v. M'Donald*, 3 Gratt. 215.

Wisconsin. *Eastman v. Parkinson*, 133 Wis. 375, 13 L. R. A. (N. S.) 921, 113 N. W. 649; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 125.

England. *In re Patent File Co.*, 6 Ch. App. 83; *In re International Life Assurance Soc.*, L. R. 10 Eq. 312.

"The weight of modern authority supports the conclusion that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so, subject only to such express limitations as are imposed by their charters. The power to borrow carries with it, by implication, unless restrained by the charter, the power to secure the loan by mortgage. Accordingly it may be regarded as settled that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessions; it may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden." *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

⁶ See § 941, *infra*.

⁷ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

exercise of such power may be advantageous and useful, enabling the corporation the sooner to put its powers into active exercise, and to require the necessary property on terms more profitable to its stockholders. It would scarcely be affirmed that the power to acquire and hold real and personal estate must be so narrowed that the corporation could not contract a debt for its purchase—that at the very moment of the purchase and conveyance, the purchase money must be counted out, or the purchase and conveyance is void. If the necessities and interests of the corporation require, which must be determined by those having charge of its affairs, and intrusted with the power and duty, that a debt be contracted in the acquisition of the necessary property, the power to contract it cannot be denied. If more advantageous to borrow the money, and make immediate payment, than to contract the debt for the purchase money with the vendor, the contract is equally within the scope of corporate power, and valid. The authorities, we think, support the proposition that every private corporation, unless prohibited, may borrow money to carry out the purposes of its creation.”⁸

The power to borrow is not precluded by the fact that the company has sufficient cash on hand by passing the payment of dividends.⁹

On borrowing money, the corporation may bind itself by any form of obligation not forbidden by the charter.¹⁰ Borrowing money requires no action of the stockholders.¹¹ If the power to borrow is expressly conferred, the corporation may borrow through a trustee.¹²

A loan may be made to the corporation by its members as well as by third persons.¹³

The lender retains no control over the sum loaned, after the loan, unless it is otherwise agreed.¹⁴

§ 940. As dependent on purpose for which borrowed. Of course, the borrowing must be for a purpose within the scope of the objects for which the corporation was created; a corporation never has any

⁸ Per Brickell, C. J., in *Alabama Gold Life Ins. Co. v. Central Agricultural & Mechanical Ass'n*, 54 Ala. 73, 77.

⁹ *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd without opinion in 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

¹⁰ *J. K. Siphon Ventilator Co. v. Hutton*, 116 Ark. 545, 175 S. W. 30.

¹¹ *Turney v. Combination Brick Co.*, 184 Mich. 439, 151 N. W. 590.

¹² *Venner v. New York Cent. & H. River R. Co.*, 160 N. Y. App. Div. 127, 145 N. Y. Supp. 725.

¹³ *Sivin v. Mutual Match Co.*, 46 N. Y. Misc. 244, 91 N. Y. Supp. 771.

¹⁴ *Miller v. Barlow*, 78 N. Y. App. Div. 331, 79 N. Y. Supp. 964.

power to borrow money for a purpose foreign to the objects for which it was created.¹⁵

As was said in a New York case, the power of a corporation to borrow money is not a principal power, but an incidental power.¹⁶ For example, a corporation has no power to borrow money in order to make an ultra vires purchase of property.¹⁷ So a bank may borrow money to use in discounting notes, but it cannot borrow money for use in speculations outside of the business of banking.¹⁸ Likewise, an insurance company may borrow money to pay losses or expenses, but it cannot borrow in order to provide a fund for the purpose of giving it credit.¹⁹ And a building and loan association may borrow money to pay debts lawfully incurred, but not for the purpose of making loans or speculating.²⁰

However, where the implied power to borrow money for use in the corporate business exists, the fact that the borrowed money is used for a purpose other than one contemplated by the charter, does not show that the corporation had no power to borrow the money, but only that it used such power for a wrong purpose.²¹

§ 941. As dependent on nature and kind of corporation. Power on the part of a corporation to borrow money will not be implied when its nature and the objects for which it was created are such that borrowing money cannot be a necessary or proper means of carrying on its business.²² On the other hand, practically every business corporation, where not expressly prohibited or restricted, has implied power to borrow money. This includes railroad companies,²³ steam-

¹⁵ *Stambaugh v. Refugio Syndicate*, 196 Fed. 143.

¹⁶ *Beers v. Phoenix Glass Co.*, 14 Barb. (N. Y.) 358, 362. See also *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

¹⁷ *Leavitt v. Yates*, 4 Edw. (N. Y.) 134; *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 31 L. R. A. 497, 59 Am. St. Rep. 751; *In re London, H. & C. Exch. Bank*, 5 Ch. App. 444.

¹⁸ *Leavitt v. Yates*, 4 Edw. (N. Y.) 134.

¹⁹ *Trenton Mut. Life & Fire Ins. Co. v. McKelway*, 12 N. J. Eq. 133.

²⁰ *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258; *In re National*

Permanent Ben. Bldg. Society, 5 Ch. App. 309.

²¹ *Taylor Feed Pen Co. v. Taylor Nat. Bank*, — Tex. Civ. App. —, 181 S. W. 534.

²² *Trenton Mut. Life & Fire Ins. Co. v. McKelway*, 12 N. J. Eq. 133; *Pittsburgh & C. R. Co. v. Allegheny County*, 63 Pa. St. 126; *In re National Permanent Ben. Bldg. Society*, 5 Ch. App. 309; *In re Cork & Y. Ry. Co.*, 4 Ch. App. 748; *Wenlock v. River Dee Co.*, 10 App. Cas. 354, 19 Q. B. D. 155; *Ruitz v. Sandwich Roman Cath. Episc. Corporation*, 30 U. C. Q. B. 269.

²³ *Alabama. Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555.

boat companies,²⁴ turnpike companies,²⁵ warehouse and storage companies authorized to advance money on merchandise,²⁶ insurance companies,²⁷ banking companies, including national banks and savings banks,²⁸ mining companies,²⁹ manufacturing and trading companies,³⁰ gas and water companies,³¹ building and loan associations,³²

New Jersey. *Lucas v. Pitney*, 27 N. J. L. 221.

Pennsylvania. *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211.

Tennessee. *Union Bank of Knoxville v. Jacobs*, 6 Humph. 515.

England. *Royal British Bank v. Turquand*, 5 E. & B. 248.

²⁴ *Booth v. Robinson*, 55 Md. 419; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 Kay & J. 733.

²⁵ *Smith v. Law*, 21 N. Y. 296.

²⁶ *National Park Bank of New York v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567, 53 N. Y. Super. Ct. 367.

²⁷ *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Nelson v. Eaton*, 26 N. Y. 410; *Hyde v. Equitable Life Assur. Soc. of United States*, 61 N. Y. Misc. 518, 116 N. Y. Supp. 219; *Orr v. Mercer County Mut. Fire Ins. Co.*, 114 Pa. St. 387, 6 Atl. 696; *In re International Life Assur. Society*, L. R. 10 Eq. 312.

The case of *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116, to the contrary cannot be sustained.

²⁸ **Illinois.** *Ward v. Johnson*, 95 Ill. 215, 238, aff'g 5 Ill. App. 30.

Maryland. *Heironimus v. Sweeney*, 83 Md. 146, 33 L. R. A. 99, 55 Am. St. Rep. 333.

Missouri. *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165.

New Jersey. *Fifth Ward Sav. Bank, of Jersey City v. Jersey City First Nat. Bank*, 48 N. J. L. 513.

England. *MacLae v. Sutherland*, 3 E. & B. 1.

"The fact that such bank is insol-

ent at the time the loan is obtained does not impair or deprive the bank of its power * * * unless it is forbidden by some statutory provision." *Harris v. Randolph County Bank*, 157 Ind. 120, 140, 60 N. E. 1025.

²⁹ *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Larwell v. Hanover Sav. Fund Society*, 40 Ohio St. 282. But see *Burmester v. Norris*, 6 Exch. 796; *Tredwen v. Bourne*, 6 M. & W. 465.

³⁰ **Alabama.** *Oxford Iron Co. v. Spradley*, 46 Ala. 98.

California. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

Connecticut. *In re National Shoe & Leather Bank's Appeal from Com'rs*, 55 Conn. 469, 12 Atl. 646.

Kentucky. *Star Mills v. Bailey*, 140 Ky. 194, 130 S. W. 1077; *Commercial Bank of New Orleans v. Newport Mfg. Co.*, 1 B. Mon. 13, 35 Am. Dec. 171.

New York. *Beers v. Phoenix Glass Co.*, 14 Barb. 358.

Virginia. *Burr's Ex'rs v. McDonald*, 3 Gratt. 216.

England. *In re Hamilton's Wind-sor Iron Works*, 12 Ch. Div. 707.

³¹ *Wood v. Whelen*, 93 Ill. 153; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Hays v. Gallion Gas Light & Coal Co.*, 29 Ohio St. 330.

³² *Marion Trust Co. v. Crescent Loan & Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688; *Davis v. West Saratoga Bldg. Union*, 32 Md. 285; *North Hudson Mut. Building & Loan Ass'n v. First*

automobile selling companies,³³ etc. So the power is ordinarily implied in case of agricultural and mechanical associations and societies,³⁴ corporations for encouraging athletics and sports,³⁵ colleges, academies, and other educational corporations,³⁶ religious corporations,³⁷ etc.

§ 942. Charter, constitutional or statutory prohibition or restrictions. Of course, a corporation has no power to borrow money in violation of a prohibition in its charter.³⁸ A prohibition against borrowing does not, however, prevent it from obtaining money by other means, as by selling its property in good faith, and leasing or hiring the same from the purchaser, under a contract giving it the right to repurchase.³⁹ Nor does a prohibition against borrowing prevent it from continuing its business and incurring debts in the usual course thereof, as for labor, supplies, etc.⁴⁰ Moreover, the fact that the charter of a corporation authorizes it to raise money in a certain way does not exclude its general power to borrow money, when necessary, unless it appears that such was the intention of the legislature. Thus, it was held that the fact that the charter of a corporation created for the purpose of encouraging athletic sports authorized it to receive and hold in trust funds given or bequeathed to it did not confine it to that mode of raising money for the purpose of purchasing or leasing land and erecting buildings as authorized by its charter, but that it had the general power to borrow money for such a purpose.⁴¹ And where the charter of a railroad company authorized it

Nat. Bank of Hudson, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300. And see *Murray v. Scott*, 9 App. Cas. 519. But see *In re National Permanent Ben. Bldg. Society*, 5 Ch. App. 309.

But it seems that a building and loan association cannot borrow money for the mere purpose of lending it. *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258, 263.

³³ *American Nat. Bank v. Wheeler-Adams Auto Co.*, 31 S. D. 524, 141 N. W. 396.

³⁴ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229; *Alabama Gold Life Ins. Co. v. Central Agricultural & Mechanical Ass'n*, 54 Ala. 73; *Thompson v. Lambert*, 44 Iowa 239.

³⁵ *Bradbury v. Boston Canoe Club*, 153 Mass. 77, 26 N. E. 132.

³⁶ *Moss v. Harpeth Academy*, 7 Heisk. (Tenn.) 283.

³⁷ *Davis v. Proprietors of Lowell Second Universalist Meeting House*, 8 Mete. (Mass.) 321.

³⁸ *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414; *Wenlock v. River Dee Co.*, 10 App. Cas. 354, 19 Q. B. D. 155.

³⁹ *Yorkshire Railway Wagon Co. v. Maclure*, 21 Ch. Div. 309.

⁴⁰ *In re German Min. Co.*, 4 De G. M. & G. 19. And see *Hawkers v. Bourne*, 8 M. & W. 703; *Hawtayne v. Bourne*, 7 M. & W. 595.

⁴¹ *Bradbury v. Boston Canoe Club*, 153 Mass. 77, 26 N. E. 132.

to borrow such money as might be necessary to construct and equip its road, and secure the same by mortgage, it was held that this did not take away its general power to borrow money for use in the course of its business.⁴²

A constitutional prohibition against an increase of corporate indebtedness without the consent of the majority of the stock at a called meeting of the stockholders has been held not applicable to a borrowing of money in the ordinary course of business.⁴³

Where the statute limits the right to borrow to a borrowing "for temporary purposes," the corporation cannot borrow on a ten year mortgage; but a thirty day note is presumably for temporary purposes.⁴⁴

Power to borrow will not be implied where the charter provides a particular fund to be exclusively used in accomplishing its objects.⁴⁵ Likewise, where a statute prohibits the contracting of any debts by banks except for the purposes mentioned in the statute, and the statute makes no reference to the borrowing of money, it has been held that a bank has no power to borrow money or, what amounts to the same thing, to incur an indebtedness for money paid out by a third person at its request in discharge of the obligation.⁴⁶

§ 943. Extent of power to borrow. Authority to raise money by borrowing, whether such authority is expressly conferred or implied, does not give the power to use means to raise money which do not fall within the definition of a borrowing. The power to borrow, therefore, cannot be relied upon to sustain the issue by a corporation of irredeemable bonds entitling the holder merely to a share in the earnings of the corporation;⁴⁷ or to sustain the issue of preferred stock.⁴⁸

⁴² *Lucas v. Pitney*, 27 N. J. L. 221.

⁴³ *West v. Dyson*, 230 Pa. 619, 79 Atl. 782.

⁴⁴ *Leighton v. Leighton Lea Ass'n*, 74 N. Y. Misc. 229, 131 N. Y. Supp. 561.

⁴⁵ *Lewis & M. County Turnpike Road Co. v. Thomas* (Ky.), 3 S. W. 907; *Trenton Mut. Life & Fire Ins. Co. v. McKelway*, 12 N. J. Eq. 133; *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258; *In re National Permanent Ben. Bldg. Society*, 5 Ch. App. 309.

But see *Union Bank v. Jacobs*, 6

Humph. (Tenn.) 515, holding that the fact that the charter directs that the funds shall be raised by subscription does not exclude other modes, such as borrowing money.

⁴⁶ *Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 277.

⁴⁷ *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. 386; *McCalmont v. Philadelphia & R. R. Co.*, 10 Wkly. Notes Cas. (Pa.) 338. But see *Philadelphia & R. R. Co. v. Stichter*, 11 Wkly. Notes Cas. (Pa.) 325.

⁴⁸ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

A bank does not borrow money by rediscounting its bills receivable, although it indorses them so as to become contingently liable for their payment.⁴⁹

A loan to officers or directors of a corporation may or may not be a loan to the corporation according to the circumstances of the particular case.⁵⁰ So whether a transaction amounts to a loan to a company or a purchase of its stock depends on the circumstances of the particular case.⁵¹

A corporation authorized to borrow money for the purposes of its business is not authorized to receive money on deposit.⁵² But the power to borrow includes the power to borrow the credit of others and employ it in raising money, as by borrowing the notes of others and raising money thereon by indorsing and discounting or pledging them.⁵³

§ 944. Limitation as to amount. If the charter of a corporation allows it to borrow money, but prohibits it from borrowing more than a certain amount, it has no power to exceed the limit; and when a charter gives the corporation power to borrow a certain sum, or not exceeding a certain sum, it impliedly prohibits it from borrowing in excess of such sum under any general power to borrow which it might otherwise have.⁵⁴ Of course, a limit on the amount of indebtedness permitted to a corporation limits the amount which can be borrowed.⁵⁵

§ 945. Defenses to actions to recover back. Generally, the corporation cannot set up as a defense to an action for money loaned to it that it had no power to borrow the money.⁵⁶ Of course, if a

⁴⁹ *United States Nat. Bank v. First Nat. Bank of Little Rock*, 79 Fed. 296.

⁵⁰ *American Exch. Nat. Bank v. First Nat. Bank of Spokane Falls*, 82 Fed. 961.

A loan on corporate bonds is not a personal one to an officer merely because the lender takes his individual note and other collateral. *Buffalo Loan Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co.*, 162 N. Y. 67, 56 N. E. 505.

⁵¹ *In re McLean-Bowman Co.*, 138 Fed. 181.

⁵² *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275.

⁵³ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229; *Lucas v. Pitney*, 27 N. J. L. 221; *Holbrook v. Basset*, 5 Bosw. (N. Y.) 147; *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53.

⁵⁴ *First Nat. Bank of Covington v. D. Kiefer Milling Co.*, 95 Ky. 97, 23 S. W. 675; *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414; *In re Cork & Y. Ry. Co.*, 4 Ch. App. 748; *Gordon v. Sea Fire Life Assur. Society*, 1 H. & N. 599; *Wenlock v. River Dee Co.*, 10 App. Cas. 354, 19 Q. B. D. 155.

⁵⁵ See § 942, *supra*.

⁵⁶ See Chap. 37, *infra*.

corporation has had the benefit of a loan, there is an implied agreement to repay it.⁵⁷ So it is no defense to an action for the money loaned that the lender knew that the corporation intended to use it for an unauthorized purpose,⁵⁸ or that the proceeds were misapplied in part by an officer of the borrowing corporation.⁵⁹ Likewise, it is no defense to an action for money borrowed that the need for it was caused by mismanagement, dishonesty or conspiracy.⁶⁰

If the corporation has received the benefit of a loan, it cannot be contended that the borrowing was not duly authorized by the corporation.⁶¹ Thus, the corporation is liable although there was no formal notice or record of the stockholders' meeting at which the request for a loan was made.⁶²

Usury does not make the loan ultra vires, and the debtor corporation is the only one who can urge the defense.⁶³

II. POWER TO LOAN

§ 946. Implied power—In general. The decisions are neither wholly clear nor harmonious as to the power of a corporation to loan money. In some cases the existence of such an implied power has been denied, at least where not incidental to some corporate enterprise within the scope of the object for which the corporation was created.⁶⁴ Thus, in Alabama, it has been held that a state grange⁶⁵ or the Grand Lodge of Masons,⁶⁶ or a railroad company,⁶⁷ has no power to loan money. However, the later and better considered decisions hold that a corporation not engaged in loaning money has power (1) to loan occasionally surplus in its hands in order to add

⁵⁷ *Meridian Life & Trust Co. v. Eaton*, 41 Ind. App. 118, 82 N. E. 480, 81 N. E. 667.

The corporation is liable where the money borrowed was used in the purchase of the corporation. *People's Bank v. American Nat. Bank*, 134 Ill. App. 528.

⁵⁸ *Marion Trust Co. v. Crescent Loan & Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

⁵⁹ *Reagan v. First Nat. Bank*, 157 Ind. 623, 61 N. E. 575.

⁶⁰ *Randall v. Fox*, 13 Ariz. 87, 108 Pac. 249.

⁶¹ *Gaitley v. Albany Foundry Co.*, 157 N. Y. App. Div. 10, 141 N. Y. Supp. 676.

⁶² *Burke v. Sidra Bay Co.*, 116 Wis. 137, 92 N. W. 568.

⁶³ *George N. Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511, 11 Det. L. N. 105, 99 N. W. 748.

⁶⁴ *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573.

⁶⁵ *Chambers v. Falkner*, 65 Ala. 448, 454.

⁶⁶ *Grand Lodge v. Waddill*, 36 Ala. 313.

⁶⁷ *Waddill v. Alabama & T. R. Co.*, 35 Ala. 323.

to its revenue,⁶⁸ and (2) to loan money where the loan is in aid of corporate enterprises.⁶⁹

The power to loan money, by discounting paper or otherwise, is implied, when not expressly conferred, in the case of banking and loan companies,⁷⁰ but the implied power to loan money is by no means confined to such corporations. Other corporations have such power, subject to express restrictions, whenever it is reasonably incidental to the transaction of their business, or necessary in order to prevent funds which they are entitled to hold from being unproductive.⁷¹ So if power is expressly conferred upon a railroad company or other corporation to aid another in the construction of its road or otherwise, it may give such aid by loaning money.⁷² But a corporation, such as a railroad company, water company, manufacturing company, and the like, not created, as are banking and loan companies, for the express purpose of making loans, has no power to make loans as a business, or for any purpose which is foreign to the objects of its creation. In the case of a corporation of this character the power to make loans is not a principal power, but exists only when incidental to the transaction of the business authorized by its charter.⁷³ For example, an insurance company cannot lawfully make loans for the purpose of sustaining another corporation, whether the other corporation is engaged in the same or a different business.⁷⁴

So a corporation created to manufacture and sell brake beams has no power to loan its money as capital.⁷⁵ Moreover, a charter provision giving the corporation a lien upon shares of stock by way of security for any indebtedness from the stockholder to the corporation does not authorize a loan to stockholders.⁷⁶

⁶⁸ See § 948, *infra*.

⁶⁹ See § 947, *infra*.

⁷⁰ *DeLoach v. Jones*, 18 La. 447.

⁷¹ *California. Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

Indiana. Pancoast v. Travelers' Ins. Co., 79 Ind. 172.

Louisiana. Bank of Berwick v. George Vinson Shingle & Manufacturing Co., 132 La. 861, 61 So. 850; *Life Ass'n of America v. Levy*, 33 La. Ann. 1203.

New York. Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; *Farmers' Loan & Trust Co. v. Clowes*, 3 N. Y. 470, 4 Edw. 575.

Washington. Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068.

"Whether it is ultra vires or not depends on circumstances." *Laughlin v. Chicago Ry. Equipment Co.*, 182 Ill. App. 280, 291.

⁷² *Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50.

⁷³ *Coltman v. Coltman*, 19 Ch. Div. 64.

⁷⁴ *Berry v. Yates*, 24 Barb. (N. Y.) 199.

⁷⁵ *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713, *aff'g* 107 Ill. App. 444.

⁷⁶ *Webster v. Howe Mach. Co.*, 54 Conn. 394, 410, 8 Atl. 482.

Power to purchase and occupy property and "employ" it in such manner as the corporation may deem necessary and proper does not constitute power to loan money.⁷⁷ On the other hand, of course, a corporation created "to promote and assist financially or otherwise" other companies, has power to loan to other companies.⁷⁸

§ 947. — To further corporate interests. It would seem that there could be no question but that a corporation may loan money to another where it will directly result in a benefit to the business of the lender.⁷⁹ Thus, a water company may make advances to a contractor to enable him to construct its works, or to another company engaged in constructing ditches and laying pipes, in order to obtain an additional supply of water required by it,⁸⁰ and a mining company may advance money to a tunnel company to put in drains which will aid the lender in drawing water from its mine.⁸¹ So too, a manufacturing or trading company, for the purpose of disposing of its goods, may make a loan to a person dealing with it, to enable him to carry out a transaction in which he is engaged.⁸² And a brewery corporation has implied power to loan a portion of its funds for the erection of a building in which its beer only shall be sold.⁸³ However, it has been held that there is no implied power to make a loan to induce a purchase of real estate from the corporation, where the proposed sale of real estate is not pursuant to an express power for the purpose of carrying out the objects for which the corporation was created, but rather to sell land not necessary for corporate use, as a step toward liquidating and winding up the affairs of the corporation.⁸⁴

§ 948. — To obtain interest on surplus funds. Whenever a corporation has the right to hold funds for which there is no present use, it may loan them, in the absence of express restriction, in order to invest them, instead of allowing them to remain idle and unpro-

⁷⁷ Calumet & C. Canal & Dock Co. v. Conkling, 273 Ill. 318, 112 N. E. 982.

⁷⁸ Finance Co. of Pennsylvania v. New Jersey Short Line R. Co., 193 Fed. 507.

⁷⁹ Sutro Tunnel Co. v. Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

⁸⁰ Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620, 628.

⁸¹ Sutro Tunnel Co. v. Segregated

Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

⁸² Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 81, 11 L. R. A. 170, 25 N. E. 1083.

⁸³ Kraft v. West Side Brewery Co., 219 Ill. 205, 76 N. E. 372, aff'g 121 Ill. App. 371.

⁸⁴ Calumet & Chicago Canal & Dock Co. v. Conkling, 273 Ill. 318, 112 N. E. 982, where, however, there is a strong dissenting opinion by Justice Carter.

ductive.⁸⁵ This is true of insurance and annuity companies,⁸⁶ benevolent associations,⁸⁷ manufacturing companies,⁸⁸ railroad companies, etc., having surplus funds.⁸⁹

On the other hand, it has recently been held in Idaho that a mining company has no power to loan money although the purpose was "merely to obtain a return on the idle funds of the corporation."⁹⁰

§ 949. Constitutional charter or statutory prohibition or restriction. If a corporation is authorized to lend money only on bond and mortgage, it cannot lend money on any other security.⁹¹ And if a corporation is authorized to loan its money to certain classes of corporations only, it cannot loan its money to a partnership.⁹² Likewise, if the charter expressly gives the corporation power to "invest" its funds in certain specified kinds of securities, no power exists to invest in other securities.⁹³

The amount which some corporations, such as banks, may loan, is generally fixed by statute.⁹⁴

Loans to stockholders are sometimes expressly forbidden by statute,

⁸⁵ *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102; *North Carolina R. Co. v. Moore*, 70 N. C. 6.

"The loaning of money not being expressly prohibited to the corporation (a canning company) it may, as we think, without any question make such temporary disposition of the funds which it has on hand from time to time as to secure a profit, the very object of its organization being to earn money for its stockholders in the prosecution of its business. Such a temporary and incidental loaning of money is not the engaging in the business of making loans, which is outside the scope of the authority of manufacturing corporations." *Garrison Canning Co. v. Stanley*, 133 Iowa 57, 110 N. W. 171.

⁸⁶ *Frese v. Mutual Life Ins. Co. of New York*, 11 Cal. App. 387, 105 Pac. 265; *Farmers' Loan & Trust Co. v. Clowes*, 3 N. Y. 470, 4 Edw. (N. Y.) 575; *Farmers' Loan & Trust Co. v. Perry*, 3 Sandf. Ch. (N. Y.) 339.

⁸⁷ *Western Boatmen's Benev. Ass'n v. Kribben*, 48 Mo. 37.

⁸⁸ *Bank of Berwick v. George Vinson Shingle & Manufacturing Co.*, 132 La. 861, 61 So. 850.

⁸⁹ *Commissioners of Craven v. Atlantic & N. C. R. Co.*, 77 N. C. 289; *North Carolina R. Co. v. Moore*, 70 N. C. 6. And see *Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50.

⁹⁰ *Riley v. Callahan Min. Co.*, 28 Idaho 525, 155 Pac. 665.

⁹¹ *New York Firemen Ins. Co. v. Ely & Parsons*, 2 Cow. (N. Y.) 678; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 31.

⁹² *Andes Ins. Co. v. McCoy*, 5 Ohio Dec. 549.

⁹³ *Robotham v. Prudential Ins. Co. of America*, 64 N. J. Eq. 673, 53 Atl. 842.

⁹⁴ A customer of a bank is chargeable with knowledge of the statute regulating the amount that may be loaned to one person. *Wald v. Wheelon*, 27 N. D. 624, 147 N. W. 402.

at least in so far as some corporations are concerned;⁹⁵ and national banks are forbidden to loan on shares of their capital stock.⁹⁶

Statutes often prohibit savings banks from loaning money on notes, drafts or other personal security.⁹⁷

A company forbidden by statute to carry "on the business * * * of buying and selling bills of exchange" cannot loan money to a stockholder of another company, where not made to advance the business of the lender.⁹⁸ Thus, a sugar refining company has no power to loan a large sum of money on a pledge of stock of another corporation, since the "buying of a bill" is within a statute forbidding such a corporation to carry on the business of discounting bills or notes, or of buying and selling bills of exchange.⁹⁹

Of course, loan companies may loan money, but only as provided for in their charters and by statute.¹

If the charter expressly forbids the corporation to engage "in the business of loaning money," a contract therefor is void.²

The power of banks and trust companies to make loans is governed by special statutes and rules not within the scope of this work.

⁹⁵ *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621 (holding statutory exception of building or homestead association not applicable to insurance company); *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

⁹⁶ *Buffalo German Ins. Co. v. Third Nat. Bank*, 19 N. Y. Misc. 564, 43 N. Y. Supp. 550; *Feckheimer v. National Exch. Bank*, 79 Va. 80.

⁹⁷ *Citizens' Sav. Bank v. Couse*, 68 N. Y. Misc. 153, 124 N. Y. Supp. 79.

⁹⁸ *Earle v. American Sugar Refining Co.*, 74 N. J. Eq. 751, 71 Atl. 391.

⁹⁹ "While the loan to Segal was not, strictly speaking, the discounting of a note, it undoubtedly was the buying of a bill, within the meaning

of the section. In other words, it was the doing of a banking business, as the loan was not made by the company for its own benefit in the course of its own business. This section is understood to be a prohibition against the exercise of banking powers by companies organized under our general corporation act." *Earle v. American Sugar Refining Co.*, 74 N. J. Eq. 751, 71 Atl. 391.

¹ *Lowry v. Collateral Loan Ass'n*, 62 N. Y. App. Div. 240, 71 N. Y. Supp. 822, aff'd 172 N. Y. 394, 65 N. E. 206 (loan as usurious).

² *In re Grand Union Co.*, 219 Fed. 353, holding ostensible sale of piano leases to be in effect a loan.

CHAPTER 26

POWERS AS TO NEGOTIABLE INSTRUMENTS

- § 950. General rule as to implied power to execute—Rule in England and Canada.
- § 951. — Rule in United States.
- § 952. — Rule applied to particular corporations.
- § 953. Power as limited to objects of corporation.
- § 954. Express or implied prohibition or restriction.
- § 955. Indorsement or other mode of transfer.
- § 956. Consideration, contents and requisites.
- § 957. Accommodation paper—Power to execute.
- § 958. — Effect of consent of or ratification by stockholders.
- § 959. — What is accommodation paper.
- § 960. — Liability of corporation.
- § 961. Defenses in actions on corporate paper.

§ 950. General rule as to implied power to execute—Rule in England and Canada. In all jurisdictions a corporation has the same power as a natural person to bind itself by becoming a party to a negotiable instrument, either as maker, drawer, acceptor or indorser, and to assume all the liabilities imposed by such a contract, if it is expressly or impliedly authorized by its charter to do so, but the courts in England and in this country do not agree as to when such authority will be implied. In England and in Canada the power to make or indorse negotiable promissory notes, and to draw, accept or indorse negotiable bills of exchange, is implied in the case of a corporation created primarily for the purpose of trading.¹ And a banking company is a trading company, within this rule.² But it is held that such power is not to be implied in the case of a railroad company,³ a waterworks company,⁴ a gas company,⁵ a mining company,⁶ a cemetery company,⁷ or any other corporation not created primarily

¹ In re Land Credit Co. of Ireland, 4 Ch. App. 460; In re General Estates Co., 3 Ch. App. 758; Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 512; Gilbert v. McAnnany, 28 U. C. Q. B. 384.

² Berton v. Central Bank, 10 New Bruns. 493.

³ Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 509.

⁴ Broughton v. Manchester & S. Water Works Co., 3 B. & A. 1.

⁵ Branch v. Roberts, 3 Bing. N. C. 963.

⁶ Dickinson v. Valpy, 10 B. & C. 128; Gilbert v. McAnnany, 28 U. C. Q. B. 384.

⁷ Steele v. Harmer, 14 M. & W. 831.

for the purpose of carrying on trade by buying and selling.⁸ In order that these may issue negotiable paper, they must be expressly empowered to do so.⁹

§ 951. — Rule in United States. In the United States the rule is different. It is held, both in the federal courts and in the state courts, that a private corporation, if not restricted by its charter, has the implied power to make, draw, accept or indorse negotiable instruments, and assume all liabilities arising out of such a contract, whenever such a transaction is necessary or proper in the conduct of its business; and that in the absence of express restrictions, such a corporation, whenever it has the power to borrow money or otherwise incur a debt, has the incidental power to issue or indorse negotiable paper in payment or as security.¹⁰

⁸ *Bult v. Morrell*, 12 A. & El. 745; *Neale v. Turton*, 4 Bing. 149; *Thompson v. Universal Salvage Co.*, 1 Exch. 694; *Bateman v. Mid-Wales Ry. Co.*, L. R. 1 C. P. 509, 512.

⁹ This view seems to be based largely upon a supposed difficulty in reconciling the principle of the law merchant, that a bona fide purchaser of a negotiable instrument takes it free from defenses existing as between the original parties, and the principle that a corporation is not liable on an ultra vires contract. See *Bateman v. Mid-Wales Ry. Co.*, L. R. 1 C. P. 508, 511.

¹⁰ **United States.** *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *In re Lance Lumber Co.*, 224 Fed. 598; *Grommes v. Sullivan*, 81 Fed. 45, 43 L. R. A. 419.

Alabama. *Oxford Iron Co. v. Spradley*, 46 Ala. 98.

California. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

Illinois. *Ward v. Johnson*, 95 Ill. 215; *Frye v. Tucker*, 24 Ill. 180.

Maine. *Came v. Brigham*, 39 Me. 35.

Massachusetts. *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345;

Kneeland v. Braintree St. Ry. Co., 167 Mass. 161, 45 N. E. 86; *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co. of Quincy*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

Michigan. *Odd Fellows v. Sturgis First Nat. Bank*, 42 Mich. 461.

Missouri. *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 12 L. R. A. 714, 24 Am. St. Rep. 351, 15 S. W. 417.

New York. *Barnes v. Ontario Bank*, 19 N. Y. 152; *Curtis v. Leavitt*, 15 N. Y. 66; *Moss v. Averell*, 10 N. Y. 449; *Munn v. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219.

North Dakota. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736.

Pennsylvania. *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Howard Oil & Grease Co. v. Hughes*, 12 Pa. Super. Ct. 311.

Tennessee. *Union Bank of Knoxville v. Jacob*, 6 Humph. 515.

Virginia. *Richmond, F. & P. R. Co.*

The right to borrow money carries with it the power to execute negotiable notes or to issue such other written customary evidences of its indebtedness as may be deemed necessary or expedient by the corporation.¹¹

"When a corporation," said Judge Comstock in a New York case, "can lawfully purchase property or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give, any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence."¹²

In another case it was said that "no question is better settled upon authority, than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day, or upon demand, when such note is given for any of the legitimate purposes for which the company was incorporated."¹³

So it can become the co-maker of a note, where it has received a substantial consideration, as against the objection that it thereby becomes a surety as to the other makers.¹⁴ And it may issue a judg-

v. Snead, 19 Gratt. 354, 100 Am. Dec. 670.

Wisconsin. Rockwell v. Elkhorn Bank, 13 Wis. 653.

"In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, or to become a party to negotiable paper. A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends; and this includes the power to borrow money for use in its legitimate business, and the power to give a time engagement to pay the debt, in any form not prohibited by statute." Mr. Justice Blatchford in *In re Hercules Mut. Life Assur. Soc.*, 6 Ben. (U. S.) 35, 37, Fed. Cas. No. 6,402.

The officer of a solvent corporation indorsed the notes of the corporation

to place it in position to pay a judgment which a third party had recovered against it. The agreement under which the indorsement was made was that a certain chose in action should be assigned to him as security by the corporation. The money thus obtained went to payment of the judgment. The parties had acted in good faith. The court held that the agreement would not be set aside either as fraudulent or beyond the corporate powers. *Anglo-American Provision Co. v. Davis Provision Co.*, 112 Fed. 574.

¹¹ *Cotton States Belting & Supply Co. v. Florida R. Co.*, 69 Fla. 52, 67 So. 568.

¹² *Curtis v. Leavitt*, 15 N. Y. 66.

¹³ *Moss v. Averell*, 10 N. Y. 449.

¹⁴ *Sesnon v. Lindeberg*, 66 Wash. 1, 118 Pac. 900.

ment note, empowering the holder or his trustee to confess judgment on default.¹⁵

A corporation may execute a note to one of its officers for a debt due.¹⁶

§ 952. — Rule applied to particular corporations. The rule in the United States as stated above, that corporations have implied power to execute negotiable paper, applies to manufacturing and trading companies,¹⁷ but it is not limited to them, as in England. It has also been applied to railroad companies, including street railroad companies,¹⁸ canal companies,¹⁹ telegraph companies,²⁰ turnpike companies and the like,²¹ gas companies,²² electric light companies,²³ water companies,²⁴ insurance companies of all kinds,²⁵ banking com-

¹⁵ *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104.

¹⁶ *Leih-und-Sparkassa Aadorf v. Pfizer*, 158 N. Y. App. Div. 505, 143 N. Y. Supp. 744.

¹⁷ *California. Temple St. Cable Ry. Co. v. Hellman*, 103 Cal. 634, 37 Pac. 530.

Connecticut. Knapp v. Tidewater Coal Co., 85 Conn. 147, 81 Atl. 1063.

Illinois. Frye v. Tucker, 24 Ill. 180.

Kentucky. Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171.

Massachusetts. Kneeland v. Braintree St. Ry. Co., 167 Mass. 161, 45 N. E. 86; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

Minnesota. Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799.

Nebraska. Preston v. Northwestern Cereal Co., 67 Neb. 45, 93 N. W. 136.

New Jersey. Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480, 38 Atl. 241.

New York. Moss v. Averell, 10 N. Y. 449; *Oppenheim v. Simon Reigel Cigar Co.*, 90 N. Y. Supp. 355; *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550.

¹⁸ *Indiana. Indiana & I. Cent. R.*

Co. v. Davis, 20 Ind. 6, 83 Am. Dec. 303.

Massachusetts. Kneeland v. Braintree St. Ry. Co., 167 Mass. 161, 45 N. E. 86.

New York. Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298, 40 Barb. 179.

Tennessee. Union Bank of Knoxville v. Jacobs, 6 Humph. 515.

Virginia. Richmond, F. & P. R. Co. v. Snead, 19 Gratt. 354, 100 Am. Dec. 670.

¹⁹ *McMasters v. Reed's Ex'rs*, 1 Grant (Pa.) 36.

²⁰ *In re Great Western Tel. Co.*, 5 Biss. (U. S.) 363, Fed. Cas. No. 5,739.

²¹ *Lebanon & R. Gravel Road Co. v. Adair*, 85 Ind. 244; *Smith v. Law*, 21 N. Y. 299.

²² *Des Moines Gas Co. v. West*, 50 Iowa 26; *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co. of Quincy*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; *Hays v. Balion Gas Light & Coal Co.*, 29 Ohio St. 330.

²³ *Sheridan Elec. Light Co. v. Chat-ham Nat. Bank*, 52 Hun (N. Y.) 575, 5 N. Y. Supp. 529.

²⁴ *Gebhard v. Eastman*, 7 Minn. 56; *Partridge v. Badger*, 25 Barb. (N. Y.) 171.

²⁵ *In re Hercules Mut. Life Assur.*

panies, including national banks and savings banks,²⁶ loan companies,²⁷ building and loan associations,²⁸ commission companies,²⁹ agricultural and mechanical associations or societies,³⁰ mining companies,³¹ transfer companies,³² charitable corporations,³³ religious corporations,³⁴ Odd Fellows associations,³⁵ a corporation created for the purpose of erecting a monument,³⁶ etc.

§ 953. Power as limited to objects of corporation. Power on the part of a corporation to become a party to a negotiable instrument is not implied when the nature and objects of the corporation are such that the transaction cannot be necessary or proper in the conduct of its business.³⁷ Thus, the power to issue promissory notes will not be implied "if it appears from the general scope of the law and from the purpose to be accomplished by such corporation that it is not essential to the proper exercise of the powers expressly conferred nor to the accomplishment of the objects for which it was created."³⁸

Society, 6 Ben. (U. S.) 35, Fed. Cas. No. 6,402; Talladega Ins. Co. v. Peacock, 67 Ala. 253; Barker v. Mechanic Fire Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Orr v. Mercer County Mut. Fire Ins. Co., 114 Pa. St. 387, 6 Atl. 696.

²⁶ Illinois. Ward v. Johnson, 95 Ill. 215.

Missouri. Donnell v. Lewis Co. Sav. Bank, 80 Mo. 165.

New Jersey. Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318.

New York. Barnes v. Ontario Bank, 19 N. Y. 152; Curtis v. Leavitt, 15 N. Y. 66.

Wisconsin. Ballston Spa Bank v. Marine Bank, 16 Wis. 120.

²⁷ Hascall v. Life Ass'n of America, 66 N. Y. 616, 5 Hun (N. Y.) 151.

²⁸ Marion Trust Co. v. Crescent Loan & Investment Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688; Davis v. West Saratoga Bldg. Union, 32 Md. 285; Russell v. Cassidy, 122 Mo. App. 565, 99 S. W. 781.

²⁹ Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

³⁰ Thompson v. Lambert, 44 Iowa 239.

³¹ Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707; Magee v. Mokelumne Hill Canal & Mining Co., 5 Cal. 258; Moss v. Oakley, 2 Hill (N. Y.) 265; Larwell v. Hanover Sav. Fund Society, 40 Ohio St. 282.

³² Sparks v. Dispatch Transfer Co., 104 Mo. 531, 12 L. R. A. 714, 24 Am. St. Rep. 351, 15 S. W. 417.

³³ Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298, 90 N. E. 704.

³⁴ Catron v. Manchester First Universalist Society, 46 Iowa 106.

³⁵ Odd Fellows v. Sturgis First Nat. Bank, 42 Mich. 461.

³⁶ Hayward v. Pilgrim Society, 21 Pick. (Mass.) 270.

³⁷ Police Jury v. Britton, 15 Wall. (U. S.) 566, 21 L. Ed. 251.

³⁸ Scott v. Bankers' Union of World, 73 Kan. 575, 85 Pac. 604.

A bankers' union whose only financial resource is the voluntary contributions of its members, and whose only business is to receive and disburse such contributions in accordance with the rules of the order, has no implied power to issue notes. Scott v. Bank-

And no corporation, even though it be a trading company, has any power to make, draw, accept, or indorse negotiable paper for a purpose which is foreign to the objects for which it was created.³⁹ For instance, a railroad company, since it has no power to establish a steamboat line to run in connection with its road, but beyond its terminus, has no power to give a promissory note for the price of a steamboat purchased by it for such purpose.⁴⁰ Nor can a bank execute a note as a subscription to secure the construction and operation of a railroad.⁴¹

§ 954. Express or implied prohibition or restriction. Of course, a corporation cannot lawfully become a party to a negotiable instrument in violation of an express or implied prohibition or restriction in its charter. Thus, a negotiable instrument payable at a future day is *ultra vires* and void, at least as between the original parties and purchasers who are not in the position of bona fide holders for value, when a statute prohibits the corporation from issuing negotiable instruments not payable on demand.⁴² The same is true of an instrument issued by a corporation in violation of a prohibition against the issue of bills, notes, or other evidences of debt "upon loan or for circulation as money."⁴³

ers' Union of World, 73 Kan. 575, 85 Pac. 604.

³⁹ **United States.** Pearce v. Madison & I. R. Co., 21 How. 441, 16 L. Ed. 184.

Indiana. James' Adm'r v. Rogers, 23 Ind. 451.

Massachusetts. Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Michigan. People v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64.

New York. National Park Bank v. German-American Mut. Warehouse & Security Co., 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567.

Ohio. Straus v. Eagle Ins. Co., 5 Ohio St. 59.

⁴⁰ Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184.

⁴¹ Arkansas Valley & W. R. Co. v. Farmers' & Merchants' Bank, 21 Okla. 322, 129 Am. St. Rep. 782, 96 Pac. 765.

⁴² Davis v. Bank of River Raisin, 4 McLean (U. S.) 387, Fed. Cas. No. 3,626; Hayden v. Davis, 3 McLean (U. S.) 276, Fed. Cas. No. 6,259; Root v. Godard, 3 McLean (U. S.) 102, Fed. Cas. No. 12,037; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

Such a prohibition applies to certificates of deposit issued by a bank, payable at a future day. Bank of Orleans v. Merrill, 2 Hill (N. Y.) 295.

And it is not limited to bills and notes intended to circulate as money, but applies also to such as are issued for a debt contracted by a corporation in the ordinary course of its business as for money borrowed, goods purchased, services, etc. Bank Commissioners v. St. Lawrence Bank, 7 N. Y. 513; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

⁴³ New York Life Insurance & Trust Co. v. Beebe, 7 N. Y. 364.

An express grant of power to borrow money and issue bonds therefor, or to borrow money and secure the payment thereof by bond and mortgage, does not impliedly prohibit a corporation from borrowing money necessary in its business, and issuing negotiable notes or bills therefor.⁴⁴ And it has been held that a prohibition against the issue by a corporation of bills, notes, or other evidences of debt, "upon loans, or for circulation as money," or against dealing in commercial paper, is intended merely to prohibit the business of banking, and does not apply to the incidental issue of bills or notes for money borrowed, or debts otherwise contracted by a corporation, or the receipt and negotiation of bills and notes, in the ordinary course of its business.⁴⁵

Negotiable bills and notes are very different from bonds, and, when issued by a corporation in the course of its business, they are not within a prohibition against or restriction upon the issue of bonds.⁴⁶

In some states, by statute, railroad companies cannot issue notes operating as a lien on the property of the company unless with the approval of the railroad commission.⁴⁷

§ 955. Indorsement or other mode of transfer. Indorsements of corporate paper, just as in the case of the paper of an individual, are of two kinds. One kind is the indorsement before delivery of the paper, which is usually an accommodation indorsement, and if for accommodation is not within the powers of a corporation.⁴⁸ The other kind is an indorsement for transfer by a corporation which is the payee or the holder of the paper. The latter is merely a step

⁴⁴ Talladega Ins. Co. v. Peacock, 67 Ala. 253; Lucas v. Pitney, 27 N. J. L. 221.

⁴⁵ California. Smith v. Eureka Flour Mills Co., 6 Cal. 1; Magee v. Mokelumne Hill Canal & Mining Co., 5 Cal. 259.

Iowa. Western Cottage Organ Co. v. Reddish, 51 Iowa 55, 49 N. W. 1048.

Maryland. Davis v. West Saratoga Bldg. Union, 32 Md. 285.

Missouri. Buckley v. Briggs, 30 Mo. 452; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

New York. Curtis v. Leavitt, 15 N. Y. 62; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280.

Ohio. White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601.

Wisconsin. Rockwell v. Elkhorn Bank, 13 Wis. 653.

⁴⁶ Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083.

⁴⁷ Davis v. Watertown Nat. Bank, — Tex. Civ. App. —, 178 S. W. 593; Jones v. Abernathy, — Tex. Civ. App. —, 174 S. W. 682, holding such a note, declared by the statute to be void, and not enforceable even in the hands of a bona fide purchaser.

⁴⁸ See § 957, *infra*.

in the sale, gift, exchange, or other disposition of the paper, and is embraced in the general rule that the power to acquire and own includes the power to sell.⁴⁹

A corporation which owns choses in action has power to transfer or assign them.⁵⁰ Furthermore, the power to sell negotiable paper includes power on the part of the corporation to indorse it to transfer title, with the contingent liability of such an indorser.⁵¹ So, a savings bank which has power to deal in commercial paper has implied power to indorse it for transfer so as to render itself subject to the liability of an indorser.⁵² Moreover, it has been held that an indorsement by a corporation, although beyond its power so far as incurring liability as indorser is concerned, passes the title to the paper.⁵³

The mode of indorsing and the sufficiency thereof,⁵⁴ including the necessity for and effect of a seal,⁵⁵ are considered in other chapters.

§ 956. Consideration, contents and requisites. So far as the contents and requisites of a bill or note are concerned, the same rules apply to paper executed by a corporation that govern such paper executed by an individual, except certain rules with regard to signatures.⁵⁶ As in the case of any other note, there must be a sufficient consideration.⁵⁷ An express promise to pay is not essential.⁵⁸

If an authorized agent of a corporation draws a draft on it in favor of a third person for a debt due such third person from the corporation, it is in effect the note of the corporation, payable on demand.⁵⁹

An instrument executed by a railroad company as security for pay-

⁴⁹ See Chap. 32.

⁵⁰ See Chap. 32.

⁵¹ *Bank of Genesee v. Patchin Bank*, 13 N. Y. 315.

Power to execute and become a party to negotiable paper includes the power to indorse a note. *Gullege v. Woods*, 108 Miss. 233, 66 So. 536.

⁵² *State v. Corning State Sav. Bank*, 139 Iowa 338, 115 N. W. 937.

⁵³ *Winer v. Bank of Blytheville*, 89 Ark. 435, 443, 131 Am. St. Rep. 102, 117 S. W. 232; *Willard v. Crook*, 21 App. Cas. (D. C.) 237.

⁵⁴ See Chap. 35, *infra*.

⁵⁵ See Chap. 19, *supra*.

⁵⁶ Mode of signing corporate paper, see Chap. 35, *infra*.

⁵⁷ *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754.

Note given by corporation for its own stock is not without consideration, even if the stock afterwards proves to be worthless. *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644.

⁵⁸ *Conowingo Land Co. of Cecil County v. McGraw*, 124 Md. 643, 93 Atl. 222, so holding as to certificates of indebtedness.

⁵⁹ *National Fire Ins. Co. of Hartford v. Eastern Building & Loan Ass'n*, 65 Neb. 483, 91 N. W. 482, *aff'd* 63 Neb. 698, 88 N. W. 863.

ment for equipment, which is in effect a note, will be considered as such although called a "lease warrant."⁶⁰

§ 957. Accommodation paper—Power to execute. It is well settled that a corporation has no implied power to issue or indorse bills or notes in which it has no interest for the mere accommodation of another, since such a transaction is ordinarily foreign to the objects for which corporations are created;⁶¹ and it can make no difference that the corporation will be incidentally benefited by such a trans-

⁶⁰ *Metropolitan Trust Co. v. Railroad Equipment Co.*, 108 Fed. 913. See also *Metropolitan Trust Co. City of New York v. Columbus, S. & H. R. Co.*, 93 Fed. 702.

⁶¹ *United States. Smith v. Nelson Land & Cattle Co.*, 212 Fed. 56; *Park Hotel Co. v. Fourth Nat. Bank of St. Louis*, 86 Fed. 742; *Lyon, Potter & Co. v. First Nat. Bank of Sioux City*, 85 Fed. 120; *National Park Bank of New York v. Remsen*, 43 Fed. 226; *Johnson v. Charlottesville Nat. Bank*, 3 Hughes 657, Fed. Cas. No. 7,425.

Alabama. *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 26 So. 494.

Arkansas. *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W. 162.

California. *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

Connecticut. *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 182.

Georgia. *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171.

Illinois. *Piser v. Serota*, 182 Ill. App. 390; *Pick, Bloch & Joel v. Ellinger*, 66 Ill. App. 570.

Indiana. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

Maine. *Johnson v. Johnson Bros.*, 108 Me. 272, Ann. Cas. 1913 A 1303, 80 Atl. 741.

Michigan. *Beecher v. Dacey*, 45 Mich. 92, 7 N. W. 689.

New Jersey. *R. M. Owen & Co. v. Storms & Co.*, 78 N. J. L. 154, 72 Atl. 441; *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 167; *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *Blake v. Domestic Mfg. Co. (N. J. Ch.)*, 38 Atl. 241.

New York. *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210, aff'g 149 App. Div. 356, 134 N. Y. Supp. 418; *Fox v. Rural Home Co.*, 157 N. Y. 684, 51 N. E. 1090, 90 Hun 365, 35 N. Y. Supp. 896; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, 13 N. Y. 309; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *National Bank of Newport v. H. P. Snyder Mfg. Co.*, 117 App. Div. 370, 102 N. Y. Supp. 478.

Rhode Island. *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

Tennessee. *McC Campbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070.

Texas. *Waller v. Gorman Mercantile Co.*, — Tex. Civ. App. —, 141 S. W. 833.

West Virginia. *Haupt v. Vint*, 68 W. Va. 657, 34 L. R. A. (N. S.) 518, 70 S. E. 702.

A corporation created "for the accumulation and loan of money" has no authority to indorse notes to raise money for another corporation. *Mc-*

action, or is paid a consideration,⁶² or that it takes security for the liability.⁶³

The rule is the same under the Negotiable Instruments Law which has now been adopted in all but five of the states in this country.⁶⁴ Moreover, by-laws cannot enlarge the power of the corporation in this respect.⁶⁵ However, a corporation is not precluded from issuing or indorsing paper for the benefit of another when it has the power, express or implied, to become surety or guarantor.⁶⁶

§ 958. — Effect of consent of or ratification by stockholders.

There is some conflict in the decisions as to the effect of ratification by, or consent of, all the stockholders to an act otherwise beyond the powers of the corporation.⁶⁷ This conflict has extended to the power to execute accommodation paper. A dictum in a New York case that "no other rights intervening, the accommodation notes, if they were such, represented transactions which the stockholders were competent to validate and ratify,"⁶⁸ adopted by a writer as the law on the subject,⁶⁹ and approved by a federal court,⁷⁰ supports the one side, but the better rule affirms that the consent or ratification of the stockholders is wholly immaterial,⁷¹ at least as against creditors.⁷²

Caleb v. Boerne Elec. Power & Manufacturing Co., — Tex. Civ. App. —, 173 S. W. 1191.

⁶² *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567; *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737, 115 N. Y. Supp. 617; *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

⁶³ *Carlaftes v. Goldmeyer Co.*, 72 N. Y. Misc. 75, 129 N. Y. Supp. 396.

⁶⁴ *Oppenheim v. Simon Reigel Cigar Co.*, 90 N. Y. Supp. 355.

⁶⁵ *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 26 So. 494.

⁶⁶ See Chap. 23.

⁶⁷ See Chap. 37.

⁶⁸ *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303.

⁶⁹ *Cook, Corporations*, § 3.

⁷⁰ *Murphy v. Arkansas & L. Land & Improvement Co.*, 97 Fed. 723.

Where all the stockholders consent and there are no creditors, the corporation cannot contend that the paper is ultra vires. *Murphy v. Arkansas & L. Land & Improvement Co.*, 97 Fed. 723, 727.

⁷¹ See dictum in *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 141, 26 So. 494.

* In this connection, we must not overlook the fact that the doctrine that a corporation has no powers except such as are conferred, expressly or impliedly, by its charter, does not depend in any way at all upon consent or want of consent upon the part of stockholders. An ultra vires contract by a corporation is none the less ultra vires because it is consented to or ratified by all the stockholders. See Chap. 37.

⁷² *In re Prospect Worsted Mills*, 126 Fed. 1011.

In New Jersey it is held that if no question of public policy is concerned so that the state cannot interfere, and there are no creditors, and all the stockholders have consented, there is no basis on which the plea of *ultra vires* can be rested.⁷³

§ 959. — What is accommodation paper. What constitutes accommodation paper is sometimes difficult to determine.⁷⁴ It has been held that the rule against issuance of such paper by a corporation does not prevent a corporation from raising money and making a loan to another corporation by indorsing its paper, when it is authorized to make the loan,⁷⁵ nor from indorsing notes of a third person in payment of a debt,⁷⁶ nor from executing a note in exchange for notes of a corporation, the business and capital stock of which the maker has acquired,⁷⁷ nor from assuming an obligation of another for the purpose of protecting its own interests where its property rights or interests might be affected.⁷⁸ So where a corporation practically owns and controls another, it may execute a bill or note for the benefit of the latter.⁷⁹

An indorsement is not an accommodation indorsement where the indorsing corporation owns all the stock of the company whose note it indorsed.⁸⁰ So where a corporation takes over the business of an individual, it assumes the debts connected therewith without any

⁷³ *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 731, 61 Atl. 167.

⁷⁴ Paper held not accommodation paper, see *Waller v. Gorman Mercantile Co.*, — Tex. Civ. App. —, 141 S. W. 833.

⁷⁵ *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083, holding that a corporation authorized to deal in manufactured goods, and needing such goods for sale, had the incidental power to aid a manufacturer by advancing him money to be repaid in goods, and that it could do so by indorsing his notes so as to enable him to raise the money by discounting the same.

⁷⁶ *National Bank of Commerce in Denver v. Allen*, 90 Fed. 545; *George E. Lloyd & Co. v. Matthews*, 119 Ill. App. 546, *aff'd* 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346,

79 N. E. 172. To same effect, see *Citizens' Sav. Bank v. Globe Brass Works*, 155 Mich. 3, 15 Det. L. N. 849, 118 N. W. 507.

⁷⁷ *Bollschweiler v. Packer House Hotel Co.*, 83 N. J. Eq. 459, 91 Atl. 1027.

⁷⁸ *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737, 115 N. Y. Supp. 617; *Hess v. W. & J. Sloane*, 6 N. Y. App. Div. 522, 73 N. Y. Supp. 313.

⁷⁹ *Cunningham Hardware Co. v. Gama Transp. Co.*, 4 Ala. App. 561, 58 So. 740. Contra, see *Savannah Ice Co. v. Canal-Louisianan Bank & Trust Co.*, 12 Ga. App. 818, 79 S. E. 45.

⁸⁰ *In re New York Car Wheel Works*, 141 Fed. 430. To same effect, see *Johnson v. Johnson Bros.*, 108 Me. 272, Ann. Cas. 1913 A 1303, 80 Atl. 741.

express agreement, and hence it may execute a note to a bank in exchange for the bank's note against the individual for money loaned for such business.⁸¹ However, it has been held in Missouri that a bank has no authority to become an accommodation indorser even though the party accommodated uses the money borrowed to pay a demand due the bank.⁸²

§ 960. — Liability of corporation. If a corporation has power to make and indorse bills and notes for value, it is liable on accommodation paper signed by it, where it is in the hands of a bona fide holder for value.⁸³ On the other hand, a corporation is not liable on accommodation paper where the holder has actual or constructive notice of the accommodation character of the paper.⁸⁴

What will constitute notice is governed by the same rules as apply to negotiable instruments executed by individuals.⁸⁵

§ 961. Defenses in actions on corporate paper. Where a corporation has power to execute negotiable notes, the defenses which it may set up against a bona fide purchaser for value are no more nor greater than can be set up by an individual, so far as the defense does not relate to corporate capacity to act.⁸⁶

Ordinarily the defense of ultra vires cannot be set up by a corporation in an action on a bill or note, where it has received the proceeds of the bill or note.⁸⁷ In any event, the indorser of a note executed by a corporation cannot set up the defense that the execution of the note was ultra vires.⁸⁸ So the defense of ultra vires cannot ordinarily be set up against a purchaser for value before maturity.⁸⁹

⁸¹ Curtis, Jones & Co. v. Smelter Nat. Bank, 43 Colo. 391, 96 Pac. 172.

⁸² Bacon, Dawson & Co. v. Farmers' Bank, 79 Mo. App. 406.

⁸³ See § 961, *infra*.

⁸⁴ See Chap. 37.

⁸⁵ Simmons Nat. Bank v. Dilley Foundry Co., 95 Ark. 368, 130 S. W. 162.

⁸⁶ Bird v. Daggett, 97 Mass. 494.

Want of consideration is no defense against a bona fide holder. Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Bird v. Daggett, 97 Mass. 494.

⁸⁷ See Chap. 37.

⁸⁸ See Chap. 37.

⁸⁹ See Chap. 37.

CHAPTER 27

POWERS AS TO BONDS, DEBENTURES AND COUPONS

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I. DEFINITIONS AND NATURE AND KINDS OF

§ 962. Introductory. The fact that an instrument is called a bond is not conclusive as to its nature, but regard must be had to the substance of the instrument.¹

¹Cass v. Realty Securities Co., 148 N. Y. App. Div. 96, 132 N. Y. Supp. 929. Board of Assessors, 82 N. J. L. 2, 80 Atl. 929.

1074. See also Hilson Co. v. State “It is necessary to disregard no-

Bonds are to be distinguished from stock in that the distinguishing feature of bonds is the obligation to pay a fixed sum of money with stated interest, while the distinguishing feature of stock is that it confers upon its holder a part ownership of the assets of the corporation and gives the holder a right to participate in the management of the corporation and to share in the surplus profits and on dissolution to share in the assets which remain after the debts are paid.² For instance, even though an instrument is styled a "debenture bond," it is, in effect preferred stock where, by its terms it is made subordinate to the rights of creditors, the interest is cumulative and payable out of earnings, and, on liquidation or dissolution or final distribution of assets, the said bonds are to be entitled to the whole residue of the corporate assets after the payment of debts.³

A "bonded indebtedness," as the term is used in a statute or constitutional provision prohibiting, except on certain conditions, the increase by corporations of their bonded indebtedness, does not embrace a non-negotiable note and mortgage executed to secure the note.⁴

An "extension" of bonds is within a provision of a lease requiring a "renewal" of the bonds on maturity.⁵

§ 963. Debentures. The common form of a bond in England is called a debenture, which is very similar to the ordinary corporate

menclature and look to the substance of the thing itself." In *re Fechheimer Fishel Co.*, 212 Fed. 357.

² In *re Fechheimer Fishel Co.*, 212 Fed. 357; *Cass v. Realty Securities Co.*, 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074. And see *Totten & Co. v. Tison*, 54 Ga. 139.

"Corporation bonds are the representatives of money, because they are issued for sale in negotiable form, but certificates of stock are not securities for money, nor are they negotiable instruments in the strict commercial sense." *Bailey v. Railroad Co.*, 89 U. S. 604, 636, 22 L. Ed. 840.

Even though an instrument which is termed a bond contains a promise to pay a stated sum of money at a fixed time and to pay meanwhile a stated rate of interest, where it is further provided that after the payment of certain fixed dividends on the common and preferred stock, the hold-

ers of the bonds in question are "entitled to a proportionate share in the surplus income, if any," and that upon liquidation the holders are entitled to share, after certain payments have been made, in the surplus capital of the corporation, and that the bonds will be satisfied, not only upon the payment of the face value, but upon the payment of a ratable proportion of the assets, whether more or less than the face value of such bonds, such securities are stock rather than bonds. *Cass v. Realty Securities Co.*, 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074.

³ In *re Fechheimer Fishel Co.*, 212 Fed. 357.

⁴ *Underhill v. Santa Barbara Land, Building & Improvement Co.*, 93 Cal. 300, 28 Pac. 1049.

⁵ *Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co.*, 193 Fed. 963, aff'g 181 Fed. 595.

bond in this country. The term is sometimes used in this country, but the kind of bonds called debentures in England, so far as they are a mere floating charge against all the property of the corporation, are rarely if ever issued here. The term is sometimes applied in this country to bonds secured by a pledge of particular assets.⁶

Ordinarily, it seems, debentures have no specific fund or property as security for their payment.⁷ Sometimes, however, a specific fund or property is pledged by the debentures, in which case they are usually termed "mortgage debentures."⁸

§ 964. Kinds of bonds—In general. Corporate bonds are divisible into negotiable and non-negotiable bonds. Furthermore, the bonds of a private or quasi public corporation are to be distinguished from the bonds of a municipal corporation, since the same rules do not always apply to both classes of bonds.⁹

§ 965. — Coupon bonds. "Coupon bonds" are the ordinary form of corporate bond in this country. They are payable to bearer and are provided with interest warrants, called "coupons," for each instalment of interest, also payable to bearer, which, when actually detached, are negotiable and payable to bearer.¹⁰

§ 966. — Convertible coupon bonds. "Convertible coupon bonds" have been defined as coupon bonds which expressly provide that they may, at the option of the holder, be converted into registered bonds.¹¹ However, bonds are often referred to as "convertible" bonds where

⁶ See *Girard Trust Co. v. McKinley-Lanning Loan & Trust Co.*, 135 Fed. 180.

In one instance, where debentures were issued, there was deposited with the trustee, as security, notes secured by mortgages of real property. *Smith v. New Hampshire Trust Co.*, 48 N. H. 424, 41 Atl. 174. See also *Bank Com'rs v. New Hampshire Trust Co.*, 69 N. H. 621, 44 Atl. 130.

⁷ *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

⁸ *Century Dictionary*.

⁹ See 4 *McQuillin on Municipal Corporations*, §§ 2262-2357 as to rules applicable to municipal bonds.

¹⁰ The title to such bonds "may

be passed from hand to hand without any formality except the mere tradition of the paper. This ease of transfer gives this class of securities its peculiar value. The collection of the interest is made by simply detaching the coupon and presenting it at the place of payment, either directly or through the usual course of bank exchanges, where it is paid without inquiry as to the ownership of the bond from which it has been cut. The disadvantage of this sort of security is the danger of its loss by theft or fire." *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668.

¹¹ *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668.

what is meant is that they provide that they may be converted into stock of the corporation, under certain conditions.¹²

§ 967. — Funding and refunding bonds. Funding and refunding bonds are those issued to pay off prior indebtedness. If issued merely to pay floating indebtedness they are generally referred to as “funding” bonds, while if issued to take up other bonds they are usually called “refunding” bonds. The effect of refunding bonds is to substitute the new bonds in the place of the old ones, with the same lien and priority as that possessed by the old bonds.¹³

Where new refunding bonds are restricted in their issue, by the terms of the mortgage, such restrictions must be strictly observed in favor of the holders of the refunding bonds who presumably, in accepting such bonds, have relied upon such restrictions.¹⁴

§ 968. — Registered bonds. A “registered” bond is one which is payable to a particular individual whose name is entered on the books of the corporation debtor as the registered owner.¹⁵

On the days when, by the terms of the bond, the interest falls due, it is paid directly to the registered creditor, without presentation of the bond, usually by check drawn to his order and sent by mail.¹⁶

Such bonds are sometimes held not negotiable,¹⁷ and can be transferred only by an entry on the books of the debtor corporation, with a proper indorsement on the bond itself.¹⁸

The peculiar value of this class of securities lies in the fact that it is not necessary to produce them to the debtor each time the interest is due, and that the danger of loss by robbery, fire, etc., is entirely removed.¹⁹ It follows that if such bonds are stolen from the owner,

¹² See § 1005, *infra*.

¹³ *Gibbes v. Greenville & C. R. R. Co.*, 15 S. C. 304, 13 S. C. 228. But compare *Hand v. Savannah & C. R. Co.*, 12 S. C. 314. See also § 1005, *infra*.

¹⁴ *St. Louis & S. F. R. Co. v. Guaranty Trust Co. of New York*, 205 N. Y. 609, 99 N. E. 162.

¹⁵ *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668.

¹⁶ *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668.

¹⁷ See § 1010, *infra*.

¹⁸ *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668.

¹⁹ *Ritchie v. Burke*, 109 Fed. 16; *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668.

“Being registered, they could not be sold. If presented to the railway company for payment of the interest or principal by others than the registered owner, payment would be refused. They were only property in the hands of the registered owner.” *Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co.*, 182 N. Y. 47, 70 L. R. A. 787, 74 N. E. 571, *aff’d* 92 N. Y. App. Div. 617; 87 N. Y. Supp. 1138, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913.

he has the right to follow them and recover them wherever found, and if they cannot be found, he may recover their value from those who were instrumental in changing them from registered to negotiable bonds.²⁰ Thus, in a particular case, where the treasurer of a corporation forged a resolution authorizing him to sell bonds which were registered in the name of the corporation, and he also fraudulently executed a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds was held liable to the corporation owning the bonds, where the former allowed a transfer on such forgery and fraud.²¹

If the corporation issuing the bonds, although charged with notice that the request to exchange registered bonds for others was not authorized by the owner and that in fact the bonds were stolen, exchanges the bonds without inquiry, it is liable for any loss sustained.²²

A corporation cannot refuse to permit a transfer of the registered ownership, and then refuse to pay the interest to the registered holder, in whose names the bonds stand, because of his attempted transfer.²³

It is not necessary, in order to convey the legal title to registered bonds, that the bonds be surrendered and new ones taken.²⁴

Where bonds of a decedent were registered in the name of his executor, but they formed a part of a trust fund created by the will, and, after the death of the executor, one of the two substituted trustees had them transferred to bearer by the corporation and so registered, the title passed to the substituted trustees.²⁵

The act of a pledgee of bonds payable to bearer in having them

²⁰ In this case, it was also held that the payment, by the issuing corporation, of the proceeds arising from the sale of the bonds over to the treasurer of the corporation owning the bonds, did not operate as a payment to the corporation, where the treasurer had stolen the bonds from the corporation. *Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co.*, 182 N. Y. 47, 70 L. R. A. 787, 74 N. E. 571, aff'g 92 N. Y. App. Div. 617, 87 N. Y. Supp. 1138, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913.

²¹ *Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co.*, 182

N. Y. 47, 70 L. R. A. 787, 74 N. E. 571, aff'g 92 N. Y. App. Div. 617, 87 N. Y. Supp. 1138, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913.

²² *Chester County Guarantee Trust & Safe Deposit Co. v. Securities Co.*, 165 N. Y. App. Div. 329, 150 N. Y. Supp. 1010.

²³ *Shaffer v. Federal Cement Co.*, 225 Fed. 893.

²⁴ *Kelly v. Bell* (Ind. App.), 83 N. E. 773.

²⁵ *Cooper v. Illinois Cent. R. Co.*, 38 N. Y. App. Div. 22, 57 N. Y. Supp. 925.

registered, so as to make them payable only to himself or his order, is not a conversion of the bonds.²⁶

Statutes sometimes require the bonds of both private and municipal corporations to be registered by the filing of a certified statement showing the facts as to the bonds.²⁷ However, a statute authorizing a bond issue by a municipality and providing that the bonds "shall be registered in the city clerk's office in a book to be kept for that purpose," has been held not to mean that the bonds should be issued as registered bonds, as distinguished from coupon bonds, and be non-negotiable in character, but that the requirement of registration was rather in the nature of a measure for the protection of the municipality and for a record showing the amount of each issue and its due date.²⁸

§ 969. — Income bonds. Income bonds, as the term is ordinarily used, are bonds which carry interest only so far as the interest is earned from the net income of the corporation, within an interest period.²⁹ They bear a close resemblance to capital stock. Such interest is ordinarily not cumulative.³⁰

It has well been said that railroad income bonds, secured by mortgage, are "but little more than the pledge of the good faith of the company in managing its lines."³¹

The corporation has the right, notwithstanding such mortgage and bonds, to conduct its operations as it sees fit, subject only to the conditions of its organic law, unless the bonds or provisions of the mortgage contain limitations upon the powers of the corporation. It may make such improvements, alterations or changes as appear desirable. The only right the bondholders have is to compel the officers of the corporation to observe good faith in determining what is to be treated as net income, as governed by provisions in the bonds and mortgage as to what shall constitute net income.³²

²⁶ Ritchie v. Burke, 109 Fed. 16.

²⁷ McDaniel v. Gate City Gas-Light Co., 79 Ga. 58, 3 S. E. 693, applying statute to bonds of gas company.

²⁸ Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 170 N. Y. 58, 65, 88 Am. St. Rep. 640, 62 N. E. 1079.

²⁹ See Central of Georgia R. Co. v. Central Trust Co. of New York, 135 Ga. 472, 69 S. E. 708.

³⁰ But see Dayton & Union Co. v. Shoemaker's, 3 Ohio Cir. Ct. 473, hold-

ing the contrary unless a different intention affirmatively appears from the face of the bonds.

³¹ Spies v. Chicago & E. I. R. Co., 40 Fed. 34, 6 L. R. A. 565.

³² The conclusions of the directors "are not vitiated by an error of judgment, and can only be disturbed when the circumstances establish bad faith," Spies v. Chicago & E. I. R. Co., 40 Fed. 34, 6 L. R. A. 565.

The right of income bondholders to interest depends wholly on the terms of the bonds and of the accompanying mortgage, if any.³³

In case of such bonds there is a default where there are no revenues on hand which are net income.³⁴

The "net earnings," as that term is used in income bonds, means the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves.³⁵

The discretion of the directors, as to what are proper expenses, will not be interfered with except in a clear case.³⁶ Thus, where the directors are authorized to first pay "all expenses, including necessary repairs," it has been held that they were "bound to act in good faith, but any expenditures incurred, which by fair construction came within the permitted charges, were conclusive upon the bondholders. It was for the board to determine, in the first instance, what repairs were necessary, and a mistake in judgment as to the necessity or extent of repairs directed would afford no ground of complaint by the bondholders. The court could not review this discretion, pro-

³³ *Barry v. Missouri, K. & T. Ry. Co.*, 34 Fed. 829, 27 Fed. 1; *State v. Cowen*, 83 Md. 549, 35 Atl. 161, 354, 581; *Seibert v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 39, 59 N. W. 822; *Thomas v. New York & G. L. Ry. Co.*, 139 N. Y. 163, 34 N. E. 877.

³⁴ *Corcoran v. Chesapeake & O. Canal Co.*, 1 MacArthur (D. C.) 358, aff'd 94 U. S. 741, 24 L. Ed. 190.

³⁵ *Barry v. Missouri, K. & T. Ry. Co.*, 27 Fed. 1, adopting definition in *Union Pac. R. Co. v. United States*, 99 U. S. 402, 420, 25 L. Ed. 274. See also *Schmidt v. Louisville & N. R. Co.*, 95 Ky. 289, 15 Ky. L. Rep. 785, 26 S. W. 547, 25 S. W. 494.

"The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances, as stipulated by the terms of the mortgage." There cannot be charged against income "a payment

or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness." *Barry v. Missouri, K. & T. Ry. Co.*, 27 Fed. 1.

³⁶ "The power of control by the board was left unimpaired, up to the point that its exercise did not interfere with the rights of bondholders to have the earnings applied to paying the interest on the bonds after defraying 'all expenses, including necessary repairs.' The fullest discretion was reposed in the board of directors, consistent with the limitation for the benefit of the bondholders, and it was left to the board to ascertain and determine whether any earnings had been made, applicable to the payment of interest." Per Chief Justice Andrews in *Thomas v. New York & G. L. Ry. Co.*, 139 N. Y. 163, 34 N. E. 877.

vided there was room for difference of opinion as to their wisdom or necessity.”³⁷

In determining the amount of net earnings available for payment of interest on income bonds, it is usually necessary to refer to the terms of the particular bonds or of the mortgage securing them. Thus, where a sum not to exceed five per cent. per annum was to be paid out of net earnings, if any, but such interest was not to be cumulative, and the mortgage, which secured both the principal and interest of the bonds, specifies that the net earnings shall be determined, *inter alia*, by deducting expenses, etc., and “cost of repairs, renewals, and reasonable betterments to the railroad equipment and property,” it has been held in Georgia that the “betterments” permissible as an item of deduction relate to the betterment of the equipment and do not include the purchase or lease of other railroads or lands acquired for expansion or extension of the railroad; but that such “betterments” are not limited to renewals or replacements of equipment but may include additions thereto, provided such enlargement of equipment is reasonable and proper in the economical operation of the road.³⁸ But in New York, where neither the bonds nor the mortgage specified what should constitute income or net earnings except in a general way, it was held that the corporation had the right to lease another road and divert income to paying rent therefor in the shape of paying the bonds of the lessee road, although thereby the bondholders are deprived of their interest for the current year.³⁹

³⁷ *Thomas v. New York & G. L. Ry. Co.*, 139 N. Y. 163, 183, 34 N. E. 877.

³⁸ *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708; distinguishing *Union Pac. R. R. Co. v. United States*, 99 U. S. 420, 25 L. Ed. 274, as a case not involving interest but merely part payments of the principal out of the net earnings.

Where the terms “are that specific lines are granted, and that income is to be ascertained by taking the gross earnings of these lines and deducting from them specified expenses and liabilities, the bondholders are entitled to hold the company to its promise.” The company must keep a separate account to ascertain the net earnings of the original lines at the several

interest periods. It would be otherwise if future acquired property was included within the provisions of the mortgage. *Spies v. Chicago & E. I. R. Co.*, 40 Fed. 34, 6 L. R. A. 565.

³⁹ *Day v. Ogdensburgh & L. C. R. Co.*, 107 N. Y. 129, 13 N. E. 765.

“The board [of directors] was bound to act in good faith, but any expenditures incurred which by fair construction came within the permitted charges, were conclusive upon the bondholders. It was for the board to determine, in the first instance, what repairs were necessary, and a mistake in judgment as to the necessity or extent of repairs directed would afford no ground of complaint by the bondholders. * * * The application of earnings to rebuilding the road might

A different rule applies where the mortgage securing income bonds covers certain railroad lines, and it is expressly provided that income is to be ascertained by taking the gross earnings of said lines and deducting from them specified expenses and liabilities, in which case the railroad company cannot deduct expenses in operating new lines of road acquired by it, from the earnings of the original lines.⁴⁰

So far as the rights of holders of income bonds to have earnings applied to payment of interest on such bonds rather than to betterments are concerned, bondholders occupy a more favorable position than do stockholders in regard to dividends; especially where the interest on the income bonds is not cumulative. This distinction is clearly brought out by a decision of Justice Evans, in a recent Georgia case, as follows: "Relatively to stockholders, directors have a broad discretion in the application of income to the improvement of the corporate property, instead of apportioning some of it to dividends. But an income bondholder, whose interest is only payable from the net income of the year in which the interest accrues, occupies a more favored position than that of a stockholder. A diversion of net income to betterments and expansion of the physical properties to the withholding of an annual dividend does not mean a loss of it to the stockholder, as the stockholder indirectly gets the dividend in the presently enhanced value of his stock. The bondholder, whose right to interest is immediate, which interest is forever lost if not paid from the income of the year in which the interest accrues, derives no present benefit from the diversion of income to betterments, but sustains a loss, so far as interest is concerned, which can never be recouped."⁴¹

Of course, the floating debt must be paid off before there can be any fund for the income bonds, where the bonds in effect so provide.⁴²

Where income bonds bear interest only after payment of expenses, etc., including "charges for depreciation by age or wear," the corporation may deduct from its gross income during each interest period a sum sufficient to make good losses from depreciation.⁴³

In determining the amount of expenses, etc., to be deducted from

in many cases constitute necessary repairs." *Thomas v. New York & G. L. Ry. Co.*, 139 N. Y. 163, 34 N. E. 877.

⁴⁰ *Spies v. Chicago & E. I. R. Co.*, 40 Fed. 34, 6 L. R. A. 565, holding also that the new lines are not "betterments requisite to maintain the line of railway in first class condition."

⁴¹ *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

⁴² *Lehigh Coal & Navigation Co. v. Central R. Co. of New Jersey*, 34 N. J. Eq. 88.

⁴³ *Whitridge v. Mt. Vernon Woodberry Cotton Duck Co.*, 210 Fed. 302

the gross income, it is not essential that liabilities shall have been actually paid during the period of the earnings but it is sufficient that the company has become liable to pay them, although the time of payment may have been deferred.⁴⁴ Of course, the corporation cannot properly charge against income for any period during the life of the bond a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness.⁴⁵

Dividends on stock owned by a railroad in another corporation are a part of its income and enter into the computation of the fund applicable to interest on the income bonds.⁴⁶

If the corporation has paid a higher rate of interest than necessary, upon prior incumbrances, it cannot charge the difference against the income, to the detriment of the income bondholders, in direct contravention of the agreement between the company and the income bondholders recited in the income mortgage.⁴⁷

It seems that where a bond provides that in case the net earnings of the railroad shall not be sufficient to pay the interest on the bonds, then scrip may, at the option of the company, be issued for the interest, it is not, strictly speaking, an income bond; and if the option to pay in scrip is not exercised before the interest day, the corporation becomes liable to pay the interest in money.⁴⁸

If a consolidation of corporations will not interfere with the determination of the net earnings of one of the companies which has issued income bonds, such bondholders cannot enjoin the consolidation on the ground that it will be impossible to determine the net earnings of the old company.⁴⁹

If a bondholder refuses to surrender his bonds under a provision for retiring the bonds, he cannot claim a larger share of the interest fund than he would have been entitled to if none of the original issue of bonds had been surrendered.⁵⁰

⁴⁴ *Barry v. Missouri, K. & T. Ry. Co.*, 27 Fed. 1.

⁴⁵ *Barry v. Missouri, K. & T. Ry. Co.*, 27 Fed. 1.

⁴⁶ *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

⁴⁷ *Barry v. Missouri, K. & T. Ry. Co.*, 34 Fed. 829.

⁴⁸ *Texas & P. R. Co. v. Marlor*, 123 U. S. 687, 31 L. Ed. 303.

⁴⁹ *Hart v. Ogdensburgh & L. C. R. Co.*, 69 Hun (N. Y.) 378, 23 N. Y. Supp. 639.

⁵⁰ *Barry v. Missouri, K. & T. Ry. Co.*, 34 Fed. 829.

“The fallacy of the position of the complainant, and the other holders of coupons and scrip not surrendered, is in the notion that by the contract of hypothecation the whole income of the railway company, to the extent

It is held in New York that the bondholders cannot obtain an accounting of the earnings, as a trust fund, since the obligation is not fiduciary but merely contractual;⁵¹ but it is held in the federal courts that where the bonds expressly make the interest the first lien on the income, the bondholders may sue in equity for an accounting on the theory that the obligation is fiduciary in its character.⁵²

If all the bondholders waive the right to fixed interest and agree to accept in full whatever sum can be paid from the earnings, minority bondholders may sue in equity for a discovery and an accounting, where no interest was ever paid after such agreement and it is claimed that the directors have acted fraudulently and that the true condition of the mortgagor can only be obtained from an inspection of the books of the lessee of the company.⁵³

The bondholders may enjoin a misapplication of proceeds.⁵⁴

§ 970. Underwriting bonds. It has been seen heretofore that the underwriting of corporate bonds is an agreement by the subscribers, based on a consideration, to insure the sale of the bonds subscribed at a stipulated price, and, if they are not sold to others,

of 6 per cent. annually, was pledged to the payment of the interest upon each bond * * * But the contract was that the company should distribute the income ratably among 10,000 bonds for \$1,000 each so as to pay each bondholder his share. This share constitutes the whole interest of the holders of outstanding coupons or certificates in the income fund." *Barry v. Missouri, K. & T. R. Co.*, 34 Fed. 829.

⁵¹ *Thomas v. New York & G. L. Ry. Co.*, 139 N. Y. 163, 34 N. E. 877. But see *Buel v. Baltimore & O. S. W. Ry. Co.*, 24 N. Y. Misc. 646, 53 N. Y. Supp. 749, holding that the holder of income bonds may sue the trustee for an accounting in order to determine what amount of the net earnings have been wrongfully diverted from the payment of the bonds.

The remedy is an action by the bondholders for damages to the amount of the interest of which they have been wrongfully deprived. *Thomas v. New York & G. L. Ry. Co.*, 139 N. Y. 163, 176-179, 34 N. E. 877.

⁵² *Morse v. Bay State Gas Co. of Delaware*, 91 Fed. 938, followed in *Edwards v. Bay State Gas Co. of Delaware*, 91 Fed. 946. See also *Weir v. Bay State Gas Co. of Delaware*, 91 Fed. 940; *Morgan v. Union Pac. Ry. Co.*, 11 Fed. 692, as to scope of accounting as to earnings after commencement of suit.

It is no defense that no award of interest has been made by the board of directors. *Spies v. Chicago & E. I. R. Co.*, 40 Fed. 34, 6 L. R. A. 565.

Where the holder of income bonds sues for an accounting, the trustee is a necessary party, since the action should be brought by the trustee, unless some good reason appears, in which case he should be made a defendant. *Morgan v. Kansas Pac. Ry. Co.*, 21 Blatchf. (U. S.) 134, 15 Fed. 55.

⁵³ *Hubbard v. Galveston, H. & S. A. Ry. Co.*, 200 Fed. 504.

⁵⁴ *Barry v. Missouri, K. & T. Ry. Co.*, 36 Fed. 228.

to purchase and pay for them at the price fixed therein.⁵⁵ Sometimes, however, under other agreements, the transaction is referred to as an "underwriting" or the party designated as an "underwriter"; but it seems incorrect to consider a mere subscriber to bonds, even if for the entire issue or the greater part thereof, as an underwriter.⁵⁶

The different phases of the law on the question of underwriting have been extensively discussed in a preceding chapter.⁵⁷

II. POWER TO ISSUE

§ 971. General rules. Whenever a corporation has the power to borrow or raise money, to purchase property, to contract for services or labor, to pay debts or take up bonds of another corporation, or to otherwise contract a debt, it has the implied power, as an incident thereto, to issue its bonds in payment or as security, provided it violates no express or implied prohibition or restriction in its charter or any other statute.⁵⁸

"There seems to be no reason," said Judge Hoar in a Massachusetts

⁵⁵ See § 442 et seq., in which the law relative to the underwriting of stock and bonds is treated fully.

⁵⁶ See *Litchfield Sav. Society v. Dibble*, 80 Conn. 128, 67 Atl. 476, where several persons signed a so-called "underwriter's certificate" by which they promised to pay a certain sum to a third person, upon delivery of a certain amount of stock and bonds of the corporation.

⁵⁷ See Chap. 15.

⁵⁸ **United States.** *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424, 16 L. Ed. 154.

Alabama. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 357, 11 So. 428.

Connecticut. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199.

Massachusetts. *Com. v. Smith*, 10 Allen 448, 455, 87 Am. Dec. 672.

New York. *Smith v. Law*, 21 N. Y. 296; *Seymour v. Spring Forrest Cemetery Ass'n*, 19 N. Y. Supp. 94; *Miller v. New York, etc., R. Co.*, 18 How. Pr. 374.

North Carolina. *Craven v. Atlantic & N. C. R. Co.*, 77 N. C. 289.

Pennsylvania. *Gloninger v. Pitts-*

burgh & C. R. Co., 139 Pa. St. 13, 21 Atl. 211; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574; *McMasters v. Reed's Ex'rs*, 1 Grant 36.

Wisconsin. *North Hudson Mut. Building & Loan Ass'n v. First Nat. Bank of Hudson*, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300.

England. *Royal British Bank v. Turquand*, 5 E. & B. 248.

"To hold that a corporation organized for any legitimate purpose did not have the power to borrow money and issue its notes, bonds or other evidences of indebtedness, to raise money to effectuate any lawful purpose connected with and germane to its corporate objects would be to deprive such corporation of the means of carrying out the purposes of its creation." *Peoria Star Co. v. Cutright*, 115 Ill. App. 492.

A corporation may execute a bond and secure it by an assignment of all the corporate assets. *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295.

case, "why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal; a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement."⁵⁹

Having the power to issue negotiable paper, a corporation may issue negotiable bonds.⁶⁰

Power to issue bonds includes power to issue refunding bonds.⁶¹

A corporation expressly given power to issue bonds convertible into stock has power to issue such bonds although there is no stock remaining unissued and notwithstanding it would increase the amount of capital stock beyond the limit fixed by the charter.⁶²

Want of power to mortgage its property cannot affect the power to issue bonds.⁶³ However, an insurance company has no power to issue its own bonds in exchange for the mortgage bonds of an individual, where the charter expressly limited the use of its funds without including any such power.⁶⁴

Without regard to whether the power to issue bonds is inherent, the power so to do may be implied from express power conferred upon a corporation to mortgage its property;⁶⁵ and officers of a corporation are impliedly authorized to execute bonds, where authority is given by the stockholders and directors to prepare and execute mortgages for the purpose of borrowing money.⁶⁶

Furthermore, the power to issue includes the power to pledge bonds for an indebtedness then incurred or for a pre-existing debt.⁶⁷

⁵⁹ *Com. v. Smith*, 10 Allen (Mass.) 448, 455, 87 Am. Dec. 672.

⁶⁰ *Lehman Bros. v. Tallassee Mfg. Co.*, 64 Ala. 567; *Curtis v. Leavitt*, 15 N. Y. 66.

⁶¹ *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199, 220.

⁶² *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, 672. See also § 1005, *infra*.

⁶³ *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 343, 49 Pac. 197; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

Bonds issued by a corporation are not invalid because secured by an ultra vires mortgage. *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

⁶⁴ *Smith v. Alabama Life Ins. & Trust Co.*, 4 Ala. 558.

⁶⁵ *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211.

⁶⁶ *Pomeroy v. New York Smelting & Refining Co.* (N. J. Eq.), 48 Atl. 395.

⁶⁷ See § 1032, *infra*.

Charter power to issue bonds bearing interest at a certain rate per annum, and to become due in not to exceed a specified number of years, authorizes the issuance of bonds with interest payable semi-annually and giving holders an option to declare the principal due in case of a default in the interest.⁶⁸

Moreover, a corporation may execute a bond in judicial proceedings, as an attachment bond,⁶⁹ a bond for costs,⁷⁰ or an appeal bond.⁷¹

A corporation which has paid the debt for which its bonds were deposited as security, and which has obtained a return of the bonds, may reissue and negotiate them before their maturity.⁷²

If a railroad extends through two or more states, and it is incorporated in each of such states, an issue of bonds valid under the laws of the state where the company was originally incorporated and where the bonds were issued, is valid in the other states.⁷³

Of course, a corporation cannot lawfully issue bonds, any more than it can do any other act, in violation of an express or implied prohibition or restriction in its charter, or in any other statute,⁷⁴ or without complying with charter or statutory requirements, if any, as to form, time of payment, amount, etc.⁷⁵ However, bonds, at least if not negotiable, are not within a prohibition against the issue of bills and notes.⁷⁶

The issuance by a consolidated railroad company of four per cent. bonds to be exchanged for three and a half per cent. bonds of one of

⁶⁸ *Newport & C. Bridge Co. v. Douglass*, 75 Ky. 673.

⁶⁹ *Tanner & Delaney Engine Co. v. Hall*, 22 Fla. 391.

⁷⁰ *Young v. Brompton, C. G. & R. Waterworks Co.*, 1 B. & S. 675.

⁷¹ *Collins v. Hammock*, 59 Ala. 448.

⁷² *Broomall v. North American Steel Co.*, 70 W. Va. 591, 74 S. E. 863. See also § 1044, *infra*, as to whether act a payment or purchase.

⁷³ *Atwood v. Shenandoah Val. R. Co.*, 85 Va. 966, 989, 9 S. E. 748.

⁷⁴ *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 29; *Farmers' Loan & Trust Co. v. San Diego Street Car Co.*, 45 Fed. 518; *Steelman v. Baker*, 53 N. J. Eq. 672, 33 Atl. 815; *In re Pooley Hall Colliery Co.*, 21 L. T. R. (N. S.) 690.

As to the issue of bonds in excess

of the amount of stock paid in, in violation of a prohibition, see *Steelman v. Baker*, 53 N. J. Eq. 672, 33 Atl. 815; *In re Pooley Hall Colliery Co.*, 21 L. T. R. (N. S.) 690.

⁷⁵ *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

Conditions precedent, see §§ 975-977, *infra*.

There is no valid authority for the issue of bonds where the authority under which they were issued was a purported resolution of the directors which was not adopted at any meeting of the directors, but was merely drawn by the secretary and signed at different times by the other directors. *Chavelle v. Washington Trust Co.*, 226 Fed. 400.

⁷⁶ *Leavitt v. Blatchford*, 17 N. Y. 521.

the constituent companies is not forbidden as an issuance of bonds "as a consideration for, or in connection with, such consolidation" nor as "a lien upon any contract for consolidation or merger."⁷⁷

§ 972. As dependent on purpose for which issued—In general. No corporation can lawfully issue bonds for a purpose which is entirely foreign to the business or objects for which it was created.⁷⁸ Thus, a corporation cannot issue a bond or bonds for the purpose of lending its credit to promote the interest of another corporation or person, unless authorized.⁷⁹

Power to issue bonds for money borrowed does not include power to issue bonds to a promoter in payment for options on competing property of little value.⁸⁰

§ 973. — Bond dividend. Bond dividends may be declared out of surplus, provided the capital stock is not thereby impaired.⁸¹ So where the surplus earnings have been used to improve the property, bonds may be issued as a dividend instead of a cash dividend.⁸² However, there is no authority to discriminate between stockholders by

⁷⁷ *Continental Securities Co. v. New York Cent. & H. River R. Co.*, 168 N. Y. App. Div. 345, 153 N. Y. Supp. 879.

A water company has no power by law to issue coupon bonds which shall pass by delivery and bonds so issued are in effect, only promissory notes which each assignee takes subject to prior equities, though they have coupons attached and are payable to bearer. *Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.*, 117 Ky. 325, 78 S. W. 113.

⁷⁸ *Smith v. Alabama Life Insurance & Trust Co.*, 4 Ala. 558.

⁷⁹ *Smith v. Alabama Life Insurance & Trust Co.*, 4 Ala. 558; *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

⁸⁰ *Wiegand v. Albert Lewis Lumber & Manufacturing Co.*, 158 Fed. 608, aff'g 153 Fed. 787.

⁸¹ *Wood v. Lary*, 47 Hun (N. Y.) 550, aff'd 124 N. Y. 83, 26 N. E. 338. To same effect, *Williams v. Western U. Tel. Co.*, 93 N. Y. 162. See also

D'Ooge v. Leeds, 176 Mass. 558, 57 N. E. 1025, holding such bonds to be capital rather than income.

⁸² *Wood v. Lary*, 47 Hun (N. Y.) 550, aff'd 124 N. Y. 83, 26 N. E. 338.

"There is no distinction between the issuing of obligations of the company for earnings which have been devoted to the betterment of the property of the company and the issuing therefor of the stock of the company which remains in its treasury. It is held by the court to be a loan of money to the extent of the dividends earned by the stockholder to the corporation, and that the corporation has a right to issue its stock or its evidence of debt. And if the corporation has a right to issue its evidence of debt to represent such loan of money, it has the same right to secure the same by a mortgage upon its property that it would have, had such money been borrowed without relation to the question of dividends." *Wood v. Lary*, 47 Hun (N. Y.) 550, 556.

awarding cash dividends to small stockholders and a dividend partly in bonds to large stockholders.⁸³

§ 974. — Perpetual bonds. Power to borrow money does not include power to issue so-called “deferred bonds” which are to be perpetual, without any obligation to ever repay the principal, since there is no borrowing because there is no duty to pay back the principal.⁸⁴ Thus a corporation, like a railroad company, for example, cannot raise money by the issue of irredeemable bonds entitling the holder to share in its earnings. The power to issue such bonds is not included in the power to borrow money.⁸⁵

§ 975. Conditions precedent—General rules. Statutes or charter provisions often prescribe conditions precedent to the issuance of bonds which must be complied with. Thus, where a statute provides that bonds secured by mortgage can only be issued to raise money for the purpose of aiding in the construction of the road of a street railway, and then not to exceed its capital stock, there is no authority to issue bonds until the whole amount of the capital stock has been actually paid in cash and expended in building the road.⁸⁶ So where a statute provides that no company incorporated thereunder can begin to build its road until all its stock has been subscribed and fifty per cent. paid in, and that bonds can only be issued to the amount of the capital stock and for the purpose of aiding in the construction of the road, bonds cannot be issued before the capital stock has been actually paid in cash and expended in building the road.⁸⁷ And a bonded debt cannot be considered as “created” until bonds are issued by the corporation; and hence a statute prohibiting corporations from creating any debts beyond their capital stock does not authorize the refusal of an officer to file a certificate of the adoption of a resolution to create a bonded debt, on the ground that the proposed debt exceeds the subscribed stock.⁸⁸

⁸³ *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363.

⁸⁴ *Taylor v. Philadelphia & R. Ry. Co.*, 7 Fed. 386. *Contra*, *Philadelphia & R. Ry. Co. v. Stichter*, 11 Wkly. Notes Cas. (Pa.) 325.

⁸⁵ *Taylor v. Philadelphia & R. Ry. Co.*, 7 Fed. 386.

⁸⁶ *Vanderveer v. Asbury Park & B. St. Ry. Co.*, 82 Fed. 355.

⁸⁷ *Vanderveer v. Asbury Park & B. St. Ry. Co.*, 82 Fed. 355, construing New Jersey statute relating to street railroads.

⁸⁸ A sufficient amount of stock may be subscribed before the bonds are sold and delivered. *Merced River Elec. Co. v. Curry*, 157 Cal. 727, 109 Pac. 264.

All the formalities required before bonds are issued are for the protection of stockholders.⁸⁹

§ 976. — Consent of stockholders. Oftentimes, the consent of at least a majority of the stock is required as a condition precedent to the issuance of bonds.⁹⁰ So sometimes it is provided by the mortgage that bonds in excess of a certain sum shall not be issued except on the written request of a certain per cent. of the stockholders.⁹¹ However, unless it is otherwise provided by the charter or statute, the consent of stockholders is not necessary to an issuance of bonds, but the board of directors may itself authorize the issue.⁹²

Non-negotiable notes secured by a corporate mortgage do not constitute "bonded indebtedness," within a statute forbidding the increase of bonded indebtedness without consent of the stockholders.⁹³

Statutes sometimes prohibit the "increase" of bonded indebtedness without the consent of a majority of the stock.⁹⁴ However, of course, a constitutional provision or statute providing that a bonded debt shall not be "increased," except at a stockholders' meeting, etc., does not apply to an original bond issue.⁹⁵ Furthermore, there is no "increase of indebtedness" where there is merely a change in the form of the debt, as where the security is issued to discharge a purchase-money indebtedness.⁹⁶

Inasmuch as such provisions are requirements for the benefit of stockholders, compliance therewith may be waived by them;⁹⁷ and

⁸⁹ *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892.

⁹⁰ *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64, holding statute applicable to street railway companies. *Smith v. Ferries & C. H. Ry. Co. (Cal.)*, 51 Pac. 710.

⁹¹ *Redwood v. Rogers*, 105 Va. 155, 53 S. E. 6.

⁹² *Hodder v. Kentucky & Great Eastern Ry. Co.*, 7 Fed. 793.

⁹³ *Underhill v. Santa Barbara Land & Building & Improvement Co.*, 93 Cal. 300, 307, 28 Pac. 1049.

⁹⁴ *Wood v. Corry Water Works Co.*, 44 Fed. 146, 12 L. R. A. 168, under Pennsylvania Constitution.

In Alabama, one notice of a meeting is sufficient, in case not only of

a proposed increase of bonded indebtedness, but also of a proposed increase of stock. *Palliser v. Home Tel. Co.*, 152 Ala. 440, 44 So. 575.

⁹⁵ *Union Loan & Trust Co. v. Southern California Motor Road Co.*, 51 Fed. 106; *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140; *Merced River Elec. Co. v. Curry*, 157 Cal. 727, 109 Pac. 264.

⁹⁶ *Powell v. Blair*, 133 Pa. St. 550, 19 Atl. 559.

⁹⁷ *Nelson v. Hubbard*, 96 Ala. 238, 11 So. 428; *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462; *Beecher v. Marquette & Pac. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695.

The Missouri Constitution, art. 12, section 8, provides that no corporation shall increase its bonded indebtedness

the failure to comply with the statute cannot be urged by creditors of the corporation.⁹⁸

In any event, where money from a sale of bonds is received and applied to corporate purposes, with the knowledge of the stockholders, neither the corporation nor its stockholders can set up as a defense that the bond issue was unauthorized by a previous meeting and consent of stockholders.⁹⁹

§ 977. — Consent of public service commission; Blue Sky Laws. In many states, certain corporations, either railroad or all quasi public corporations, are now prohibited by statute from issuing bonds without the consent of the public service commission.¹ Such statutes have

except in pursuance of law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law, and Mo. Rev. St. 1889, section 2499, carrying into effect the foregoing constitutional provision, provides that any corporation may increase its bonded indebtedness, with the consent of the persons holding the larger amount in value of the stock, which consent shall be obtained at a meeting of the stockholders, called for that purpose, sixty days' notice of the time and place of the meeting and of the amount of the proposed increase having been given. It was said as to these provisions: "It is clear that the constitutional and statutory provisions construed are for the benefit of the stockholders, and not for that of the public; that no useful purposes would be subserved by construing them to be for the benefit of the public; and that being for the benefit of the stockholders, they can waive that benefit, and, if they do so, and all meet, and unanimously or by a legal majority vote to increase the * * * bonded indebtedness, their act is binding on them, and neither they nor their creditors can be heard to deny the validity of the act." Accordingly

the validity of a bond issue was upheld even though the requisite notice had not been given where all of the stockholders signed an agreement waiving the notice. *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238, overruling *State v. McGrath*, 86 Mo. 241.

⁹⁸ *Anderson v. Bullock County Bank*, 122 Ala. 275, 25 So. 523.

A statute requiring, as a condition to a bond issue, the consent of two-thirds of the stockholders and the filing of a certificate of the execution of the bonds, is intended merely as a protection to stockholders and not for the protection of creditors, and failure to comply therewith does not make the bonds void at the option of creditors. *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140.

⁹⁹ *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428. See also § 1036, *infra*.

¹ *Grafton County Elec. Light & Power Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

In Massachusetts, a street railroad company cannot issue mortgage bonds without first obtaining authority therefor from the state board of railroad commissioners; and there must be due notice, public hearing and a formal vote of the board. *Augusta Trust Co. v. Federal Trust Co.*, 153

been held to be within the power of the legislature.² The principal purpose of these provisions is to protect the purchasers of stocks and bonds.³

Another purpose of the enactment of statutes requiring issuances of bonds by public service corporations to be approved by the public utility commission is to enable the commission to prevent such issue where for an improper purpose or not reasonably necessary, but it does not make the commission the financial manager of the corporation nor empower it to substitute its judgment for that of the board of directors or stockholders of the corporation as to the wisdom of the issue.⁴ Furthermore, the commission cannot permit the issue of improper securities in violation of a statute, upon condition, nor permit the issue of securities which the law prohibits.⁵ It seems, however,

Fed. 157. "Our statutes respecting the supervision of issue of bonds of street railways require not a perfunctory or merely formal approval, but a thoroughgoing investigation designed for the protection of the public, the stockholders and the secured and unsecured creditors, which results in an intelligent approval manifested by an adjudication." *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 43, 109 N. E. 880.

²In *re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486. But compare *State v. Great Northern R. Co.*, 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 289, where a statute relating to increase of capital stock was held unconstitutional.

³*Interstate Telephone & Telegraph Co. v. Board of Public Utility Com'rs*, 84 N. J. L. 184, 86 Atl. 363.

"For a generation or more the public has been frequently imposed upon by the issues of stocks and bonds of public service corporations for improper purposes, without actual consideration therefor, by company officers seeking to enrich themselves at the expense of innocent and confiding investors. One of the legislative purposes in the enactment of this statute

was to correct this evil by enabling the commission to prevent the issue of such stock and bonds, if upon an investigation of the facts it is found that they were not for the purposes of the corporation enumerated by the statute and reasonably required therefor." *People v. Stevens*, 197 N. Y. 1, 9, 90 N. E. 60.

⁴*People v. Stevens*, 197 N. Y. 1, 90 N. E. 60, aff'g 134 N. Y. App. Div. 99, 118 N. Y. Supp. 969, approved in *People v. Stevens*, 203 N. Y. 7, 20, 96 N. E. 114.

⁵"It is beyond the power of the commission to permit the issue of improper securities upon the condition that the company cancel stock of about half the amount. Read together, the two orders permit the company to issue unauthorized securities, but attempt to lessen the harm to the public which may result therefrom. The commission has no power to thus barter away the public interests, or on its own terms to permit the issue of securities which the law prohibits. Its discretion cannot override the discretion of the officers of the company in the management of its affairs, or the provisions of the statute which prescribe the cases in which securities are permitted. Its duty in the prem-

at least where the statute does not provide that bonds in the hands of bona fide holders shall be void where issued without authority of the proper commission, that failure to obtain the consent of the commission is no defense in an action by a bona fide holder on the bonds.⁶

Where the line of a railroad company extends over several states, the public utility commission of the state where the home office of the company is located has not the broad power to "control the expenditure of moneys, the creating and issue of evidences of indebtedness, the prices at which such bonds or debentures shall be marketed, the necessity and expediency of the creation of this indebtedness, in general to direct the entire physical and fiscal policy of one of the great common carriers of this country, over its entire system of 4,450 miles of railroad, of which but 281 are within this state and 4,169 located without the state;" but it is proper to require the road to file an application or report with the commission, "stating with reasonable fullness such facts as may be required to enable the commission and those legitimately interested therein to ascertain whether any proposed issue or issues of bonds or certificates of indebtedness is or are in fact bona fide and for value," but beyond that the road is not subject to the jurisdiction of the commission "either in respect to determining the aggregate amount of its capital stock, bonded indebtedness, the prices at which its bonds or certificates of indebtedness shall be sold, or where or how the moneys realized from the sale thereof shall be expended."⁷

In Indiana, under the 1913 statute, the commission is required "to hear and determine the facts upon which the application is based, and the facts thus determined constitute the foundation upon which its order shall be based. If the facts thus found are such as to entitle the utility to a certificate of authority to issue and sell bonds in a given amount, it is the duty of the commission to issue such a certificate. Under such circumstances, the act required is ministerial and not discretionary. To hold that such act is discretionary would enable the commission, after the facts were determined, to grant the

ises is to determine whether the proposed issue is necessary for the proper purposes of the company, is authorized by law, and is to be used in a proper manner. If such are the facts it cannot withhold its certificate; otherwise it cannot grant it." *People v. Stevens*, 203 N. Y. 7, 19, 96 N. E. 114, rev'g 143 N. Y. App. Div. 789, 128 N. Y. Supp. 440, and adopting

language of Justice Kellogg in dissenting opinion in the Appellate Division.

⁶ *Goldan v. Delaware & E. R. Co.*, 144 N. Y. App. Div. 78, 128 N. Y. Supp. 936.

⁷ *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 47 L. R. A. (N. S.) 1167, Ann. Cas. 1915 B 728, 88 Atl. 348.

certificate of authority, or to withhold it at its will, or to grant such a certificate to one public utility and to withhold it from another under the same state of facts. Such is not the purpose of the statute.”⁸ Furthermore, in that state the commission cannot refuse a certificate to a public utility to issue bonds on account of additions and extensions made, merely because the additions and improvements upon which the authority to issue the bonds is asked, constitute a duplication of the instrumentalities already in existence and in use by a rival public utility, and for that reason will be neither used nor useful for public convenience.⁹

In Massachusetts, it has been held that the public service commission has no power to approve a railroad company’s issue of convertible debentures payable twenty years after date, convertible into shares of stock at par at any time, not less than five nor more than fifteen years after date; the reason being that since the statute forbids the approval of any issue of stock, etc., if the price at which it is to be issued is so low “as to be inconsistent with the public interest,” the commission cannot form an intelligent opinion as to whether the

⁸ Public Service Commission of Indiana v. State, — Ind. —, 111 N. E. 10.

⁹ Public Service Commission of Indiana v. State, — Ind. —, 111 N. E. 10.

“There can be no doubt that one of the purposes of statutes of the kind under consideration is the prevention of the useless and wasteful expenditure of capital in the duplication of plants and instrumentalities to be utilized in furnishing heat, light or other necessary service to the public. Such statutes proceed upon the assumption that all capital unnecessarily expended in this way will have the effect of increasing the cost of the service supplied to the public, and that by legislative control and regulation of the rates to be charged the injurious results which might otherwise arise from a lack of competition can be effectually controlled. * * * The legislature by the act under consideration evinced a purpose to prevent a waste of capital by competing

public utilities in the duplication of instrumentalities for public services; but the extent to which such a policy is to be carried is a question for the legislature, and not one for the public service commission or the courts.

* * * If the legislature had gone further and provided that, where two or more utilities were engaged in furnishing service of the same kind in the same municipality, neither should make any extensions which would duplicate the instrumentalities of the other without first obtaining the consent of commission, and that money expended in such duplication without the consent of the commission should not be capitalized by the issue of stock, bonds, or other evidence of indebtedness, a different question would have been presented. The act, however, contains no provision restricting or limiting competition between companies engaged in furnishing competitive service at the time the law became effective except the provision as to the regulation of

price at which said stock was to be issued after five and before fifteen years was consistent with the public interest.¹⁰

In New Jersey, the Act of 1911 creating a public utility board forbids any public utility company from issuing any bonds payable in more than one year from the date thereof, without first obtaining the consent of such board, and it is provided that the board shall approve issues of bonds "when satisfied that the same is to be made in accordance with law and the purpose of such issue be approved by said board." It has been held that the word "purpose," as used therein, "must be accorded a meaning which will enable the board to investigate, not only the object of the proposed bond issue, but the conditions under which it is to be made and the entire environment of the company with its antecedents, and the prospective opportunities it may encounter in view of its past history, to meet the financial demands that the proposed burden is likely to impose upon it"; that the board may refuse to permit a bond issue where it appears that there is no reasonable warrant for the expectation that the company from its earnings can pay the annual interest on the bonds, and although the bonds are refunding bonds and do not increase the corporate indebtedness but instead reduce it by one-half; and that the supreme court, where there is evidence to support the conclusion of the board, will not substitute its judgment for that of the board.¹¹

In New York, the public service commission has no power to authorize the issue of bonds upon the application of a corporation which has not received the permission and approval required by statute to be obtained from the commission before the corporation can "begin construction * * * or exercise any right or privilege under any franchise hereafter granted."¹² In that state, even refunding bonds cannot be issued unless with the consent of the public service commission.¹³ It is there held that the enactment of the Public Service Commissions Law did not repeal the provisions in the Stock Corporation Law for the reorganization of the property and franchises of corporations sold under foreclosure, and on the other hand that the

rates." Public Service Commission of *Indiana v. State*, — Ind. —, 111 N. E. 10.

¹⁰ *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

¹¹ *Interstate Telephone & Telegraph Co. v. Board of Public Utility Com'rs*, 84 N. J. L. 184, 86 Atl. 363.

¹² *People v. Willecox*, 207 N. Y. 86, 45 L. R. A. (N. S.) 629, 100 N. E. 705, rev'g 151 N. Y. App. Div. 832, 136 N. Y. Supp. 1031.

¹³ *People v. Public Service Commission*, First Dist., 167 N. Y. App. Div. 286, 153 N. Y. Supp. 344, deciding what matters the court may take into consideration.

provisions of the latter law do not withdraw corporations formed on reorganizations from compliance with the provision of the former law in regard to the consent of the commission to bond issues; but that the commission is not justified in refusing consent to a bond issue because the value of the mortgaged property and the amount of new capital to be invested were less than the amount of securities to be issued by the corporation, although ordinarily securities should not be authorized except where the value of the property is equal to the amount of the securities issued, but the reorganized corporation has the right to issue securities to the extent of those of the company to whose property and franchises it has succeeded and the new money that may be put in the enterprise.¹⁴

In Texas, the statute requiring the railroad commission to consent to the issuance of bonds by "railroad" companies does not, it has been held, apply to street railway companies.¹⁵ In that state, the statutes invalidate every evidence of debt operating as a lien upon the property of a railway company, unless accompanied by a certificate of the secretary of state showing the approval of such indebtedness by the railroad commission; and if one purchases the bond of a railroad company not so certified he takes with notice that the bond is invalid.¹⁶

In recent years there has been enacted a type of legislation, popularly known as the "Blue Sky Laws," which regulates, under certain conditions, the sale, by domestic and foreign corporations and dealers, of stocks, bonds and other evidences of indebtedness, the purport and object of these statutes being to guard against fraud and deception in the sale of securities and to protect the investor. The validity and effect of such legislation will be considered hereafter in the chapter treating of Governmental Regulations.

§ 978. Necessity for mortgage or deed of trust. There may be authority to issue bonds although there is no authority to execute a mortgage;¹⁷ and a bond may be issued without any mortgage. It follows that the fact that the mortgage is invalid does not affect the validity of the bonds secured thereby.¹⁸

¹⁴ *People v. Public Service Commission*, First Dist., 203 N. Y. 299, 96 N. E. 1011, aff'g 145 N. Y. App. Div. 318, 130 N. Y. Supp. 97.

¹⁵ *Denison & S. R. Co. v. Railroad Commission of Texas*, 95 Tex. 671, 69 S. W. 62.

¹⁶ *Davis v. Watertown Nat. Bank*, — Tex. Civ. App. —, 178 S. W. 593.

¹⁷ See § 971, *supra*.

¹⁸ *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

§ 979. Amount. Bonds should not be issued in excess of the charter or statutory limit,¹⁹ nor in excess of the amount fixed by the mortgage.²⁰ Thus, statutes sometimes limit the amount of bonded indebtedness to the amount of the capital stock of the corporation.²¹ In some states the limit fixed for the amount of the construction mortgage bonds of railroad corporations is the amount of capital stock subscribed, not to exceed double the amount of the stock actually paid in.²²

Where the charter authorizes a corporation to borrow money "not exceeding in amount one-half of the par value of the capital stock," the par value is to be figured on the actual amount of capital paid in and not on the full amount of stock subscribed.²³ Whether bonds issued in excess of such limit are void, and the extent to which they are enforceable, if at all, is considered hereafter.²⁴

General rules as to debt limits of corporations have been considered in a preceding chapter relating to contracts in general,²⁵ while the rights of bondholders *inter sese*, in applying the proceeds of a foreclosure sale, are stated in a subsequent chapter relating to mortgages.²⁶

§ 980. Ratification. There is no question but that if a corporation has issued bonds without authority to do so, the legislature may thereafter validate such bonds.²⁷ But an issue of bonds, illegal when issued, cannot be validated by anything done after the corporation which issued them has become bankrupt.²⁸

¹⁹ *Beach v. Wakefield*, 107 Iowa 567, 583, 76 N. W. 197.

²⁰ *Flynn v. Coney Island & B. R. Co.*, 26 N. Y. App. Div. 416, 50 N. Y. Supp. 74.

A covenant in a lease by a corporation that it will not, during the continuance thereof, "authorize, create or issue any stock or bonds additional to the amounts thereof" there authorized or outstanding does not prevent the issue of new bonds in substitution of old bonds outstanding at the time the lease was executed. *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026.

A condition in a lease that the lessor should not authorize or issue bonds additional to the amount then authorized or outstanding is void in so far as it operates to prevent the lessor

from issuing mortgage bonds upon its reversion. *Continental Insurance Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026.

²¹ *Palliser v. Home Tel. Co.*, 152 Ala. 440, 44 So. 575, holding statute repealed.

²² *New Castle Northern Ry. Co. v. Simpson*, 21 Fed. 533, constitutional provision in Pennsylvania.

²³ *In re Lehigh Avenue Ry.'s Appeal*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 498.

²⁴ See § 994, *infra*, and see chapter on *Ultra Vires*.

²⁵ See Chap. 22.

²⁶ See Chap. 34, *infra*.

²⁷ Ratification of mortgage, see Chap. 34, *infra*.

²⁸ *In re Progressive Wall Paper Corporation*, 229 Fed. 489.

III. CONSIDERATION

§ 981. In general. Corporate bonds, in order to be valid, must be based on some consideration.²⁹ However, independently of statute, the want of consideration for a corporate bond is no defense, at least if as against a bona fide holder;³⁰ but as against the original subscriber or holder, or one otherwise not a bona fide holder, want of consideration is undoubtedly a defense, and partial failure of consideration a defense pro tanto.

The fact that a bond issue is in part to repay directors who have advanced money to the corporation does not invalidate the bonds, where the mortgage securing the bonds is for the benefit of all the creditors of the corporation without preference.³¹

The consideration may be property instead of money.³² Thus, payment may be made in construction material as well as cash.³³

§ 982. Constitutional and statutory provisions. In some jurisdictions, to prevent a fictitious increase of their indebtedness by corporations, it is provided by the constitution or by statute that a corporation shall not issue bonds except (1) for money paid, (2) labor done, or (3) property actually received, and that all fictitious increase of indebtedness shall be void; and bonds issued in violation of this provision are invalid,³⁴ unless they have passed into the hands of a bona fide purchaser for value.³⁵

²⁹ *Chicago v. Cameron*, 22 Ill. App. 91, aff'd 120 Ill. 447, 11 N. E. 899.

³⁰ See § 1015 et seq., *infra*.

³¹ *Ramsey v. W. M. Welch Co.*, 163 Iowa 324, 144 N. W. 323.

³² *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

³³ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

³⁴ *Shumpert v. National State Bank of Columbia*, 231 Fed. 82, under South Carolina Constitution and statute. *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 237 Fed. 673, under Montana Constitution; *In re Progressive Wall Paper Corporation*, 229 Fed. 489, under New York statute; *Chanell v. Washington Trust Co.*, 226 Fed. 400, under Washington Constitution; *Woodbury v. Allegheny & K. R. Co.*, 72 Fed. 371, 377-381, under Pennsyl-

vania Constitution; *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, 45 Fed. 518; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

For construction of such statutes so far as concerns stock, see chapter on Stock and Stockholders.

A constitutional provision relating to "railroad" corporations does not apply to street railways, where at the time of its adoption street railways were practically unheard of in the state. *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278.

A stockholder may enjoy that part of a bond issue, the proceeds of which are to be used as a bonus to be distributed among stockholders. *American Ice & Industries Co. v. Crane*, 142 Ala. 620, 39 So. 233.

³⁵ See § 1015 et seq., *infra*.

Such provisions in most of the states are in identically the same words. Such a construction should be given such provisions as will make them effective, and no evasion can be countenanced.³⁶

The object of such provisions is "to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being purely fictitious."³⁷

Under such provisions, a corporation cannot issue bonds to pay scrip dividends or for the purpose of reducing its capital stock,³⁸ or to pay for stock sold by the sole stockholder to a third person.³⁹

A promissory note is not "property," before its collection, for which bonds may be issued.⁴⁰ And a corporation cannot issue a bond for a purchase of its own stock, where a constitutional provision prohibits the issuing of bonds except for money, labor, or money or "property" actually received, since the stock of the corporation is not property that is available for creditors.⁴¹

However, the provision does not preclude a railroad company from delivering bonds to a contractor as advance payments on a contract to construct the road.⁴²

The words "lawful purposes," in the New York statute, are general in character, "but would seem to mean such property as would be germane to or connected with the business purposes of the corporation, as defined in its charter or articles of incorporation."⁴³

If bonds are purchased in good faith and in the regular course of

³⁶ *In re Wyoming Valley Ice Co.*, 153 Fed. 787.

³⁷ *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187, 201, approved in *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 298, 30 L. Ed. 595.

³⁸ *Merz v. Interior Conduit & Insulation Co.*, 87 Hun (N. Y.) 430, 34 N. Y. Supp. 215. But see dissenting opinion of Justice O'Brien.

³⁹ *Shumpert v. National State Bank of Columbia*, 231 Fed. 82.

⁴⁰ *In re Waterloo Organ Co.*, 134 Fed. 341, rev'g on this point, 128 Fed. 517.

⁴¹ "Surely the corporation did not receive anything it did not already

have; so far as ability to pay debts was concerned. If such a transaction as the one in hand is upheld as to a portion of its stock, why would it not hold good as to the whole amount?" *Tepel v. Coleman*, 229 Fed. 300, construing Pennsylvania Constitution, aff'd 230 Fed. 63.

⁴² "If it chose to pay in advance, it could do so. The contract to build was the consideration for the contract to pay, and presumably was full consideration." *Hudson River & W. C. M. R. Co. v. Hanfield*, 36 N. Y. App. Div. 605, 55 N. Y. Supp. 877.

⁴³ *In re Waterloo Organ Co.*, 134 Fed. 341, rev'g 128 Fed. 517.

business from the corporation issuing them, and there is nothing to show that the money is to be used or applied to other than legitimate corporate purposes, such bonds, when issued, will be regarded as having been issued for money, labor or property (as the case may be) actually received "and applied," within the meaning of a provision adding "and applied" to "actually received," without regard to the actual application of the proceeds.⁴⁴

In regard to these matters, federal courts are governed by the decisions of the state courts construing their statutes and constitutional provisions.⁴⁵

§ 983. Paying or securing antecedent debts—In general. Whether antecedent debts are "property," within the meaning of provisions that bonds can be issued only for money, work or "property received," is answered in the affirmative where bonds are issued to pay off such debts.⁴⁶ Thus, such provisions do not prevent an issuance of bonds to take up existing indebtedness as represented by promissory notes,⁴⁷ and bonds issued in exchange for notes of the corporation are issued for value, where the notes were issued for cash received.⁴⁸ Nor are bonds issued on reorganization of a company, after foreclosure, to take up the old bonds, forbidden by such a provision.⁴⁹

Where a corporation purchases bonds of another company, as expressly authorized by statute, and executes notes to pay therefor and then issues bonds to take up the notes, there is no "fictitious increase of indebtedness," but instead merely a change in the form of the obligation.⁵⁰ However, this provision cannot be evaded by the payment, by one to whom the corporation is indebted, of money which the latter immediately pays back to the former to extinguish an old indebtedness, so as to create a new indebtedness.⁵¹

⁴⁴ *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187, 202.

⁴⁵ *Mudge v. Black, Sheridan & Wilson*, 224 Fed. 919.

⁴⁶ See *In re Progressive Wall Paper Corporation*, 229 Fed. 489, under New York statute.

⁴⁷ "The bonds were not given as collateral security merely, but upon surrender of obligations representing money and property which the company had received and used in its business. Although the indebtedness for which the bonds were issued was

antecedent, the consideration was a present one." *In re Snyder* (N. Y. Misc.), 59 N. Y. Supp. 993.

⁴⁸ *Central Trust Co. of New York v. Worcester Cycle Mfg. Co.*, 93 Fed. 712.

⁴⁹ *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

⁵⁰ *Wrightsville Hardware Co. v. McElroy*, — Pa. —, 98 Atl. 1052.

⁵¹ *In re Progressive Wall Paper Corporation*, 229 Fed. 489, rev'g on other grounds 224 Fed. 143.

§ 984. — **Statutes as affecting power to pledge bonds.** That the word "issue," as used in constitutional and statutory provisions forbidding corporations to issue stock except for money, property or labor, is broad enough to cover a pledge, as well as a sale, of bonds,⁵² is too well settled to admit of controversy. However, admitting that to pledge is to "issue," there is conflict in the decisions as to whether the pledge of bonds for a pre-existing debt is an issue for property received. Concededly it is not for "money" or for "work done." Late decisions in the federal courts have held that because of this provision bonds cannot be pledged by the corporation issuing them, to secure an antecedent debt;⁵³ and this has been held even though there is

⁵²First Savings & Trust Co. v. Waukesha Canning Co., 211 Fed. 927; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. 842; Western Supply & Manufacturing Co. v. United States & Mexican Trust Co., 41 Tex. Civ. App. 478, 92 S. W. 986.

"The constitution uses the word 'issued.' This term is broad enough to embrace the idea of pledge as well as that of sale. In contemplation of law, bonds pledged by a corporation are just as much issued as when they are sold." William Firth Co. v. South Carolina Loan & Trust Co., 122 Fed. 569.

"Its counsel has argued that the bonds have not yet been issued, and will not be issued until the title of the pledgor has been divested. Until that has happened he would have us regard them as the pledgor's bonds, and therefore not yet issued. We have not been impressed by the argument." In re Progressive Wall Paper Corporation, 229 Fed. 489.

⁵³Pacific Coast Pipe Co. v. Conrad City Water Co., 237 Fed. 673, construing Montana Constitution; In re Progressive Wall Paper Corporation, 229 Fed. 489, rev'g on other grounds 224 Fed. 143, construing New York statute; Chavelle v. Washington Trust Co., 226 Fed. 400, under Washington Constitution; Kemmerer v. St. Louis Blast Furnace Co., 212 Fed. 63 (de-

cided under Missouri statute, and explaining Nelson v. Hubbard, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428), followed in Mudge v. Black, Sheridan & Wilson, 224 Fed. 919; Farmers' Loan & Trust Co. v. San Diego St. Car Co., 45 Fed. 518, decided under California Constitution.

"Existing debts are not money, and to say that they are property capable of estimation at its true money value does considerable violence to the words used. * * * Pre-existing debts are neither money nor property capable of being valued unless actually given up." Nichols v. Waukesha Canning Co., 195 Fed. 807, rev'd in 211 Fed. 927, decided under Wisconsin statutes.

"This constitutional and statutory inhibition is plain, and has but one meaning—the money paid, labor done, or property actually received must be paid, performed, or received, as the case may be, on account of the issuance of the bonds; and any bonds issued contrary to this provision are of course illegally issued. The provision does not mean and cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness. Now none of the bonds in question are, or ever were, issued or held for money paid, labor performed, or property actually received on account of their issuance.

an extension of the time for payment of the secured debt or though a new note is substituted for the old note, either with the same or different indorsers.⁵⁴ However, in a recent case in a federal court, where bonds were pledged as collateral on a basis of not less than seventy-five per cent. of their face value, it was held that such issuance was for property, within a Wisconsin statute providing that no corporation should issue bonds except for money, labor or property estimated at its true value actually received equal to seventy-five per cent. of the par value thereof.⁵⁵

The reasoning upon which this decision was based was that property interests may be enhanced by an increase in their quality as well as in their quantity, and that in agreeing to take the bonds as collateral at the rate of not less than seventy-five per cent. of their face value upon their past due claims, and in extending time of payment thereof, the bondholders "afforded to the corporation a valid property consideration equal to seventy-five per cent. of the face of the bonds, and are therefore satisfying the demands of the Wisconsin statute * * *, provided, of course, the creditors had agreed to accept the bonds on that basis."⁵⁶ And in Alabama a pledge to secure a debt has been held to be for "money or property actually received."⁵⁷ Moreover, such provisions, applied to the issuance of "stock," are held to not forbid a pledge to secure pre-existing indebtedness.⁵⁸

In any event, the prohibition does not prevent the use of bonds as collateral when issued at the time the debt is incurred.⁵⁹

Nor does such a provision prohibit an issue as security for both past and future advances, under an agreement that the creditor will account for the bonds at their par value.⁶⁰

On the contrary, all of them were delivered and are held as collateral security in part for pre-existing indebtedness of the defendant corporation, and in large part for pre-existing indebtedness, not of the defendant corporation, but of one of its creditors. As had already been said, not one of the bonds was ever sold, and not one of the holders of them paid a dollar on account of their delivery." *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, 45 Fed. 518.

⁵⁴ *In re Progressive Wall Paper Corporation*, 229 Fed. 489, rev'g 224 Fed. 143.

⁵⁵ *First Savings & Trust Co. v. Waukesha Canning Co.*, 211 Fed. 927, rev'g 195 Fed. 807.

⁵⁶ *First Savings & Trust Co. v. Waukesha Canning Co.*, 211 Fed. 927, rev'g 195 Fed. 807.

⁵⁷ *Nelson v. Hubbard*, 96 Ala. 238, 251, 17 L. R. A. 375, 11 So. 428.

⁵⁸ See chapter on Stock and Stockholders, *infra*.

⁵⁹ *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842. See also *Memphis & Little Rock R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

⁶⁰ *In re Waterloo Organ Co.*, 134

In a rather far-fetched case, where two creditors, who owned all the stock of the corporation, agreed that their claims against the corporation should be cancelled except as to excess owed one over the other, the purpose being to increase the value of the stock, and thereafter the corporation reinstated such claims in consideration of the payment of the outstanding debts by said stockholders, and bonds were issued to secure such debts and the sums advanced to pay other debts, it was held that the bonds were not void as not issued for money paid or property transferred, on the theory that the cancelled indebtedness was in the nature of a surplus which could have been distributed among the stockholders and could then have been loaned back to the company in exchange for its bonds, and that that was practically what was actually done.⁶¹

Where the indebtedness of a corporation does not arise until a novation at the time of the pledge of bonds, such pledge is one for an immediate debt rather than an antecedent debt.⁶²

§ 985. Issuance below par—General rule. Independently of statute, a corporation has power to issue bonds at less than par,⁶³ and in New York it is held that "the repeal of the statute of usury, so far as regards corporations, operates to give validity to bonds negotiated at less than par."⁶⁴ In other words, a corporation, when it is authorized, expressly or impliedly, to raise money or pay debts by issuing bonds, may issue them at a discount,⁶⁵ unless it is prohibited by its charter, or by the statute against usury,⁶⁶ or some other statute. However, where a statute forbids the issuing of "stock" at less than par, it cannot be evaded by issuing a certain amount of stock and a certain amount of bonds, to pay for property purchased, where, figuring the stock at par, there was issued almost twice the number of bonds, taken at their actual value, necessary to pay the balance due on the property purchased, such issue being made in fact because the stock was really worth less than half of its par value.⁶⁷

Fed. 345, aff'd 154 Fed. 657, under New York statute.

⁶¹ In re De Soto Coal Mining & Development Co., 218 Fed. 892.

⁶² William Firth Co. v. South Carolina Loan & Trust Co., 122 Fed. 569.

⁶³ Gamble v. Queens County Water Co., 123 N. Y. 91, 108, 9 L. R. A. 527, 25 N. E. 201.

⁶⁴ Gamble v. Queens County Water

Co., 123 N. Y. 91, 108, 9 L. R. A. 527, 25 N. E. 201.

⁶⁵ Gamble v. Queens County Water Co., 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201, rev'g 52 Hun (N. Y.) 166, 5 N. Y. Supp. 124; In re Anglo-Danubian Steam Navigation & Colliery Co., L. R. 20 Eq. 339.

⁶⁶ See § 989, *infra*.

⁶⁷ Gamble v. Queens County Water

The common constitutional or statutory provision forbidding the issuance of bonds except for money, property or labor done, and declaring all "fictitious" increase of indebtedness void, does not prevent the issuance of bonds below par,⁶⁸ nor forbid the sale of bonds at a discount.⁶⁹ Such provisions do not require the consideration received to correspond to the face value of the bonds.⁷⁰

Thus, in the Supreme Court of the United States, in construing the Arkansas constitution, Justice Harlan stated the rule as follows: "Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used, that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property or labor, upon such terms as they deem proper; provided, always, the transaction is a real one based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden."⁷¹

The prohibition is not to be construed so as to restrict and hamper corporations in the management of their legitimate business, or in procuring the means to accomplish their legitimate objects. To bring a case within the prohibition, it must appear that the corporation has fraudulently issued, or is about to fraudulently issue and put upon

Co., 123 N. Y. 91, 108, 9 L. R. A. 527, 25 N. E. 201.

⁶⁸ *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 298, 30 L. Ed. 595; *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892.

⁶⁹ *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140.

A corporation may issue bonds for a pre-existing debt and an amount to be paid for a further forbearance for a fixed time, although the result is in effect the sale of a corporate obligation at a discount. *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

In California, "there is no rule of

public policy or law" of the state "which forbids a corporation from discounting its notes or bonds. It is a common custom, and it has never been held unlawful." *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140.

⁷⁰ *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642, 656; *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

⁷¹ *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 299, 30 L. Ed. 595.

the market, bonds which do not represent, and are not intended to represent, money or property received. It does not prevent a corporation from disposing of its bonds for the best price which it can obtain, though it may be less than par.⁷² Nor does the provision require that the corporation shall receive a dollar in money for each dollar of indebtedness, but that the amount received shall bear some reasonable approximation to the amount of indebtedness.⁷³ In Utah, however, the rule is laid down, so far as bondholders who are stockholders are concerned, that the corporation must receive for its bonds "the par or face value thereof paid in money or its equivalent in either property or labor."⁷⁴

In some states, statutes expressly permit the sale of bonds of railroad companies, or of all companies, at such prices as the directors may choose to take.⁷⁵

In other states, however, the provision is that no corporation shall issue bonds "except for an equivalent" in money paid, property or labor, in which case, of course, bonds cannot be issued for labor or property unless the market price thereof is equal to the par value of the bonds.⁷⁶

When it is held that bonds may be issued below par, it necessarily follows that the value of the property received or labor done need not exactly correspond with the face value of the bonds but may be considerably less than the face value.

⁷² *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595; *Brown v. Duluth, M. & N. Ry. Co.*, 53 Fed. 889; *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Underhill v. Santa Barbara Land, Building & Improvement Co.*, 93 Cal. 300, 28 Pac. 1049; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

⁷³ *Northside Ry. Co. v. Worthington*, 88 Tex. 573, 53 Am. St. Rep. 778, 30 S. W. 1055; *Western Supply & Manufacturing Co. v. United States & Mexican Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986.

⁷⁴ *Rolapp v. Ogden & N. W. R. Co.*, 37 Utah 540, 558, 110 Pac. 364. On rehearing the court said (p. 564): "That good reasons may exist for making a distinction between stockholders as corporate creditors and

others who in no way are related to the corporation is obvious."

"We think that any amount in excess of what was actually received by the corporation * * * either in money or its equivalent for bonds, so long as they have not passed into the hands of innocent holders for value and without notice, is, in the language of the Constitution, 'a fictitious issue of indebtedness,' and is therefore void." *Rolapp v. Ogden & N. W. R. Co.*, 37 Utah 540, 558, 110 Pac. 364.

⁷⁵ *McGregor v. Covington & L. R. R. Co.*, 1 Disney (Ohio) 509, holding statute not applicable to foreign railroad corporations.

⁷⁶ *Altenberg v. Grant*, 85 Fed. 345, under Kentucky Constitution; *Mayfield Water & Light Co. v. Graves County Banking & Trust Co.*, — Ky. —, 185 S. W. 485.

It is immaterial that the price at which property is turned over to the corporation for the bonds is excessive.⁷⁷

"Fictitious indebtedness" does not include an excessive valuation of services or property which are the consideration for bonds.⁷⁸ So the mere fact that stock and bonds, nominally of much greater par value than the cost of the railroad in actual money, were transferred to a contractor to build the road in payment therefor, "is not of itself conclusive evidence of excessive, much less fictitious, consideration."⁷⁹ Nor is the fact that bonds, issued by a railroad company to pay for constructing its road, exceeded the value of the work, fatal, where the contract was fairly made and carried out, and there is no fraud charged.⁸⁰

Stock and bonds issued in exchange for other stock and bonds, not shown to have been invalid, and in pursuance of a reorganization scheme entered into in perfect good faith by the issuing company, are not invalid because at the time of the exchange the cash value of the physical property and franchises acquired by the reorganized company was not fully equal to the par value of its securities.⁸¹

The defense that bonds were issued below par, even where unlawful, cannot be set up against bona fide holders of the bonds.⁸²

§ 986. — "Fictitious" increase of indebtedness. The power of a corporation, discussed in the preceding section, to issue bonds for a sum of money less than their par value, or for property or work of a value less than their par value, is not wholly without limitations. It is to be noted that the provision of the constitution or statute adds that there shall be no "fictitious" increase of indebtedness.⁸³

Conceding that the bonds may be issued below par, the question arises as to whether there is any limit as to how far below par bonds may be issued and still not be fictitious. Can bonds be issued at fifty per cent. of their face value, either in money or property or labor and

⁷⁷ *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365.

⁷⁸ *Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co.*, 90 Ill. App. 460, 486, aff'g 195 Ill. 288, 63 N. E. 136.

⁷⁹ The contractor "is not likely to take such risks without a margin sufficiently large to make it worth his while to proceed with the undertaking." *Chicago & S. S. Rapid Transit*

R. Co. v. Northern Trust Co., 90 Ill. App. 460, 485, aff'g 195 Ill. 288, 63 N. E. 136.

⁸⁰ *Farmers' Loan & Trust Co. v. Rockaway Valley R. Co.*, 69 Fed. 9.

⁸¹ *Sioux City, O. & W. Ry. Co. v. Manhattan Trust Co.*, 92 Fed. 428, 434, following *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595 (construing Nebraska Constitution).

⁸² See § 1037, *infra*.

⁸³ See § 985, *supra*.

still not violate the prohibition against "fictitious" increase of indebtedness? If they can be issued at fifty per cent., can they be issued at twenty-five or ten or five? The purpose of such provision, according to the Supreme Court of the United States, is to guard the public against securities that are absolutely worthless.⁸⁴ However, this statement, probably intended only to be read in connection with the general statements and explanations in the opinion, is undoubtedly too limited. In other words, under this rule, it would seem that if bonds should be sold at five cents on the dollar, they would not be fictitious because not "absolutely worthless." It is submitted, however, that the rule established in Texas, although perhaps difficult of application, is the correct one, i. e., the amount received must bear some reasonable and just approximation to the amount of the indebtedness.⁸⁵ And this seems to be the rule in Alabama.⁸⁶

However, where bonds are issued for property or for work done—especially construction work—the courts have, except in a few instances, in effect refused to hold an issue fictitious regardless of a discrepancy, varying from ten to fifty per cent., between the par value or the real value and the value of the property or labor.⁸⁷ But

⁸⁴ *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

⁸⁵ *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

⁸⁶ "The constitutional provision in question operates to invalidate evidences of indebtedness when there is in fact no debt; to require every issue of stocks or bonds of private corporations to represent substantial values received by the corporations; to impose upon those charged with the disposition of corporate securities the duty to procure therefor a fair and reasonable equivalent in money, labor, or property actually contributed to the corporation." *Nelson v. Hubbard*, 96 Ala. 238, 250, 17 L. R. A. 375, 11 So. 428.

⁸⁷ *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595; *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

"It may be that an amount of corporate bonds and stock turned over

by a corporation is so much in excess of the expenditures to be made by the recipients of the same that a court would hold that the statute prohibited such a transaction; but, if the purpose of the corporation in issuing bonds and stock is to build its road, and no unreasonable amount is issued beyond the value actually received or provided for, the statute, in my opinion, does not apply." *Brown v. Duluth, M. & N. Ry. Co.*, 53 Fed. 889, construing Minnesota statute.

Bonds for \$38,000 executed in payment for property have been held not necessarily issued upon a fraudulent overvaluation of the property, although the property had been sold at sheriff's sale for only \$17,000. *Pomeroy v. New York Smelting & Refining Co. (N. J. Eq.)*, 48 Atl. 395.

While bonds issued by a railroad company for construction of a railroad need not, at their par value, correspond exactly with the value of the work, yet such provisions forbid the issuance of bonds for labor or prop-

bonds executed to promoters for options on the property of a competing company, of little value, have been held fictitious, and therefore void.⁸⁸

So in New York it has been held that there is a fictitious increase, as that term is used in the constitutions and statutes of sister states, where refunding bonds are for nearly twice the par value of the old securities, being in effect an overpayment for the old bonds.⁸⁹

The present value at the time the bonds are issued governs in determining whether they are fictitious.⁹⁰

In determining the value of railroad property paid for by issuing bonds, its net earning power and the cost of building it de novo are to be considered, rather than the price at which the seller originally acquired it.⁹¹

§ 987. — Purchase by officers of corporation. In the absence of statutory regulation, it seems that officers of a corporation may buy its bonds at less than par.⁹² However, in some states a purchase by directors at less than par is expressly prohibited by statute.⁹³

§ 988. — Pledge of bonds. Bonds may be pledged for more than the amount of the debt, where there is no statute fixing the limit at

erty, the value of which is much less than the par value of the bonds. "For every dollar's worth of labor done for the corporation, or property received by it, or of money expended in its behalf, the defendant is to receive more than threefold in the stock and bonds of the company. A door is thus to be opened for throwing upon the market, to the beguilement of confiding people, corporation securities apparently representing \$600,000 of real value, but having actually behind them \$180,000 of value only. * * * If the proposed issue of stock and bonds beyond the sum of \$180,000 would not be 'fictitious,' it is hard to divine the meaning which the framers of the constitution attached to that word." *New Castle Northern Ry. Co. v. Simpson*, 21 Fed. 533.

⁸⁸ *Wiegand v. Albert Lewis Lumber & Manufacturing Co.*, 158 Fed. 608, aff'g 153 Fed. 787.

"But the present actual value of

that which they represented was comparatively so slight—there being but \$27,500 of visible property for \$90,000 of bonds, to say nothing of the \$200,000 of stock—and the prospective value, upon which alone the transaction could be justified, was so speculative, not to say fanciful, that the obligations given in return must be regarded as colorable, and so fictitious, within the meaning of the Constitution, and therefore void." *In re Wyoming Valley Ice Co.*, 153 Fed. 787.

⁸⁹ *Pollitz v. Wabash R. Co.*, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803.

⁹⁰ *In re Wyoming Valley Ice Co.*, 153 Fed. 787.

⁹¹ *Grant v. East & West R. Co.*, 54 Fed. 569, construing Alabama Constitution and statutes.

⁹² *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365, aff'g 64 Hun (N. Y.) 632, 19 N. Y. Supp. 94.

⁹³ See § 985, *supra*.

which bonds can be hypothecated below par for money, labor or property actually received.⁹⁴

Transferring bonds of a greater par value than the debt as collateral security is not a "fictitious" issue or disposition of the bonds, where, if the bonds should be sold by the pledgees for more than the debt, the pledgor would be entitled to a return of the surplus.⁹⁵ In other words, where corporations issuing bonds may sell them bona fide below par, they may pledge them for money borrowed, although the nominal value of the bonds pledged is greater than the sum borrowed.⁹⁶ However, statutes sometimes expressly or impliedly prohibit a pledge at less than par or at less than a certain per cent. of the par value.⁹⁷

§ 989. — As affected by statutes against usury. Statutes against usury have been held to invalidate bonds issued below par.⁹⁸ However, in many states, the statutes relating to usury do not apply to corporations;⁹⁹ and there is no usury where the bonds are issued for property or work done, as distinguished from money loaned.¹ And

⁹⁴ *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842, 846; *Dexter v. McClellan*, 116 Ala. 737, 22 So. 461; *Nelson v. Hubbard*, 96 Ala. 238, 251, 11 So. 428; *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197; *Miller v. Hellam Distilling Co.*, 57 Pa. Super. Ct. 183.

⁹⁵ *Dexter v. McClellan*, 116 Ala. 37, 22 So. 461.

⁹⁶ *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892.

⁹⁷ See § 990, *infra*.

⁹⁸ *Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co.*, 94 Ga. 306, 321, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701; *Houghteling v. Gogebic Lumber Co.*, 165 Mich. 498, 35 L. R. A. (N. S.) 1106, 131 N. W. 109; *Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511, 99 N. W. 748; *Craven v. Atlantic & N. C. R. Co.*, 77 N. C. 289.

⁹⁹ *Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757, 64 Atl.

126; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 108, 9 L. R. A. 527, 25 N. E. 201; *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

It is held in New York that the repeal of the statute of usury, so far as regards corporations, operates to give validity to bonds negotiated at less than par. *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

¹ "It must be conceded that if there was no loan there was no usury. * * * We will assume that the work, labor and materials furnished by the construction company were worth much less than the par value of the bonds. But that alone will not make the transaction a loan. * * * There must * * * be something else proved before the transaction can be held to be a loan, viz.: That a loan was intended under the form of a sale." *Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co.* (Del. Ch.), 77 Atl. 756.

where there is in fact no loan, it is immaterial that the bonds recite that they are issued for a loan.²

If the charter permits the corporation to borrow money on such terms as its directors may determine, its bonds sold below par are not void for usury.³ Of course, if bonds are delivered for construction work, the holders may sell them at any discount they please and there is no usury in such a transaction.⁴

The general rule is that usury is no defense against bona fide holders of the bonds.⁵

§ 990. — Statutes expressly forbidding or limiting to certain per cent. Corporations cannot lawfully issue bonds in violation of an express provision against their issue for less than par, or for less than a certain percentage of their par value.⁶

In some states the sale of corporate bonds for less than seventy-five per cent. of their face value is forbidden.⁷

Thus by statute in Wisconsin it is provided that no corporation shall issue any bonds except for money, labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and that all bonds issued contrary to the provisions of law shall be void.⁸ Under this provision, bonds issued for less than seventy-five per cent. of their par value are void, as between the immediate parties, without regard to the obligee's lack of knowledge of the violation of the law.⁹ And it is held thereunder that bonds pledged by a corporation as collateral for a loan are invalid where it is not stipulated that they shall be accounted for at not less than seventy-five per cent. of their par value.¹⁰ The statute

² *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414, 423, 16 L. Ed. 154.

³ *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 303, 3 S. E. 363.

⁴ *Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co.*, 94 Ga. 306, 321, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701.

⁵ *Weed v. Gainesville, J. & S. R. Co.*, 119 Ga. 576, 595, 46 S. E. 885.

⁶ *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 29; *Neuse River Nav. Co. v. Newbern Com'rs*, 7 Jones (N. C.) 275; *Pfister v. Milwaukee Elec. Ry. Co.*, 83 Wis. 86, 53 N. W. 27.

⁷ *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, aff'g 86 Fed. 929, applying Ohio statute where an amount of both bonds and stock were issued to a contractor who was to buy in a railroad, pay off the liens, and reconstruct and equip it.

⁸ *Wis. Rev. St. § 1753.*

⁹ *In re Valecia Condensed Milk Co.*, 233 Fed. 173.

¹⁰ *Pfister v. Milwaukee Elec. Ry. Co.*, 83 Wis. 86, 53 N. W. 27.

The provision applies to a pledge as well as a sale of the bonds. To pledge

is also violated where one is to sell bonds and expend the proceeds for the benefit of the corporation, and to receive in consideration therefor all the proceeds of the business, expend not more than half for the benefit of the business, and himself retain the other half until the sum retained by him equals the proceeds of the bonds, and where the seller was to have a first lien on all the property to secure payment to him of an amount equal to the proceeds of bonds sold.¹¹

However, where the statute does not in terms provide that the payment of the consideration must be contemporaneous with the issue of the bonds, bonds declared void by statute because the requirement as to consideration was not complied with may thereafter be validated by supplying such consideration without a surrender and reissuance.¹²

Nor does the provision render invalid bonds in the hands of bona fide holders which were issued in contravention thereof.¹³

The Ohio statute providing that all bonds "of a company, purchased of a company by a director thereof, either directly or indirectly," for less than the par value thereof, shall be void, applies only to original sales made by the company;¹⁴ and the "indirect purchase by a director, prohibited by the statute, is a purchase for a director by another, or by a director in the name of another."¹⁵ Moreover, such statute, although using the word "void," is to be construed as if the word "voidable" was used, and subsequent creditors cannot attack the validity of the bonds on that ground.¹⁶

The Kentucky constitution provides that "No corporation shall

is to "issue" the same as to sell is to issue. *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 29, construing Wisconsin statute.

¹¹ "Under these conditions the corporation does not actually receive the proceeds of the bonds, but only a conditional promise that it shall be paid such proceeds if plaintiff's undertaking to operate the mine shall produce an income sufficient to pay double the amount realized from the sale of the bonds, and in the event that the mine does not produce such an income the corporation never would receive the proceeds of the sale of the bonds." *Pozorski v. Gold Range Commonwealth Corporation*, 142 Wis. 595, 126 N. W. 24.

¹² *Haynes v. Kenosha Elec. R. Co.*,

139 Wis. 227, 121 N. W. 124, 119 N. W. 568, holding same rule applies to bonds as to stock.

¹³ *In re Footville Condensed Milk Co.*, 229 Fed. 698.

¹⁴ It does not apply to a purchase by a director from third persons. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 86 Fed. 929.

¹⁵ *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, aff'g 86 Fed. 929.

¹⁶ *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, aff'g 86 Fed. 929. See also *Shoemaker v. Dayton & U. R. Co.*, 19 Wkly. Law Bul. (Ohio) 322, holding that the corporation may be estopped from declaring transaction void.

issue stocks or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time such labor was done or property delivered, and all fictitious increase of stock or indebtedness shall be void.”¹⁷ Under this provision a corporation is without power to issue or negotiate its stock or bonds for money or other thing of less value than the par value of said bonds.¹⁸ And if a corporation loans its bonds to an individual without consideration and they are by him pledged with another for his own purposes and the pledgee has knowledge of the circumstances, the pledge is void. But if he pledged the bonds for the corporation and it received the proceeds of the note which they were pledged to secure, then, to the extent to which the corporation received the proceeds of the note, the bonds, at their par value, can be sold by the pledgee for the indebtedness.¹⁹

In New York, the statute, at one time, provided that no bonds “shall be issued for less than the fair market value thereof”; but thereunder it was held that bonds may be pledged as security for future advances by the pledgee, under an agreement that the corporation may sell any of such bonds at par and that the pledgee on receipt of the proceeds should then redeliver the sold bonds to the corporation, as against the objection that inasmuch as the bonds were issued as collateral without a present consideration, they were not issued for their fair market value, as required by statute, and hence were void.²⁰ The 1901 statute in that state omitted the provision that no “bonds shall be issued for less than the fair market value thereof.”²¹

§ 991. Bonds or stock as bonus. Sometimes, in order to sell stock, bonds are issued as a bonus; and, vice versa, stock is sometimes issued as a bonus to a subscriber to corporate bonds as an inducement to purchase the bonds. Ordinarily the giving of bonus stock with bonds does not invalidate the bonds,²² although, if by the arrangement the

¹⁷ Ky. Const. § 193. To the same effect, see Ky. St. § 568.

¹⁸ *Altenberg v. Grant*, 85 Fed. 345; *Mayfield Water & Light Co. v. Graves County Banking & Trust Co.*, — Ky. —, 185 S. W. 485. See also *Bennett v. Stuart*, 161 Ky. 264, 170 S. W. 642.

¹⁹ *Mayfield Water & Light Co. v. Graves County Banking & Trust Co.*, — Ky. —, 185 S. W. 485.

²⁰ *In re Waterloo Organ Co.*, 134 Fed. 345.

²¹ *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

²² *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423, aff'g 80 Fed. 450.

bond is practically issued without any consideration whatever, it seems that this fact is a defense to the bonds or to a foreclosure suit, where the bonds are in the hands of the original holders.²³

The delivery of stock as a bonus on selling bonds does not violate a provision that bonds or stock shall not be issued except for money, labor or property actually received and applied for corporate purposes, etc., where the amount is not unreasonable or beyond the value actually received.²⁴ In any event, where stock has been fully paid for, and issued, upon a sufficient and adequate consideration, to the subscribers, such holders have the right to return the stock to the company, or to a trustee for the benefit of the company, to be donated, as may be directed by the owner of the stock, to purchasers of bonds of the corporation.²⁵

Subscription to bonds under an agreement to give stock as a bonus, where the bonds are afterwards paid for and accepted, makes the bondholder a stockholder, notwithstanding his failure or refusal to take the stock to which he is entitled.²⁶

An issue of stock as bonus to purchasers of bonds cannot be impeached by existing creditors of the corporation.²⁷

The liability of the bondholder, as a stockholder, to pay for the stock, whether at the instance of the corporation or of a judgment creditor of the corporation, is treated of in a subsequent volume.²⁸

Where there is a subscription to purchase all of an issue of bonds by a corporation at a certain price, with a bonus of common stock of a specified amount, and the underwriting agreement is pledged together with the bonds before the time for delivery of the bonds and stock to the underwriters, the pledgee is entitled to a delivery of the shares of stock to be issued as a bonus.²⁹

²³ *Guarantee Title & Trust Co. v. Dilworth Coal Co.*, 235 Pa. 594, 84 Atl. 516; *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 276, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.
²⁴ *Brown v. Duluth, M. & N. Ry. Co.*, 53 Fed. 889.

Where the actual value of both the stocks and the bonds does not exceed the par value of the bonds which was paid to the company on the purchase, the transaction is lawful. *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227.

²⁵ *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 131, 8 So. 496.

²⁶ "It was by virtue of the subscription contract that he became the owner of the stock. Whether he actually received the certificate is immaterial." *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 413, 82 N. E. 891, aff'g 131 Ill. App. 66.

²⁷ *Dummer v. Smedley*, 110 Mich. 466, 38 L. R. A. 490, 68 N. W. 260.

²⁸ See chapter on Stock and Stockholders, *infra*.

²⁹ *Kirkpatrick v. Eastern Milling & Export Co.*, 135 Fed. 146, aff'd 137 Fed. 387.

The consideration for bonds may be a subscription to stock of the corporation, it is held in California, where bonds were issued as a bonus.³⁰ In Utah, however, it is held that bonds issued as a bonus to subscribers to the capital stock are without consideration and void as against creditors, while in the hands of persons not bona fide purchasers.³¹

IV. FORM AND CONTENTS

§ 992. General rules. The mode of executing corporate bonds is governed by the same rules applicable to corporate contracts in general, as stated in a subsequent chapter.³² The rules relating to the necessity for, and effect of, a seal, are also treated of in a separate chapter.³³

No precise words are necessary to the validity of a bond,³⁴ but certain additions or omissions may make it non-negotiable.³⁵

When a corporation has the power to issue bonds, and there are no express or implied restrictions in the way, it may issue them in any form and with any conditions or terms it may see fit.³⁶ It may be made a condition of the contract that bonds must be presented for payment at the corporate office.³⁷ It may issue a bond containing a warrant of attorney to confess judgment on breach of conditions.³⁸

It is not necessary to the validity of a bond that it should name a place of payment.³⁹ It seems that bonds may be issued providing that they may be used in payment for the corporate property should execution sale thereof be held.⁴⁰

³⁰ McKee v. Title Insurance & Trust Co., 159 Cal. 206, 113 Pac. 140.

³¹ Rolapp v. Ogden & N. W. R. Co., 37 Utah 540, 110 Pac. 364.

³² See Chap. 35, *infra*.

³³ See Chap. 19.

³⁴ For particular forms, see Fletcher, Corporation Forms 1226, 1251, 1274, 1278, 1315 (income bond), 1320 (registered bond), 1322, 1323 (convertible gold bond).

³⁵ See § 1011, *infra*.

³⁶ Willoughby v. Chicago Junct. Railway & Union Stockyards Co., 50 N. J. Eq. 656, 25 Atl. 277; Philadelphia & S. R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

³⁷ If the corporation has power to issue bonds, and there is no statute to

the contrary, the question "whether such bonds shall be ordinary bonds, or income bonds, or simple debentures, is a matter of corporate regulation and management, with which the courts will not interfere." Willoughby v. Chicago Junct. Railways & Union Stockyards Co., 50 N. J. Eq. 656, 700, 25 Atl. 277.

³⁸ See H. Abraham & Son v. New Orleans Brewing Ass'n, 110 La. 1012, 35 So. 268, where there was such a condition as to coupons.

³⁹ Stratton v. Allen, 16 N. J. Eq. 229.

⁴⁰ Parsons v. Jackson, 99 U. S. 434, 440, 25 L. Ed. 457.

⁴¹ In re Saxton Furnace Co., 136 Fed. 697.

Any variation from the precise name of a corporation, when the true name may be collected from the instrument itself, and when it appears that the obligations sued on were intended to be the obligation of the corporation sued, is unimportant.⁴¹

A statement in a bond that it is "secured by all the property and assets of the company," means a special security by some lien on all the property, which is peculiar to such bonds, since the word "secured" means that there is something behind the bond not common to other creditors.⁴²

Bonds called "special contract bonds" are nevertheless valid unconditional obligations, although they provide for a retirement fund and an interest fund created from the surplus earnings of the company and out of which the principal and interest is to be paid until a default therein occurs, where on a default occurring it is expressly stipulated that the bonds are an unconditional obligation of the company and enforceable against the entire mortgaged property by foreclosure.⁴³

A provision in a bond that upon any distribution of assets, after the payment in full of principal and interest, the bondholders shall share equally with the stockholders, until the latter should receive a certain sum, after which the bondholders should receive the balance, is invalid, at least where a statute provides that if there is any surplus, on dissolution, it shall be distributed among the stockholders.⁴⁴

If a statute provides that the bonds shall not mature for thirty years, it seems that a provision that on default in payment of interest the principal shall become due is void.⁴⁵ But bonds with interest payable semiannually and with an option to declare the principal due on nonpayment of interest, do not violate a statute requiring the bonds to bear a rate of interest not exceeding a certain per cent. "per annum" and for not more than thirty years.⁴⁶

§ 993. Blanks and incomplete bonds. The general rules applicable to bills of exchange, checks and promissory notes, that the mere fact that such instruments are issued with blanks or in an incomplete form does not ordinarily affect their validity,⁴⁷ applies equally well to cor-

⁴¹In re Goldville Mfg. Co. of Goldville, South Carolina, 118 Fed. 892. See also Chap. 35, *infra*.

⁴²Stickel v. Atwood, 25 R. I. 456, 56 Atl. 687.

⁴³Martin v. Bankers' Trust Co., — Ariz. —, 156 Pac. 87.

⁴⁴Smith v. Westchester Bronxville

Realty Co., 78 N. Y. Misc. 75, 137 N. Y. Supp. 690.

⁴⁵Howell v. Western R. R. Co., 94 U. S. 463, 24 L. Ed. 254.

⁴⁶Newport & C. Bridge Co. v. Douglass, 75 Ky. 673, 713.

⁴⁷See 1 Daniel, Negotiable Instruments (6th ed.), § 145 et seq.

porate bonds.⁴⁸ Thus, the omission of the name of any person as payee, where the bond is not payable to bearer, does not invalidate the bond;⁴⁹ and if a blank is left in the bond for the name of the payee, any holder may insert his own name as the payee.⁵⁰ Moreover, the Negotiable Instruments Law expressly provides that a person in possession, after delivery, of an incomplete instrument, has prima facie authority to complete it, by filling up blanks therein if it is wanting in any material particular.⁵¹ However, there is no implied authority in any holder to fill a blank, where the bonds have not been actually issued and delivered by the corporation. Thus, where railroad bonds were for a certain number of pounds if payable in London, or for a certain number of dollars if payable in New York or New Orleans, and the bonds provided that the president of the company was authorized by his indorsement to fix the place of payment, and he indorsed them with a blank for the place of payment, and thereafter they were stolen from the office of the corporation, the holder was held to have no authority to fill the blank.⁵²

If no time of payment is expressed in the bond, it seems that it is payable on demand.

§ 994. Indorsement and certification. It is more or less common to indorse on bonds a condition that they shall not be valid until the certificate on the back that they are authorized is signed by the trustee of the mortgage, and to include such condition in the mortgage.⁵³

If the bonds are not so certified, where there is such a provision, they are of no validity even in the hands of one otherwise a bona fide holder.⁵⁴ But it is held that where a bond provides that it "shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee," such certificate, where annexed, renders the bonds obligatory so as to validate them in the

⁴⁸ 1 Daniel, Negotiable Instruments (6th ed.), § 148.

⁴⁹ White v. Vermont & M. R. Co., 21 How. (U. S.) 575, 16 L. Ed. 221.

⁵⁰ White v. Vermont & M. R. Co., 21 How. (U. S.) 575, 16 L. Ed. 221; Chapin v. Vermont & M. R. Co., 74 Mass. 575.

⁵¹ Selover, Negotiable Instruments, § 19.

⁵² Jackson v. Vicksburg, S. & T. R. Co., Fed. Cas. No. 7,150; Ledwich v. McKim, 53 N. Y. 307. See also Par-

sons v. Jackson, 99 U. S. 434, 25 L. Ed. 457, where such a bond was held non-negotiable.

⁵³ See Holland Trust Co. v. Thompson-Houston Elec. Co., 170 N. Y. 68, 62 N. E. 1090, aff'g 62 N. Y. App. Div. 299, 71 N. Y. Supp. 51.

Powers and duties of trustee, and effect of certificate, see chapter on Mortgages, *infra*.

⁵⁴ Maas v. Missouri, K. & T. R. Co., 83 N. Y. 223.

hands of a bona fide holder, even if they were wrongfully sold or pledged by an officer of the corporation for his own benefit.⁵⁵

Bonds may be certified by the trustee, after default in the payment of interest on bonds already sold, where the deed of trust does not prohibit such act.⁵⁶

At one time, the indorsement of railroad bonds by states, to help railroads to raise money for construction purposes, was expressly authorized by statute and acted on in many states. Such indorsements, in the nature of a guaranty, are now, however, a thing of the past. And the fact that an indorsement of railroad bonds by the state is void does not affect the liability of the corporation upon such bonds.⁵⁷

Where a state indorses railroad bonds and takes a lien on the road as security, such lien operates as a specific appropriation of the property of the corporation to their payment on default of principal or interest.⁵⁸

§ 995. Construing with mortgage. It is elementary that where several instruments are executed together as parts of the same transaction, they are all to be considered in determining what the agreement was; and this principle is applicable to a bond and mortgage given to secure a debt.⁵⁹

Conditions in the mortgage securing the bonds are binding on the bondholders.⁶⁰ Thus, if the provision that the principal shall become due upon default of payment of interest, is in the mortgage and not in the bonds, it becomes a part of the bonds,⁶¹ unless the provision

⁵⁵ Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co., 65 Fed. 455, 459.

⁵⁶ Idaho-Oregon Light & Power Co. v. State Bank of Chicago, 224 Fed. 39, aff'g 219 Fed. 583.

⁵⁷ Kelly v. Alabama & C. R. Co., 58 Ala. 489.

⁵⁸ Forrest's Ex'rs v. Luddington, 68 Ala. 1.

⁵⁹ Stanton v. Alabama & C. R. Co., Fed. Cas. No. 13,297; Shoemaker's Ex'rs v. Dayton, 18 Wkly. Law Bul. (Ohio) 43; Schoonmaker v. Taylor, 14 Wis. 313.

⁶⁰ "The bond is, in effect, a part of the trust deed, being a contemporaneous act and constituting, with the

deed, but one transaction." Moses v. Philadelphia Mortgage & Trust Co., 127 Ala. 433, 437, 29 So. 463.

⁶¹ McGeorge v. Big Stone Gap Improvement Co., 57 Fed. 262.

⁶¹ "But when it appears that such instruments are executed simultaneously and in respect to the same transaction, and they refer to each other, as is the case here, the terms of each are qualified by applicable provisions of the others, and a stipulation of this sort in the mortgage becomes part of the obligation of the bonds." Security Trust & Safe-Deposit Co. v. New Jersey Paper-Board & W. Mfg. Co., 57 N. J. Eq. 603, 42 Atl. 746.

clearly shows that it is intended to relate only to the foreclosure of the mortgage.⁶²

Moreover, the general rule is that the holder of a bond is chargeable with notice of the contents of the mortgage, where it is referred to in the bonds.⁶³

If the terms of the bonds differ from the terms of the mortgage, the former being the principal obligation and the latter a mere security, the terms of the bonds control.⁶⁴

V. SUBSCRIPTIONS, ISSUANCE, TRANSFERS AND OWNERSHIP

§ 996. Subscriptions—In general. Bonds are often subscribed for in advance, by written offers or agreements.⁶⁵

The construction of agreements to purchase bonds depends, of course, on the terms of the particular agreement.⁶⁶

Ordinarily, the delivery of the bonds and the payment of the purchase price are required to be concurrent.⁶⁷

If the subscription is conditional, then the purchaser cannot refuse to perform after the condition has been fulfilled in due time.⁶⁸ On the other hand, if the subscription is conditional, then of course the subscriber cannot be held on his subscription if the condition fails,⁶⁹ nor before the condition is complied with.⁷⁰

But a provision that each of the subscribers pay, at maturity, the underwriting certificates signed by him has been held not conditional on all the bonds being subscribed for, where there is no such condition in the subscription.⁷¹

Of course, a subscriber to bonds may cancel his contract where he was induced to enter into it by fraud,⁷² and may defend on that ground an action for the price.⁷³

⁶² See § 1043, *infra*.

⁶³ See § 1025, *infra*.

⁶⁴ *Indiana & I. C. Ry. Co. v. Sprague*, 103 U. S. 756, 761, 26 L. Ed. 554. To same effect, *Miller v. Ratterman*, 47 Ohio St. 141, 165, 24 N. E. 496.

⁶⁵ Forms of subscriptions for bonds, see *Fletcher, Corporation Forms*, 1435-1437.

⁶⁶ *Philadelphia Const. Co. v. Cramp*, 138 Fed. 999, syndicate agreement; *Davis & Farnham Mfg. Co. v. Dunbar*, 81 Vt. 354, 70 Atl. 562, contract by corporation with broker to buy all of bond issue.

⁶⁷ *Cleveland Iron Co. v. Ennor (Ill.)*, 4 N. E. 762.

⁶⁸ *Atkins v. Trowbridge*, 162 N. Y. App. Div. 629, 148 N. Y. Supp. 181.

⁶⁹ *Real Estate Trust Co. of Philadelphia v. Riter-Conley Mfg. Co.*, 223 Pa. 350, 72 Atl. 695.

⁷⁰ *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762, rev'g 14 Ill. App. 327.

⁷¹ *Knickerbocker Trust Co. v. Davis*, 143 Fed. 587, aff'g 139 Fed. 792.

⁷² *Donnelly v. Missouri-Lincoln Trust Co.*, 239 Mo. 370, 144 S. W. 388; *Rose v. Merchants' Trust Co. (N. Y. Misc.)*, 96 N. Y. Supp. 946.

⁷³ *Guaranty Trust Co. v. Dinwiddie*, 79 Ore. 653, 156 Pac. 279.

The purchaser cannot rescind merely because the mortgagor has used the proceeds for other purposes than those stated in the prospectus.⁷⁴

The effect of false representations in the sale of bonds is in no wise peculiar to the law of corporations.⁷⁵

Where certain persons agree to insure the sale of bonds at par, and that if they are not so sold to others, then to purchase and pay for them at par, in consideration of the agreement of the corporation issuing the bonds to deliver them and to pay a certain commission in cash and a certain per cent. in stock, the contract is an underwriting, and it is no defense to an action for its breach by the underwriters that the corporation issuing the bonds became insolvent and the bonds worthless after making the contract.⁷⁶

Where a corporation sues for failure to take bonds subscribed for, the damages recoverable are the same as in other like cases for breach of contract.⁷⁷

If there is a breach of a subscription to bonds by failure to pay part of the price, the measure of damages for the breach is the difference between the balance which the subscriber agreed to pay and the value of the bonds he was to receive therefor;⁷⁸ but if the corporation issuing the bonds elects to bring them into court and tender them to the subscriber, in an action on the contract, the judgment should direct a delivery of the bonds to the subscriber, and a recovery of the contract price.⁷⁹

§ 997. — Assignment of subscriptions. An underwriting agreement whereby stockholders subscribe for an issue of bonds to be paid for in instalments is assignable by the corporation.⁸⁰

⁷⁴ *Banque Franco-Egyptienne v. Brown*, 34 Fed. 162.

⁷⁵ See *Kimber v. Young*, 137 Fed. 744.

Where a person has been induced by fraudulent representations to become a subscriber for corporate bonds, an equitable action for rescission cannot be maintained if there is an adequate remedy at law by an action for fraud and deceit, nor where there has been a delay of several years in suing after knowledge of facts putting on inquiry. *Dennin v. Powers*, 96 N. Y. Misc. 252, 160 N. Y. Supp. 636.

⁷⁶ *Busch v. Stromberg-Carlson Tel. Mfg. Co.*, 217 Fed. 328.

⁷⁷ See *Galena & S. W. R. Co. v. Ennor*, 123 Ill. 505, 14 N. E. 673, aff'g 23 Ill. App. 124; *Galena & S. W. R. Co. v. Barrett*, 95 Ill. 467.

⁷⁸ *Busch v. Stromberg-Carlson Tel. Mfg. Co.*, 217 Fed. 328.

⁷⁹ *Busch v. Stromberg-Carlson Tel. Mfg. Co.*, 226 Fed. 200.

⁸⁰ *Kirkpatrick v. Eastern Milling & Export Co.*, 135 Fed. 146. See §§ 478, 479, *supra*.

If subscriptions to an issue of bonds are assigned to secure a loan to the corporation, and by such subscription the subscribers are entitled to a bonus of certain common stock of the company, the pledgee may require the company to turn over to it such stock.⁸¹

However, such subscriptions are not negotiable, and assignee of a non-negotiable subscription contract takes no greater or better rights than existed in the hands of the original holder who assigned it to him.⁸²

§ 998. — Subscriptions as trust fund. Subscriptions to bonds, payable in instalments, do not constitute a trust fund for the benefit of the creditors of the corporation.⁸³ Thus, an agreement by mortgage bondholders to subscribe certain sums for debenture bonds—in effect an agreement by creditors of the company to make an additional loan—does not make the subscribers liable to creditors of the company for the amount unpaid on such agreement, as in case of unpaid stock subscriptions.⁸⁴

§ 999. — Rescission. The remedy of rescission on the ground that a subscription to bonds has been induced by fraudulent representations is only available when recourse to equity is necessary to do full justice.⁸⁵

The right to this form of relief on such grounds may be lost by laches.⁸⁶

§ 1000. When bonds deemed “issued.” The term “issue,” as applied to bonds, is sometimes used in different senses.⁸⁷ Generally, however, and in the sense in which the term is ordinarily used, a bond

⁸¹ Kirkpatrick v. Eastern Milling & Export Co., 135 Fed. 146.

⁸² Guaranty Trust Co. v. Dinwiddie, 79 Ore. 653, 156 Pac. 279. See § 478, supra.

⁸³ Pettibone v. Toledo, C. & St. L. R. Co., 148 Mass. 411, 1 L. R. A. 787, 19 N. E. 337.

⁸⁴ Pettibone v. Toledo, C. & St. L. R. Co., 148 Mass. 411, 1 L. R. A. 787, 19 N. E. 337, holding also that the interest of the corporation in the agreement was not assignable.

⁸⁵ Dennin v. Powers, 96 N. Y. Misc. 252, 160 N. Y. Supp. 636, holding that the burden is on the plaintiff to show that equitable relief is necessary, and that the burden is not sustained where no facts are alleged to show

that plaintiff would not have a complete remedy by returning the bonds and suing at law for the purchase price.

⁸⁶ Dennin v. Powers, 96 N. Y. Misc. 252, 160 N. Y. Supp. 636, holding that there was laches where relief was not sought until four or five years after the discovery of the facts on which the charge of fraud is based and the bonds were assigned after the discovery of such facts.

⁸⁷ Wright v. East Riverside Irrigation Dist., 138 Fed. 313; O'Neill v. Yellowstone Irrigation Dist., 44 Mont. 492, 121 Pac. 283; Hidalgo County Drainage Dist. v. Davidson, 10 Tex. 539, 120 S. W. 849.

is not issued until delivered to some one who claims it as a debt against the corporation.⁸⁸ In other words, a bond is issued when it comes into the hands of the holder so executed and delivered as to bind the obligor.⁸⁹

Executing is not issuing, since the bonds may be fully executed but never issued.⁹⁰ Thus, bonds are not issued so as to constitute property of the corporation where they are merely put into the hands of an agent of the corporation to sell them.⁹¹ The delivery of bonds as a pledge is an "issue" of them.⁹²

The deposit of bonds with a trust company by the holders thereof, under a reorganization agreement, as security for other bonds issued at the time, is not a reissue of bonds.⁹³

"In financial parlance, the term 'issue' seems to have two phases of meaning. 'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery." The other sense or the other phase of meaning is "when the bonds are delivered to the purchaser they will be 'issued' to him." *Yesler v. Seattle*, 1 Wash. St. 308, 25 Pac. 1014, foll'd in *State Nat. Bank v. Board of Com'rs of Port of New Orleans*, 121 La. 269, 46 So. 307, and *Gage v. McCord*, 5 Ariz. 227, 51 Pac. 977.

"It is said that the word 'issued,' as used in the statute, has reference to the date of actual delivery to the purchaser. * * * We agree with counsel that the word 'issue,' as here used, means the delivery of the bonds to the purchaser, and has no reference to the arbitrary date fixed as the beginning of the time for which they run. The word 'issue,' used in connection with bonds, notes, etc., sometimes and perhaps, generally, refers to this date." *O'Neill v. Yellowstone Irrigation Dist.*, 44 Mont. 492, 121 Pac. 283.

"The word 'issued,' as applied to

bonds, usually includes delivery, but it does not invariably do so." *Potter v. Lainhart*, 44 Fla. 647, 33 So. 251.

Municipal bonds, see 4 *McQuillin, Municipal Corporations*, § 2297.

⁸⁸ *Austin v. Valle* (Tex. Civ. App.), 71 S. W. 414.

Bonds "cannot be regarded 'issued' until a contract of sale is completed and the bonds actually or constructively delivered." *Black v. Fishburne*, 84 S. C. 451, 19 Ann. Cas. 1104, 66 S. E. 681.

"A bond does not become an obligation of the debtor until it is issued, and it is issued when, and only when, a third party acquires some right or interest therein." *Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co.*, 228 Fed. 516.

⁸⁹ *Zimmermann v. Timmermann*, 193 N. Y. 486, 493, 86 N. E. 540.

⁹⁰ *Brownell v. Greenwich*, 114 N. Y. 518, 4 L. R. A. 685, 22 N. E. 24.

⁹¹ *Eastern Elec. Cable Co. v. Great Western Mfg. Co.*, 164 Mass. 274, 41 N. E. 295; *Coddington v. Gilbert*, 17 N. Y. 489.

⁹² *Gilchrist Transp. Co. v. Phenix Ins. Co.*, 170 Fed. 279. See also § 971, *supra*.

⁹³ *Mowry v. Farmers' Loan & Trust Co.*, 76 Fed. 38.

The term "issue," as used in the Negotiable Instruments Law, is expressly defined to mean the "first delivery of the instrument, complete in form, to a person who takes it as holder."⁹⁴

A "bond issue" is defined as "a class or series of bonds, debentures, etc., comprising all that are emitted at one and the same time." It means all the bonds issued at one time, and "any bond issue" means any one of the issues of bonds thus defined.⁹⁵

§ 1001. Power to issue after execution of subsequent mortgage. If the full amount of bonds authorized by the deed of trust have not been issued, the corporation may issue bonds thereunder even after the execution of a second mortgage to secure a bond issue, the proceeds of which were to be used in part to refund the first mortgage bonds, where the second mortgage expressly provided that all bonds issued thereafter were under and pursuant to the terms of the first mortgage.⁹⁶ In other words, a subsequent mortgage does not cut off the right to issue bonds under a prior mortgage "unless it in terms limits the lien of the prior mortgage to bonds actually out, and provides against reissues."⁹⁷

§ 1002. Delivery. A bond does not become a valid enforceable obligation until it is delivered,⁹⁸ unless the corporation is estopped by its conduct to deny delivery.⁹⁹ Moreover, as in case of bills and notes in general, the delivery must have been with an intention to deliver the bond, although it may have been a conditional delivery. The delivery should be by an officer authorized to make delivery.¹

⁹⁴ See Negotiable Instruments Law as enacted in all the states except California, Georgia, Mississippi and one or two other states.

⁹⁵ *Bell County v. Lightfoot*, 104 Tex. 346, 138 S. W. 381.

⁹⁶ *Idaho-Oregon Light & Power Co. v. State Bank of Chicago*, 224 Fed. 39, aff'g 219 Fed. 583.

⁹⁷ *Claffin v. South Carolina R. Co.*, 8 Fed. 118.

⁹⁸ *Zimmermann v. Timmermann*, 193 N. Y. 486, 493, 86 N. E. 540.

"The ordinary mortgage bond of a railroad corporation represents a loan of money from the holder to the borrower. It becomes a valid obligation, and must be regarded as having been

issued by the corporation when it is actually delivered for a valuable consideration." *Zimmermann v. Timmermann*, 193 N. Y. 486, 86 N. E. 540.

The bond does not, until that time, constitute property capable of seizure under attachment or execution. *Zimmermann v. Timmermann*, 193 N. Y. 486, 86 N. E. 540.

⁹⁹ *Pittsburgh, C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596, and see § 1042, *infra*.

¹ But see *Buffalo Loan, Trust & Safe-Deposit Co. v. Medina Gas & Electric Light Co.*, 12 N. Y. App. Div. 199, 42 N. Y. Supp. 781, where resolution provided that bonds should be delivered by the president, but a de-

§ 1003. Ownership. The holder of negotiable bonds payable to bearer is presumed to be the owner. But, of course, the holder of bonds is not necessarily the owner nor entitled to a lien thereon.²

A stockholder in a corporation may lawfully acquire and hold its bonds, and is entitled to equal protection with other holders of like bonds.³ Directors also may purchase, but in order to make it valid the transaction must in all respects be free from fraud or the suspicion of wrongdoing or unfair dealing.⁴

§ 1004. Transfers. If corporate bonds are payable to bearer, they are transferable merely by delivery,⁵ and are negotiable without indorsement.⁶ So if they are payable to a named person or his order or assigns, and are transferred by him by a blank indorsement, his transferee holds the bond exactly as if payable to bearer.⁷ On the other hand, if a bond is payable to a person or his order, it is necessary, in order that the transferee occupy the position of a bona fide holder, that the bond be indorsed, as in the case of bills and notes; indorsement without delivery passes no title.⁸

A contract to deliver bonds when "issued" is a contract to deliver them when they shall have been issued in such reasonable quantities as to render it possible for the promisor with due diligence to procure them; and it is not necessary that the full amount of the bonds provided for by the mortgage should have been issued.⁹

A transfer of all the property of a corporation does not include its own unissued bonds, since they are not property, except in the sense of the material of which they are composed; nor does it include issued bonds, since debts are not property of the debtor.¹⁰

livery by the secretary who owned practically all the stock was held sufficient.

² *New Paddock-Hawley Co. v. Fayetteville Wagon Wood & Lumber Co.*, 207 Fed. 786.

³ *Broomall v. North American Steel Co.*, 70 W. Va. 591, 74 S. E. 863.

⁴ *Idaho-Oregon Light & Power Co. v. State Bank of Chicago*, 224 Fed. 39, aff'g 219 Fed. 583.

Purchases by officers in general, of corporate property, see chapter on Officers, *infra*.

⁵ *Boyd v. Kennedy*, 38 N. J. L. 146,

147, 20 Am. Rep. 376; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423; *Pittsburgh, C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 49, 44 N. E. 596.

⁶ *Pittsburgh, C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596.

⁷ *Brainerd v. New York & H. R. Co.*, 10 Bosw. (N. Y.) 332.

⁸ *Nelson v. Nelson*, 41 N. C. 409.

⁹ *Zimmermann v. Timmermann*, 193 N. Y. 486, 86 N. E. 540, rev'g 120 N. Y. App. Div. 218, 105 N. Y. Supp. 443.

¹⁰ *Dibert v. D'Arcy*, 248 Mo. 617, 154 S. W. 1116.

Power conferred on a corporate officer to execute and "deliver" bonds includes power to sell.¹¹

VI. EXCHANGE FOR STOCK OR NEW BONDS

§ 1005. Bonds convertible into stock—Validity. Where authority is given by charter or statute, a corporation may issue convertible bonds, i. e., bonds which may be converted at the option of the holder into stock of the issuing company.

Such a provision does not render the bonds invalid on the theory that the exercise of the option will increase the stock without the assent of the stockholders.¹²

Where this charter or statutory authorization is given, such bonds may be issued notwithstanding that if the option should be exercised, the capital stock would thereby be increased beyond the amount fixed by the charter.¹³ However, a corporation cannot evade constitutional or statutory provisions forbidding the sale of its stock below par by issuing below par bonds convertible into stock at their par value.¹⁴ Moreover, under the rule that where a corporation increases its capital stock, every stockholder has a right to his proportion of the new stock, on paying therefor,¹⁵ it has been held that a stockholder may enjoin an issue of bonds with an option to convert the bonds into stock, where in a contemplated increase of the capital stock his rights to share ratably in the new issue of stock is not provided for.¹⁶

Even if the clause as to convertibility should be deemed invalid, it would not impair the liability of the obligor to discharge the debt.¹⁷

The conversion of preferred stock into bonds is treated of in another chapter.¹⁸

§ 1006. — Nature and effect of agreement. Such an agreement, although appearing on the face of the bond, is in fact a separate independent agreement, and no part of the bond proper.¹⁹

¹¹ McCormick v. Unity Co., 239 Ill. 306, 87 N. E. 924, aff'g 142 Ill. App. 159.

¹² Wood v. Whelen, 93 Ill. 153.

¹³ Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637, 669-674, followed in Ramsey v. Erie R. Co., 38 How. Pr. (N. Y.) 193, 217.

¹⁴ Sturges v. Stetson, Fed. Cas. No. 13,568; Carver v. Southern Iron & Steel Co., 78 N. J. Eq. 81, 78 Atl. 240.

¹⁵ Chapter on Stock and Stockholders, *infra*.

¹⁶ Wall v. Utah Copper Co., 70 N. J. Eq. 17, 62 Atl. 533.

¹⁷ Lisman v. Milwaukee, L. S. & W. Ry. Co., 161 Fed. 472; Wood v. Whelen, 93 Ill. 153, 162.

¹⁸ Chapter on Stock and Stockholders, *infra*.

¹⁹ "It gains nothing in force by reason of its association with the stipu-

Being merely an unaccepted offer, it is strictly construed by the courts.²⁰

The option is available only to the holder of the bond, and he cannot assign to another the right of action for a breach of the option and still retain the bond for the benefit of himself and his future assignees.²¹ The agreement is not negotiable, and when it passes by assignment the assignee merely steps into the shoes of the assignor.²²

§ 1007. — Rights of bondholders. If the holder of a bond desires to exchange it for stock of the company, as authorized by a provision in the bond, he must bring himself within the terms of that provision.²³ For instance, if the time is fixed within which the option must be exercised, the holder cannot demand stock after the expiration of such time.²⁴ Where bonds provide for their payment in thirty years and also that they may be exchanged for preferred stock, the right to exchange expires on the maturity of the bonds, where the corporation is ready and willing to pay the bond at the time of maturity.²⁵

An option in bonds to exchange them for common stock "at any time within ten days after the date fixed for the payment of any dividend upon its common stock," does not accrue until and unless a dividend is declared, and ceases when the payment of dividends

lations of the bond. It must be construed as though embodied in a separate writing." *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472.

²⁰ *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472.

²¹ *Denney v. Cleveland & P. R. Co.*, 28 Ohio St. 108.

²² *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472.

²³ *Carpenter v. Chicago, M. & St. P. R. Co.*, 119 N. Y. App. Div. 169, 104 N. Y. Supp. 152.

²⁴ The option cannot be exercised several years after the time fixed for its exercise has expired. *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472.

If the bonds provide for an exchange "at the date of maturity," an exchange cannot be compelled where not sought until the day after maturity, there being no days of grace; but it is not necessary, if presented

for exchange on the day of maturity, that the presentation be before three o'clock, the usual hour for closing the office, where in fact presented at a reasonable hour in the afternoon. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

²⁵ *Loomis v. Chicago, M. & St. P. Ry. Co.*, 102 Fed. 233, *aff'd* 97 Fed. 755.

"The promise of the defendant to pay the bonds at a specified time implies a reciprocal engagement on the part of the holders to accept payment on that date. It implies the existence of the right to tender payment and extinguish the primary obligation. It seems quite inconsistent with that implication that the option is to survive, and be exercised at a subsequent period." *Loomis v. Chicago, M. & St. P. Ry. Co.*, 97 Fed. 755, *aff'd* 102 Fed. 233.

ceases;²⁶ and subsequent transactions by which the corporation is absorbed by another corporation are not the equivalent of a dividend transaction.²⁷

An agreement before the maturity of bonds to extend the time of payment does not operate to extend the fixed period within which the holders were entitled to exchange the bonds for stock.²⁸

If no time is fixed for the exercise of the option, it would seem that it must be exercised within a reasonable time.²⁹

If bonds are surrendered and stock received prior to the declaration of a dividend, the corporation cannot discriminate between stockholders by limiting the dividend to stockholders holding stock at a day prior to the issue of such stock in exchange for bonds.³⁰

Where a bondholder had been paid the interest on his bonds, up to the time of a stock dividend, and he thereafter elected to convert his bonds into stock, he was entitled only to receive stock to the amount of the principal of the bonds, and could claim no part of the new stock so issued, nor any compensation or allowance, in stock or otherwise, on account thereof.³¹

If, after the sale of such bonds, the capital stock is reduced from a million dollars, divided into shares of one hundred dollars, to ten thousand dollars, by reducing the par value of each share to one dollar, and then raised to a million dollars consisting of a million shares—all this being done to circumvent a covenant in the mortgage prohibiting an increase in capital stock—the right to convert the bonds into stock is governed by the new valuation, so that if the original right was to exchange one bond for ten shares of the par value of one hundred dollars each, the right after the change is to exchange one bond for one thousand shares of the par value of one dollar each.³²

The corporation is not in duty bound to maintain itself in a position to permit a bondholder to exercise such option.³³ Moreover, it seems that if the corporation goes out of existence before the option is exer-

²⁶ *Welles v. Chicago & N. W. Ry. Co.*, 175 Fed. 562, following *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472.

²⁷ *Welles v. Chicago & N. W. Ry. Co.*, 175 Fed. 562.

²⁸ *Muhlenberg v. Philadelphia & R. R. Co.*, 47 Pa. St. 16.

²⁹ See *Catlin v. Green*, 120 N. Y. 441, 24 N. E. 941.

³⁰ *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196.

³¹ *Sutliff v. Cleveland & M. R. Co.*, 24 Ohio St. 147.

³² *Gay v. Burgess Mills*, 30 R. I. 231, 74 Atl. 714.

³³ *Welles v. Chicago & N. W. Ry. Co.*, 163 Fed. 330.

cised, such bondholders are not entitled to claim a proportionate share of the assets of the company.³⁴

The effect of consolidation of the corporation issuing convertible bonds as terminating the option of the holder to exchange his bonds for stock is not altogether clear. In one case in the federal courts it was held that the bondholders could not be deprived of their rights, and relegated to the rights conferred upon them by the articles of consolidation, until they had a fair opportunity, after notice of the contemplated change, to exercise their original rights, and had declined to convert the bonds.³⁵

In Massachusetts, it is held that where the corporation issuing convertible bonds consolidates, and the consolidation does not terminate the existence of the original corporation but is in effect merely a change of name, as where the consolidating act provides that the new corporation shall be subject to "all the duties, restrictions, obligations, debts and liabilities to which, at the time of the union, either of said corporations is subject," the new corporation is bound to deliver its own stock for the bonds.³⁶ However, in a later case in the same state the court held that a consolidation "which makes no arrangement for furnishing stock in the new company, and which ends the existence of the old ones, as a general rule may be presumed to put an end to the right of bondholders to call for stock, not because the law has not machinery for keeping such a right alive, but because, not being bound to do so, it has made dispositions which manifestly take no account of it."³⁷

Until the option is exercised, the bondholder is not a stockholder in any sense, and he has no vested right or title in any particular stock.³⁸ It follows that if the holder of such a bond has not exercised

³⁴ *Parkinson v. West End St. Ry. Co.*, 173 Mass. 446, 53 N. E. 891.

If another corporation acquires all the stock of the company issuing the bonds, the option is terminated. *Lisman v. Milwaukee, L. S. & W. Ry. Co.*, 161 Fed. 472.

³⁵ *Rosenkrans v. Lafayette, B. & M. R. Co.*, 18 Fed. 513.

³⁶ *India Mut. Ins. Co. v. Worcester, N. & R. R. Co.* (Mass.), 25 N. E. 975; *Day v. Worcester, N. & R. R. Co.*, 151 Mass. 302, 23 N. E. 824; *John Hancock Mut. Life Ins. Co. v. Worcester, N. & R. R. Co.*, 149 Mass. 214, 21 N. E. 364.

³⁷ *Per Justice Holmes in Parkinson v. West End St. Ry. Co.*, 173 Mass. 446, 449, 53 N. E. 891.

³⁸ *Pratt v. American Bell Tel. Co.*, 141 Mass. 225, 55 Am. Rep. 465, 5 N. E. 307, in which case, though there were no bonds but certain notes with coupons attached, the principle involved was the same.

"The bondholder does not become a stockholder, by his contract in equity any more than at law." *Parkinson v. West End St. Ry. Co.*, 173 Mass. 446, 53 N. E. 891.

his option to surrender the bonds and receive stock, he is not in a position to question, either at law or in equity, the declaration of dividends on outstanding stock.³⁹ Nor does the election to take stock in exchange for bonds make the bondholder a stockholder; but his right to become a stockholder depends upon the performance of an executory contract by the corporation, and the bondholder is not a stockholder until the contract is performed.⁴⁰

Such an option "imposes no restriction upon the obligor in regard to the issue of new stock, although the issue may be upon such terms as to diminish the value of the right. * * * It is simply an option to take stock as it may turn out to be when the time for choice arrives."⁴¹

The facts that there is no preferred stock in the treasury and none in the control of the corporation, and that none of the other bondholders have demanded preferred stock, is no excuse for a refusal to exchange bonds for preferred stock as provided for in the bonds.⁴²

Whether a court of equity will specifically enforce the performance of the contract depends upon "a variety of considerations."⁴³

If the corporation has no unissued stock, there is no remedy in equity.⁴⁴

§ 1008. Substitution of new bonds. Where a bondholder desires to exchange old bonds for new, he must strictly comply with the terms imposed by the corporation as a condition to the exchange.⁴⁵

Ordinarily one who has exchanged his bonds cannot rescind merely because the holders of all the old bonds have not made the exchange of old bonds for new;⁴⁶ and a surrender of all the old bonds is never a condition precedent to an exchange where not so provided.⁴⁷

Where bonds are exchanged, the old bonds which are surrendered are ordinarily canceled and not kept alive for any purpose.⁴⁸

³⁹ *Gay v. Burgess Mills*, 30 R. I. 231, 74 Atl. 714.

⁴⁰ *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

⁴¹ *Parkinson v. West End St. Ry. Co.*, 173 Mass. 446, 448, 53 N. E. 891.

⁴² *Bratten v. Catawissa R. Co.*, 211 Pa. 21, 25, 60 Atl. 319.

⁴³ *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34; *Pratt v. American Bell Tel. Co.*, 141 Mass. 225, 55 Am. Rep. 465, 5 N. E. 307.

⁴⁴ *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

⁴⁵ *Railway Co. v. Stewart*, 95 U. S. 279, 24 L. Ed. 431, where all of the issue of old bonds was required to be first surrendered.

⁴⁶ *Central Trust Co. of New York v. Marietta & N. G. Ry. Co.*, 73 Fed. 589.

⁴⁷ *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 29 L. Ed. 963.

⁴⁸ *New York Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co.*, 102 Fed. 382.

Where new bonds secured by mortgage are issued, and the trustee is expressly authorized to exchange such new bonds for certain old bonds when presented by the holders, one who has delivered up old bonds and perfected his right to new bonds is entitled to the exchange, notwithstanding the corporation thereafter withdraws its offer to exchange.⁴⁹

Under a corporate mortgage providing for the issue of refunding bonds, it has been held that where the corporation itself desires to obtain refunding bonds in place of underlying bonds, it is immaterial whether the latter kind of bonds proposed to be exchanged are or are not canceled.⁵⁰

Where a corporation which was the successor of another corporation which had executed a mortgage to secure bonds, executed a new mortgage to secure a larger issue of bonds with a provision that the trustee should retain a sufficient amount to refund all the old bonds, holders of the old bonds cannot insist on an exchange some seventeen years afterwards, when their bonds are about to mature and the new issue is selling at a higher price on the market, since the right to exchange was lost by laches.⁵¹

It seems that the legislature may authorize an exchange of old bonds for new bonds, pursuant to an agreement between the mortgagor and majority bondholders, without regard to the consent of minority bondholders, where provision is made for the protection of the minority in the enjoyment of rights and privileges in the new security identical with those of the majority.⁵²

VII. NEGOTIABILITY

§ 1009. General rule. The rule is too well settled to admit of controversy, that the bonds of a corporation, where in the form and containing the requisites essential to negotiability in other instruments, are negotiable;⁵³ and the fact that bonds are under seal does

⁴⁹ *Wakefield Water Co. v. New England Trust Co.*, 175 Mass. 478, 56 N. E. 703.

⁵⁰ *Twin State Gas & Electric Co. v. Knickerbocker Trust Co.*, 135 N. Y. App. Div. 467, 120 N. Y. Supp. 764, followed in *Charleston Illuminating Co. v. Knickerbocker Trust Co.*, 138 N. Y. App. Div. 107, 122 N. Y. Supp. 994, aff'd without opinion in 203 N. Y. 529, 96 N. E. 1112. See also *Beech Creek Coal & Coke Co. v. Knicker-*

bocker Trust Co., 127 N. Y. App. Div. 540, 111 N. Y. Supp. 1030.

⁵¹ *Morse v. Chicago & E. I. R. Co.*, 84 N. Y. App. Div. 406, 82 N. Y. Supp. 698.

⁵² *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020, rev'g 1 Fed. 387.

⁵³ *United States. White v. Vermont & M. R. Co.*, 21 How. 575, 16 L. Ed. 221; *Davis v. Hanover Savings Fund Society*, 210 Fed. 768.

not destroy or affect their negotiability.⁵⁴ Thus, it was said by the Supreme Court of the United States in 1858 that if such bonds were not conceded "the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money; and it is not too much to say that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the bona fide holder."⁵⁵

"This species of bonds," said Mr. Justice Grier in 1863, in the

Alabama. *Lehman Bros. v. Tallassee Mfg. Co.*, 64 Ala. 567, 593.

Connecticut. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199, 222.

Illinois. *Peoria & S. R. R. Co. v. Thompson*, 103 Ill. 187, 205.

Indiana. *New Albany, L. & C. Plank-Road Co. v. Smith*, 23 Ind. 353. See also *Junction R. Co. v. Cleneay*, 13 Ind. 161.

Mississippi. *Lampton v. Edwards*, 54 So. 245.

New Jersey. *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York. *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237; *Brainerd v. New York & H. R. Co.*, 25 N. Y. 496; *Wickes v. Adirondack Co.*, 2 Hun 112; *Holt v. Hopkins*, 63 Misc. 537, 117 N. Y. Supp. 177.

Ohio. *Pittsburgh, C., C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596.

Pennsylvania. *Cochran v. Fox Chase Bank*, 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117; *Gibson v. Lenhart*, 101 Pa. St. 522.

Rhode Island. *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 29 L. R. A. 103, 61 Am. St. Rep. 746, 32 Atl. 305.

England. In re *General Estates Co.*, 3 Ch. App. 758; In re *Blakely Ordinance Co.*, 3 Ch. App. 154.

"Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper." *Aurora City v. West*, 74 U. S. 82, 105, 19 L. Ed. 42.

In England, as early as 1824, corporate bonds were placed on the same plane as notes and bills of exchange and were held negotiable in *Gorgier v. Mieville*, 3 B. & C. 45.

In Kentucky, however, it was held at one time that bonds were not negotiable although they had coupons attached and were payable to bearer, because the statute limited negotiability to instruments payable at a bank or discounted by a bank. *Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.*, 117 Ky. 325, 25 Ky. L. Rep. 1739, 78 S. W. 113. However, this rule does not apply since the enactment of the Negotiable Instruments Law in that state.

⁵⁴ *Blackman v. Lehman, Durr & Co.*, 63 Ala. 547, 35 Am. Rep. 57; *Pittsburgh, C., C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 49, 44 N. E. 596.

⁵⁵ *White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575, 577, 578, 16 L. Ed. 221.

Supreme Court of the United States, "is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to public policy in making them negotiable, if the necessity of commerce require that they should be so. A mere technical dogma of the courts of common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every state in the Union, is well known and admitted."⁵⁶

Statutes in some states expressly provide that corporate bonds are negotiable "in the same manner and to the same extent as promissory notes are now negotiable."⁵⁷

The fact that a statute declares promissory notes to be negotiable, without mentioning corporate bonds, does not prevent such bonds being negotiable.⁵⁸

§ 1010. Registered bonds. There is some conflict as to whether a registered bond or debenture is negotiable,⁵⁹ some decisions holding that they are non-negotiable,⁶⁰ while other decisions take a view

⁵⁶ *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, 17 L. Ed. 548, quoted in *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 29 L. R. A. 103, 61 Am. St. Rep. 746, 32 Atl. 305.

⁵⁷ See *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

⁵⁸ "Such statutes are declaratory and remedial, and are evidently not intended to exclude other forms of

negotiable paper." *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 154, 29 L. R. A. 103, 61 Am. St. Rep. 746, 32 Atl. 305.

⁵⁹ See *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019, reviewing American and English authorities. As to registered county bonds, see *Cronin v. Patrick County*, 89 Fed. 79.

⁶⁰ *Scollans v. Rollins*, 173 Mass.

tending to the contrary,⁶¹ and it has well been said by a prominent textbook writer that such a bond is as negotiable as a bearer bond and that "the difference is rather in the method of the negotiability. As a bill or note payable to order is negotiable, so is a registered bond or debenture. A transfer by registration is equivalent to a transfer by indorsement of a bill or note. After registration, the company is effectually precluded from raising any equitable defenses which would have been available against the transferor."⁶² In any event, debentures made payable to a certain person "or other, the registered holder for the time being," and providing that the principal and interest will be paid without regard to any equity between the company and the original or any intermediate holder thereof, are negotiable so as to give title to an innocent holder for value, free from any equities existing between the company and the original holder or intermediate holders.⁶³

§ 1011. As affected by contents of bond—General considerations. Bills of exchange, checks and promissory notes, in order to be negotiable, must be an unconditional promise to pay a sum certain in money, must be payable at a fixed or determinable future time, and must be payable to order or to bearer.⁶⁴ The same requirements are necessary, it seems, in order to make a corporate bond negotiable.⁶⁵

275, 73 Am. St. Rep. 284, 53 N. E. 863 (municipal bond); *Benwell v. Newark*, 55 N. J. Eq. 260, 36 Atl. 668; *Chester County Guarantee Trust & Safe Deposit Co. v. Securities Co.*, 165 N. Y. App. Div. 329, 150 N. Y. Supp. 1010.

But where it is the custom for registered bonds to be considered negotiable the same as a coupon bond, provided they are indorsed in blank, it seems that the owner is estopped to assert title where he intrusts such a bond to a third person who converts it to his own use by pledging it to one who occupies the position of a bona fide purchaser. *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, where, however, the bond was a municipal bond (the rule being the same) and it was held that where the bond was put in a sealed envelope there was no such intrust-

ing of the bond to the broker as to came within the rule. See also *Scollans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863.

⁶¹ *Strauss v. United Tel. Co.*, 164 Mass. 130, 41 N. E. 57.

⁶² 2 Machen, *Modern Law of Corporations*, § 1743.

⁶³ *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019. To same effect, so far as right of assignee to sue in his own name is concerned, see *Strauss v. United Tel. Co.*, 164 Mass. 130, 41 N. E. 57.

⁶⁴ See *Daniels, Negotiable Instruments*.

⁶⁵ *McClelland v. Norfolk Southern Co.*, 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237; *Hibbs v. Brown*, 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353, *aff'd* 190 N. Y. 167, 82 N. E. 1108.

Rule in *Kentucky*, see *Ritchie v.*

In other words, both corporate bonds and coupons may be rendered non-negotiable by reason of omissions or special stipulations therein.⁶⁶ For instance, in order to be negotiable, corporate bonds must be certain as to the amount payable.⁶⁷ In like manner, a bond to pay money, and to do something else, such as to feed and clothe a slave, is not negotiable.⁶⁸ Again, provisions in the mortgage, where it is referred to in the bonds and coupons, may make them non-negotiable because they are thereby rendered contingent or uncertain;⁶⁹ but whether terms in the mortgage become a part of the instrument secured so as to affect the negotiability of the latter is a question attended with some difficulty.⁷⁰

On the other hand, bonds are not rendered non-negotiable by leaving a blank for the name of the payee,⁷¹ or by adding an agreement to exchange them for stock.⁷² A provision in a bond payable to bearer that it may be "registered and made payable by transfer only on the books of the company" does not of itself make the bond non-negotiable.⁷³ Moreover, in most jurisdictions, the mere recital in a

Cralle, 108 Ky. 483, 56 S. W. 963, which, however, is based on statutes repealed either before or by the enactment of the Negotiable Instruments Law in that state.

In view of this similarity to the law relative to negotiable instruments generally, in determining whether a bond is negotiable, where it is claimed that it is non-negotiable because certain omissions or clauses therein render it incomplete, contingent or uncertain, it is advisable to consider the effect of like omission or provisions in bills of exchange, checks or promissory notes. Therefore reference should also be made to standard textbooks on the law of bills and notes, and negotiable instruments in general.

⁶⁶ McClelland v. Norfolk Southern R. Co., 110 N. Y. 469, 475, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

⁶⁷ Parsons v. Jackson, 99 U. S. 434, 25 L. Ed. 457, where bonds amounted to a promise to pay so many pounds or so many dollars, without saying which, because of a failure to fill blanks in an indorsement.

⁶⁸ Knight v. Wilmington & M. R. Co., 1 Jones L. (N. C.) 357.

⁶⁹ McClelland v. Norfolk Southern R. Co., 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

⁷⁰ See Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720, where provisions in mortgage were held to make bond of individual non-negotiable; and see textbooks on bills and notes.

⁷¹ White v. Vermont & M. R. Co., 21 How. (U. S.) 575, 16 L. Ed. 221.

⁷² Lisman v. Milwaukee, L. S. & W. Ry. Co., 161 Fed. 472.

"The agreement, respecting the scrip preferred stock, is entirely independent of the pecuniary obligation contained in the instrument. The latter recites an indebtedness in a specific sum, and promises its unconditional payment to bearer at a specified time. It leaves nothing optional with the company. Standing by itself, it has all the elements and essential qualities of a negotiable instrument." Hotchkiss v. National Banks, 21 Wall. (U. S.) 354, 357, 22 L. Ed. 645.

⁷³ Savannah & M. R. Co. v. Lancaster, 62 Ala. 555, 563.

bond that it is secured by mortgage does not destroy its negotiability.⁷⁴

The fact that bonds of a joint stock association stipulate against personal liability of the shareholders does not make them non-negotiable on the theory that the liability is restricted to a particular fund.⁷⁵

The fact that coupons are non-negotiable because of provisions in the deed of trust in regard thereto, does not necessarily affect the negotiability of the bonds themselves.⁷⁶

A corporate bond, in order to be negotiable must be payable at a time certain.⁷⁷ However, it is generally held that a provision in bonds that some or all of them can be redeemed before maturity under certain conditions does not make them non-negotiable.⁷⁸ Thus, the fact that bonds are redeemable by instalments, determined by drawings, does not impair their negotiability where, although it was not known which bonds would be redeemed in any one year since this was to be determined by drawings, yet there was a promise to redeem all the bonds before a certain date.⁷⁹ On the same theory, bonds are not non-negotiable merely because they are due and payable, at the option of the trustee, in case of default in interest.⁸⁰

⁷⁴ Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co., 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658.

⁷⁵ Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, aff'g 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353. But see dissenting opinion of Justice Werner and the separate opinions of Chief Justice Cullen and Justice Edward T. Bartlett.

⁷⁶ Hibbs v. Brown, 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353, aff'd 190 N. Y. 167, 82 N. E. 1108.

⁷⁷ See Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co., 90 Ill. App. 460, 486, aff'g 195 Ill. 288, 63 N. E. 136.

⁷⁸ McCormick v. Unity Co., 239 Ill. 306, 87 N. E. 924, aff'g 142 Ill. App. 159; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 500, 21 N. E. 962.

Where a bond is payable at a certain date, it is not rendered non-negotiable because of a provision giving the obligor an option to redeem

before maturity at any date when the semiannual interest is due. Union Loan & Trust Co. v. Southern California Motor Road Co., 51 Fed. 840.

A coupon bond, issued by a corporation, under seal, and payable to a trust company, or bearer, or, in case of registry, to the registered holder, in ten years after date, with a reservation of the privilege of paying it at any time after five years, bearing interest at a certain rate per annum, payable semiannually, is a negotiable security. American Nat. Bank v. American Wood Paper Co., 19 R. I. 149 29 L. R. A. 103, 61 Am. St. Rep. 746, 32 Atl. 305.

⁷⁹ Dickerman v. Northern Trust Co., 176 U. S. 181, 194, 44 L. Ed. 423; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 500, 21 N. E. 962.

⁸⁰ Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co., 90 Ill. App. 460, 486, aff'g 195 Ill. 288, 63 N. E. 136.

However, in Missouri, it has been held that bonds giving an option to the corporation to pay them at any time before maturity are non-negotiable.⁸¹ And in New York it is held that if coupons are subject to the condition that the time of their payment may be changed and postponed from time to time at the option of a majority of the holders of the series of bonds simultaneously issued therewith, they are deprived of one of the essential characteristics of negotiable paper.⁸²

§ 1012. — Applicability of Negotiable Instruments Law or other statutes. The Negotiable Instruments Law, as enacted in nearly all the states of this country, provides that "an instrument to be negotiable must conform to the following requirements," and then follows such requirements as that it must contain an "unconditional" promise or order to pay a sum "certain" in money, and must be payable on demand or at a "fixed and determinable" future time, and must be payable to order or to bearer. The question which naturally arises is whether such statute applies to corporate bonds, so as to make such bonds non-negotiable where not in compliance with the requirements enumerated, and the courts without dissent have either directly held or have assumed that the statute is applicable.⁸³ However, much is to be said in favor of the claim that the statute should be liberally construed in favor of the negotiability of a bond and that negotiability should not be affected by petty omissions nor by the inclusion of clauses merely tending to make the instrument uncertain in some respect. This idea has been well stated as follows: "certainly it will be an important, and, as it seems to me, an unfortunate, result if an obligor in that which by all of its prominent characteristics is a negotiable instrument can by inserting in some obscure manner a clause cutting off some utterly inconsequential liability secure not only such particular exemption, but, what is vastly more harmful, make apparently negotiable securities in the hands of investors non-negotiable, and seriously impair their value and security."⁸⁴

⁸¹ *Chouteau v. Allen*, 70 Mo. 290, 339.

⁸² *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 476, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

⁸³ *In re Footville Condensed Milk Co.*, 229 Fed. 698; *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108, aff'g 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353; *Volk v. Shoemaker*, 229 Pa. 407,

78 Atl. 933, where, however, bond was not that of corporation.

⁸⁴ *Per Hiseock, J.*, in *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108, aff'g 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353, where a clause in bonds of a joint stock association, exempting shareholders from personal liability, was held not to affect negotiability.

In determining whether bonds are negotiable, statutes relating to "negotiable instruments," where including bonds, must be looked at.⁸⁵ And the fact that corporate bonds have for a long period of years been treated as negotiable does not make a particular issue negotiable where they are non-negotiable under the statutes defining negotiability.⁸⁶ Thus, it has been held in California that bonds are not negotiable where payable not upon the general credit of the maker, as required by statute in order to be negotiable, but out of a specific fund, as where it is provided that neither the trustee nor any bondholder shall have recourse to any personal, statutory, or constitutional liability against any stockholder or officer of the corporation.⁸⁷

§ 1013. What law governs. In determining whether bonds are negotiable, the law of the place where the bonds are payable governs.⁸⁸ However, if no place of payment is stated, then undoubtedly the law of the place where the bonds were issued would govern.

§ 1014. Guaranty indorsed on bond. Although there is some authority to the contrary,⁸⁹ the general rule is that a guaranty indorsed upon corporate bonds is negotiable.⁹⁰ In any event, such a

⁸⁵ In California, where bonds are supported by a mortgage containing conditions not certain of fulfilment, and notice of the mortgage and its conditions appears on the bonds, the bonds are not negotiable instruments. *Kohn v. Sacramento Electric, Gas & Railroad Co.*, 168 Cal. 1, 141 Pac. 626.

⁸⁶ *Kohn v. Sacramento Electric, Gas & Railroad Co.*, 168 Cal. 1, 141 Pac. 626.

⁸⁷ *Kohn v. Sacramento Electric, Gas & Railroad Co.*, 168 Cal. 1, 141 Pac. 626.

⁸⁸ *Aurora v. West*, 22 Ind. 88, 94, 85 Am. Dec. 413; *Tyrell v. Cairo & St. L. R. Co.*, 7 Mo. App. 294.

⁸⁹ *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 Fed. 423, and cases cited.

⁹⁰ *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433; *Gilman, Sons & Co. v. New Orleans & S. R. Co.*, 72 Ala. 566; *Atchison, T. & Santa Fe*

R. Co. v. Fletcher, 35 Kan. 236, 250. See *Codman v. Vermont & C. R. Co.*, Fed. Cas. No. 2,935, p. 1160, where question referred to but not decided.

"Not, say the authorities, that the guaranty is, in itself, negotiable as a separate contract, but that it is a collateral promise to any and each person, in his turn, who may give credit to a negotiable bond, note or bill coupled with such guaranty." *Toppan v. Cleveland, C. & C. R. Co.*, Fed. Cas. No. 14,099, p. 58.

"The contract is negotiable, and the promise of the state is not only to the immediate payee, or the present holder, but to whoever becomes the holder in the usual course of trade." *State v. Cobb*, 64 Ala. 127, 156.

Thus the transfer of bonds carries with it a guaranty of payment indorsed thereon by another corporation, when such guaranty was not extin-

guaranty is negotiable where it is in terms payable to the holder thereof.⁹¹ And even if the guaranty be considered not strictly negotiable, it is at least transferable by delivery, subject to equities, where the bond is payable to bearer.⁹²

VIII. WHO ARE BONA FIDE HOLDERS

§ 1015. Importance of question. The rule governing negotiable paper in general that a bona fide holder takes the instrument free from defects of title of prior parties and free from defenses available to prior parties among themselves, while if the holder is not a bona fide holder, he takes subject to the same defenses as if the instrument were non-negotiable, applies to holders of negotiable corporate bonds as well as to holders of negotiable bills of exchange, checks or promissory notes,⁹³ and often renders it necessary to determine whether the holder is a bona fide holder, i. e., a holder in good faith, in the ordinary or usual course of business, for a valuable consideration, before the maturity of the instrument, and without notice of defenses.

In determining whether a holder of a corporate bond is a bona fide holder for value, or what is now termed by the Negotiable Instruments Law a "holder in due course," it is necessary to go outside the decisions relating to bonds and to consider the rules regulating the holders of other negotiable instruments, such as bills of exchange, checks and promissory notes, for the reason that the decisions in which a bond was involved constitute only a very small proportion of the decisions and do not fully cover the law in regard thereto. However, it is not the purpose of this work to state the law relating to bills and notes in detail and with extensive citation of authorities, but reference should be made to textbooks on that subject. It is deemed sufficient in this connection merely to state a few of the general governing rules, without attempting a complete discussion or citation of authorities.

§ 1016. What law governs. In those states where the Negotiable Instruments Law has been enacted, the question of who is a bona fide

guished at the time of the transfer.
Georgia S. & F. Ry. Co. v. Einstein,
218 Fed. 55.

⁹¹ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 573, 43 L. Ed. 1081.

⁹² *Owens v. Potter*, 115 Mich. 556, 569, 73 N. W. 977.

⁹³ *Union Trust Co. v. Detroit & R. St. C. Ry.*, 127 Mich. 252, 86 N. W. 788; *Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757, 64 Atl. 126.

holder, or as termed by that statute a "holder in due course," must be determined from the terms of that statute defining a holder in due course.⁹⁴ However, such statute is largely a mere reiteration of the law merchant so far as this question is concerned.

§ 1017. Purchasers from bona fide holders. Where a holder of bonds takes them from one who occupies the position of a bona fide holder, the former is a bona fide holder,⁹⁵ notwithstanding he has actual notice of defenses⁹⁶ or is a purchaser after maturity,⁹⁷ or is not a purchaser for value. This rule is elementary and is reiterated by the provisions of the Negotiable Instruments Law.

§ 1018. Consideration for transfer—General rule. The holder of bonds, in order to be a bona fide holder, must have been a purchaser for value,⁹⁸ except where his transferor himself was a bona fide holder.⁹⁹ However, the amount of the consideration for the transfer is immaterial, although the sale of bonds at a small part of their face value, together with other facts, may be sufficient to put the purchaser on inquiry and charge him with notice of any defects or equities.¹ Thus, the fact that the bonds are signed and issued by a trustee, together with the sale at a small per cent. of their face value, puts the purchaser on inquiry.²

§ 1019. — Transfer as collateral. There is no question but that one who takes a bond as collateral security for a debt created at the time of the transfer is a bona fide holder;³ and the law in most of the

⁹⁴ See *Interboro Brewing Co. v. Doyle*, 165 N. Y. App. Div. 646, 151 N. Y. Supp. 325; *Hibbs v. Brown*, 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353.

⁹⁵ *New Paddock-Hawley Co. v. Fayetteville Wagon Wood & Lumber Co.*, 207 Fed. 786; *Union Loan & Trust Co. v. Southern California Motor Road Co.*, 51 Fed. 840; *Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757, 64 Atl. 126.

⁹⁶ *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 283, 30 L. Ed. 1210; *Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co.*, 116 Fed. 700, 114 Fed. 263.

⁹⁷ *Central Railroad & Banking Co.*

of *Georgia v. Farmers' Loan & Trust Co.*, 116 Fed. 700, 114 Fed. 263.

⁹⁸ *Gilman, Sons & Co. v. New Orleans & S. R. Co.*, 72 Ala. 566, 583, holding, however, that amount paid is immaterial except as bearing upon the inquiry whether the purchaser had notice, actual or constructive, of the infirmity of the paper or of the title to it.

⁹⁹ See § 1017, *supra*.

¹ *Parsons v. Jackson*, 99 U. S. 434, 440, 25 L. Ed. 434; *Riggs v. Pennsylvania & N. E. R. Co.*, 16 Fed. 804.

² *Riggs v. Pennsylvania & N. E. R. Co.*, 16 Fed. 804.

³ *Rawlings v. New Memphis Gas-light Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

states is that bonds transferred to secure pre-existing indebtedness make the pledgee a bona fide purchaser,⁴ and this rule is expressly made the law in those states which have adopted the Negotiable Instruments Law.

§ 1020. Time of transfer—Transfer after maturity. The rule that a purchaser after maturity is not a bona fide holder is so elementary as not to require the citation of authority. It applies to holders of bonds as well as bills and notes.⁵ There is an exception, however, where one purchases after maturity from one who is himself a bona fide holder.⁶

§ 1021. — Effect of overdue interest or coupons. In some jurisdictions it is held that bonds with past due coupons attached must be considered dishonored paper.⁷ It is generally held, however, that a purchaser of corporate bonds may be a bona fide holder, although some of the interest coupons attached thereto are past due and unpaid at the time of purchase.⁸ However, while the presence of overdue coupons is not conclusive of the fact of dishonor,⁹ yet it is a fact proper to be considered, in connection with other circumstances, on the question whether the holder is a bona fide holder.¹⁰ Thus, a

⁴ *McMurray v. Moran*, 134 U. S. 150, 33 L. Ed. 814; *Davis v. Hanover Savings Fund Society*, 210 Fed. 768; *Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757, 64 Atl. 126; *Hoskins v. Seaside Ice Manufacturing & Cold Storage Co.*, 68 N. J. Eq. 476, 59 Atl. 645; *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

⁵ *Gilbough v. Norfolk & P. R. Co.*, Fed. Cas. No. 5,419; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221, 60 Am. Rep. 443, 12 N. E. 577.

⁶ See § 1017, *supra*.

⁷ *Chouteau v. Allen*, 70 Mo. 290, 339. Same rule applied to county bonds, see *First Nat. Bank of St. Paul v. County Com'rs Scott County*, 14 Minn. 77, 100 Am. Dec. 194.

⁸ *Railway Co. v. Sprague*, 103 U. S. 756, 761, 26 L. Ed. 554; *New Paddock-*

Hawley Co. v. Fayetteville Wagon Wood & Lumber Co., 207 Fed. 786; *Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co.*, 65 Fed. 455, 457; *McLane v. Placerville & S. Val. R. Co.*, 66 Cal. 606, 6 Pac. 748; *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

That the purchaser of negotiable bonds is aware at the time of his purchase that there has been default in the payment of interest thereon does not constitute such dishonor of the bonds as to affect the equities of such purchaser. *Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co.*, 116 Fed. 700.

⁹ *Morton & Bliss v. New Orleans & S. Ry. Co.*, 79 Ala. 590, 616.

¹⁰ *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457; *Morton & Bliss v. New Orleans & S. Ry. Co.*, 79 Ala. 590, 616.

purchaser of bonds with long overdue coupons attached is put on notice, where he purchased for about two per cent. of the face value of the bonds.¹¹

In New York it is held that the presence of due and unpaid coupons on a bond is sufficient to put a purchaser on inquiry, but it does not of itself make the bond to which they are attached dishonored paper so as to prevent a purchaser from becoming a bona fide purchaser.¹²

§ 1022. Notice—Actual notice. Of course, a person is not a bona fide purchaser where he has actual knowledge of defenses at the time of the purchase.¹³

§ 1023. — Constructive notice. The notice may be constructive as well as actual.¹⁴ Thus, in a proper case, notice may be implied from the bond itself or from the relationship of the parties or circumstances connected with the transaction.¹⁵

A pledgee is not a bona fide holder where he takes bonds issued in violation of a statute, since he is presumed to have knowledge of the statutes.¹⁶

It is settled "that a bona fide holder of negotiable corporate bonds is not subject to the general doctrine of *lis pendens*. This exception holds even though the paper was purchased during the pendency of a suit in which its issue was finally declared invalid, the purchaser not being affected with notice thereof."¹⁷

§ 1024. — Duty to inquire. It is now the well-settled rule, in practically every state (with the possible exception of Georgia, where

¹¹ *Bramblet v. Commonwealth Land & Lumber Co.*, 26 Ky. Law Rep. 1176, 83 S. W. 599.

¹² *Buffalo Loan, Trust & Safe-Deposit Co. v. Medina Gas & Electric Light Co.*, 162 N. Y. 67, 56 N. E. 505.

¹³ *McMurray v. Moran*, 134 U. S. 150, 33 L. Ed. 814; *Chicago v. Cameron*, 22 Ill. App. 91, aff'd in 120 Ill. 447; 11 N. E. 899; *Shellenberger v. Altoona & P. Connecting R. Co.*, 212 Pa. 413, 108 Am. St. Rep. 876, 61 Atl. 1000.

Notice that an authorized agent is disposing of the bonds for an unauthorized purpose makes the purchaser take at his peril. *Chew v. Henrietta Mining & Smelting Co.*, 2 Fed. 5.

¹⁴ *American Loan & Trust Co. v. St. Louis & C. Ry. Co.*, 42 Fed. 819.

¹⁵ *McMurray v. Moran*, 134 U. S. 150, 33 L. Ed. 814.

¹⁶ "The bank must be assumed to know that the law of the state expressly forbade the corporation from issuing bonds unless for money, labor, or property actually received. It also knew that it was receiving the bonds without giving the corporation either money, labor or property. It took the bonds with notice of this infirmity in its title, and is not therefore a bona fide holder." In re *Progressive Wall Paper Corporation*, 229 Fed. 489.

¹⁷ *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759.

there is a statute regulating the subject)—and this rule is expressly reiterated by the Negotiable Instruments Law—that mere suspicion or mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge does not prevent a transferee from becoming a bona fide holder, unless the failure to inquire amounts to “bad faith.”¹⁸

A bondholder is affected “only by what he actually knew, and not at all by what he might have known, or by what he was put on the point of discovery by the use of ordinary diligence.”¹⁹

The purchaser of bonds does not ordinarily owe the duty of active inquiry to avert the imputation of bad faith.²⁰ Nor is the purchaser from an agent of a corporation of bonds payable to bearer and negotiable by delivery required to make inquiry as to the disposition of the purchase price.²¹ Whether inquiry is necessary to avoid the imputation of bad faith,²² as well as the extent of the inquiry necessary to make a purchaser a bona fide purchaser of bonds,²³ is largely governed by the facts of the particular case.

It has been held that purchasers of bonds of a water company are bound at their peril to ascertain the terms of the ordinance which is the contract between it and the municipality.²⁴

Bondholders must take notice of ordinances granting street franchises or containing contracts with the mortgagor, and hold the bonds subject to the continuing compliance of the mortgagor with the terms of the ordinances.²⁵

¹⁸ Hotchkiss v. National Banks, 21 Wall. (U. S.) 354, 22 L. Ed. 645; Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 Fed. 310; Birdsall v. Russell, 29 N. Y. 220; Hibbs v. Brown, 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353, aff'd 190 N. Y. 167, 82 N. E. 1108.

“Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.” Murray v. Lardner, 2 Wall. (U. S.) 110, 121, 17 L. Ed. 857.

¹⁹ Central Trust Co. of New York v. Bowdell Water Power Co., 181 Fed. 735.

²⁰ Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 Fed. 310.

²¹ Atkinson v. Colorado Title & Trust Co., — Colo. —, 151 Pac. 457. See also Philadelphia & S. R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

²² See New Paddock-Hawley Co. v. Fayetteville Wagon Wood & Lumber Co., 207 Fed. 786; Doty v. Oriental Print Works Co., 28 R. I. 372, 67 Atl. 586.

²³ See Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co., 162 N. Y. 67, 56 N. E. 505.

²⁴ Illinois Trust & Savings Bank v. Pontiac, 112 Ill. App. 545, 557, aff'd 212 Ill. 326, 72 N. E. 411.

²⁵ Farmers' Loan & Trust Co. v. Galesburg, 133 U. S. 156, 178, 33 L. Ed. 573.

§ 1025. — Notice from face of bonds. It is undoubtedly the law that the transferee must take notice of all matters appearing upon the face of the bonds.²⁶

It is generally held that where corporate bonds on their face refer to the mortgage or trust deed securing them, holders are put on inquiry thereby and charged with notice of the terms of the deed or mortgage,²⁷ but it is also held that a mere general reference to the mortgage or trust deed in the bond is not sufficient to put a bondholder on inquiry as to a provision in the mortgage or trust deed which was absolutely repugnant to the terms of the bond.²⁸ In any event, the fact that a bond refers to the mortgage as security therefor charges holders with notice of all the provisions in the mortgage relating to the foreclosure of the mortgage by the trustee.²⁹

Where a corporation bond contains a clear statement that it is one of a series of bonds secured by a mortgage to a trustee upon the property of the corporation, every proposed purchaser is thereby advised that if he buys he will be brought into contract relations with his co-bondholders, and that his absolute rights in respect to the foreclosure of the mortgage, or the collection thereby of the principal or interest of his bond, are limited by the provisions of the trust deed and the peculiar nature of the security.³⁰ However, a purchaser of bonds reciting that they are "secured by all the property and assets of the company" need not make inquiry as to the security, since the recital is neither vague nor indefinite except as to the form of the

²⁶ *Stanton v. Alabama & C. R. Co.*, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 Fed. Cas. No. 13,297.

²⁷ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 189 Fed. 661; *Lyman v. Kansas City & A. R. Co.*, 101 Fed. 636; *Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co.*, 48 Minn. 560, 570, 31 Am. St. Rep. 694, 51 N. W. 658; *Caylus v. New York, K. & S. R. Co.*, 10 Hun (N. Y.) 295, aff'd 76 N. Y. 609; *Taylor v. Atlantic & G. W. R. Co.*, 57 How. Pr. (N. Y.) 26.

"The reference in the coupons to the mortgage and bonds, and in the bonds to the terms and conditions of the mortgage, clearly, we think, charges the holders of both coupons and bonds with notice of the provisions contained in each of such instruments." *McClelland v. Norfolk Southern R. Co.*, 170 N. Y. 469, 474,

1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

²⁸ *Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co.*, 48 Minn. 560, 575, 576, 31 Am. St. Rep. 694, 51 N. W. 658.

²⁹ *Grant v. Winona & S. W. Ry. Co.*, 85 Minn. 422, 431, 89 N. W. 60, explaining *Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co.*, 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658.

³⁰ "Whether the reference in the bonds in this case to the mortgage is sufficient to import into them all of the terms of the mortgage, we need not and do not here decide; but we do hold that it is sufficient to charge the bondholders with notice of all the provisions relating to the foreclosure of the mortgage by the trustee." *Grant v. Winona & S. W. Ry. Co.*, 85 Minn. 422, 431, 89 N. W. 60.

security, at least where the recital is wholly false.³¹ Moreover, if the bonds and mortgage which put one on inquiry lull and satisfy inquiry, the prospective purchaser is not bound to look further.³²

Reference to statutes in the recitals in bonds puts purchasers on inquiry as to the terms of such statutes.³³

The absence of certificates originally pinned to bonds, entitling the holder to exchange the bonds for preferred stock, is not a circumstance sufficient to put a purchaser on inquiry as to the title of the holder.³⁴

§ 1026. — Notice from relationship of transferor to corporation. One purchasing from the agent of a corporation bonds payable to bearer and negotiable by delivery is not concerned with the relation between the agent and the corporation.³⁵ Nor is a purchaser or pledgee put on notice because the seller or pledgor is a director or other officer of the corporation, and known to be such, where he represents himself as the owner of the bond.³⁶ However, one who takes corporate bonds from an officer of the corporation to secure his private debt must ascertain his right to dispose of the bonds.³⁷ And a person is not a bona fide holder who receives bonds from an officer of the corporation issuing them, when that officer, in the negotiation of the sale, pledge or transfer, is exercising the functions of his office, and at the same time, to the knowledge of the transferee, using the bonds for his own purposes or for his own pecuniary benefit.³⁸

Where bonds are delivered as collateral to a receiver's certificate, whether by the receiver or by the attorney of the company, it is

³¹ *Stickel v. Atwood*, 25 R. I. 456, 56 Atl. 687.

³² *Stanton v. Alabama & C. R. Co.*, Fed. Cas. No. 13,297.

³³ *Gilman, Sons & Co. v. New Orleans & S. R. Co.*, 72 Ala. 566, 580.

³⁴ *Hotchkiss v. National Banks*, 21 Wall. (U. S.) 354, 359, 22 L. Ed. 645.

³⁵ *Atkinson v. Colorado Title & Trust Co.*, — Colo. —, 151 Pac. 457.

³⁶ *Farmers' Loan & Trust Co. v. Madison Mfg. Co.*, 153 Fed. 310; *Claflin v. South Carolina R. Co.*, 8 Fed. 118; *Rockville Nat. Bank v. Citizens' Gas Light Co.*, 72 Conn. 576, 45 Atl.

361; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190, 202.

"A director may be the lawful and honest holder of the bonds of his company. There is no presumption to the contrary. The fact is not even just ground of suspicion." *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190, 202.

³⁷ "Neither is it sufficient, under such circumstances, to inquire of the officer himself, as to his authority." *Germania Safety-Vault & Trust Co. v. Boynton*, 71 Fed. 797.

³⁸ *Farmers' Loan & Trust Co. v. Madison Mfg. Co.*, 153 Fed. 310.

sufficient to put the purchaser on inquiry as to the circumstances under which they were issued, and charge him with knowledge of the fact that the actual issuance of the bonds was after the receiver was appointed.³⁹

§ 1027. — Notice to trustee as notice to bondholders. There is some conflict in the decisions as to whether notice to the trustee in the mortgage is to be deemed notice to the bondholders. The better rule seems to be that notice to him is not notice to the bondholders, on the theory that he is not their agent.⁴⁰ Other decisions hold the contrary.⁴¹ In any event, bondholders are not chargeable with notice of facts which the trustee did not know, though it would have known if it had fully discharged its duty in a prior transaction between other parties.⁴²

§ 1028. Presumptions and burden of proof. Holders of corporate bonds are presumed to be bona fide holders for value, but evidence to show the contrary is ordinarily admissible.⁴³

The rules applicable to all negotiable paper as to the presumption that the holder is a bona fide holder for value, and the burden of proving the contrary, apply to negotiable bonds as well as to negotiable bills or notes.⁴⁴

When the burden shifts is an important question to be settled by the rules governing negotiable paper in general.

³⁹ *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807.

⁴⁰ *National Waterworks Co. of New York v. Kansas City*, 78 Fed. 428; *Curtis v. Leavitt*, 15 N. Y. 194, approved in *Commissioners of Johnson County v. Thayer*, 94 U. S. 631, 644, 645, 24 L. Ed. 133.

⁴¹ "To hold that notice to a trustee in a railroad mortgage to secure negotiable bonds is notice to every purchaser of such bonds of defenses against them would be to cast a cloud upon the millions of such securities outstanding." *Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

⁴² *Crumlish v. Shenandoah Valley R. Co.*, 32 W. Va. 244, 9 S. E. 180.

Notice to the trustee of the rights of third persons to the mortgaged property is notice to the bondholders. *Haven v. Emery*, 33 N. H. 66.

Notice to the trustee of an existing incumbrance on the property is notice to the bondholders. *Miller v. Rutland & W. R. Co.*, 36 Vt. 452.

⁴³ *National Waterworks Co. of New York v. Kansas City*, 78 Fed. 428.

⁴⁴ *Shellenberger v. Altoona & P. Connecting R. Co.*, 212 Pa. 413, 423, 108 Am. St. Rep. 876, 61 Atl. 1000.

⁴⁵ *Simmons v. Taylor*, 38 Fed. 682; *Shellenberger v. Altoona & P. Connecting R. Co.*, 212 Pa. 413, 108 Am. St. Rep. 876, 61 Atl. 1000.

IX. GUARANTY OF BONDS

§ 1029. Power to give. It has already been noticed that ordinarily one corporation has no power to guaranty the obligations of another;⁴⁵ and under this rule a corporation has no power to guaranty the bonds of another corporation,⁴⁶ except as hereinafter noticed. However, if a corporation has power to sell and dispose of bonds of other companies, it has power to guaranty both the validity and the payment of such bonds, in selling and disposing of them.⁴⁷ Thus, where a corporation has been obliged to take bonds for a debt owing it, it is within its power to guaranty their payment on making a sale of them.⁴⁸ And a lessee of a railroad has power, in consideration of the lease, to guaranty the payment of the bonds of the lessor.⁴⁹ And a corporation, on purchasing property subject to a mortgage securing bonds, may, as a part of the purchase price, guaranty the payment of the bonds.⁵⁰

Such power is sometimes conferred on corporations, or at least certain classes of corporations, by statute;⁵¹ and such power, where conferred, includes power to make such terms and conditions for the guaranty as may be agreed upon, including capacity to receive stock in the company, the debts of which are contingently assumed.⁵²

⁴⁵ See Chap. 23, *supra*.

⁴⁶ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 567, 43 L. Ed. 1081.

⁴⁷ *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 250, 10 Pac. 596; *Arnot v. Erie R. Co.*, 67 N. Y. 315.

Rule applied to municipal bonds issued to aid a railroad company, where sold by the latter. The court said: "Undoubtedly they may receive such bonds under the laws of the state, and if they may receive them, they may transfer them to others; and if they may transfer them to purchasers, they may, if they deem it expedient, guaranty their payment as the means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose." *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392, 412, 19 L. Ed. 117.

⁴⁸ *Rogers L. & M. Works v. South-*

ern Ry. Ass'n, 34 Fed. 278; *Madison & I. R. Co. v. Norwich Sav. Society*, 24 Ind. 457.

⁴⁹ *Opdyke v. Pacific R. Co.*, Fed. Cas. No. 10,546; *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629.

⁵⁰ "In equity such guaranty is nothing more than an assumption of a mortgage debt existing upon the land." *Ellerman v. Chicago Junct. Railways & Union Stockyards Co.*, 49 N. J. Eq. 217, 248, 23 Atl. 287.

⁵¹ *Central Trust Co. of New York v. Indiana & L. M. R. Co.*, 98 Fed. 666, holding Indiana statute relating to railroad leases not applicable; *Louisville, N. A. & C. R. Co. v. Ohio Valley Improvement & Contract Co.*, 69 Fed. 431, Indiana statute; *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 247, 10 Pac. 596.

⁵² *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433, 445, modifying 69 Fed. 431.

Trust companies sometimes act as trustee and certify bonds issued by other corporations.⁵³

§ 1030. Negotiability of guaranty. The guaranty of a bond indorsed thereon is generally held negotiable so as to cut off equities existing between the guarantor and the original holder.⁵⁴

§ 1031. Irregularities in exercise of power as defense. Where a statute authorizes the guaranty of bonds on a petition of the majority of the stock, the fact that there was no such petition, while a defense against holders of the bonds with notice, is no defense against bona fide holders.⁵⁵ A fortiori, where the statute confers express authority upon a corporation to guaranty the bonds of another corporation, a mere failure on the part of the guaranteeing company to pursue the mode specified in the statute, will not invalidate such guaranty in the hands of a bona fide holder.⁵⁶ Furthermore, even if a guaranty is solely for accommodation and unauthorized, the corporation is sometimes held liable as guarantor where the bonds come into the hands of a bona fide holder for value.⁵⁷

X. PLEDGE OF BONDS

§ 1032. Power to pledge. It is the general rule, there being no restrictions in the corporate charter or the statutes, that a corpora-

⁵³ *Hunsberger v. Guaranty Trust Co.* of New York, 164 N. Y. App. Div. 740, 150 N. Y. Supp. 190.

⁵⁴ See § 1014, *supra*.

⁵⁵ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081. *Contra*, *Louisville, N. A. & C. R. Co. v. Ohio Valley Improvement & Contract Co.*, 69 Fed. 431.

"One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation." *Louis-*

ville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 573, 43 L. Ed. 1081.

⁵⁶ *Gay v. Hudson River Elec. Power Co.*, 190 Fed. 773; *Central Trust Co. of New York v. Indiana & L. M. R. Co.*, 98 Fed. 666; *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 248, 10 Pac. 596.

"It would be intolerable to hold that the ultimate or secondary purchaser of a negotiable bond offered on the market and guaranteed by another corporation is bound to go to the record of the corporation executing the guaranty and ascertain at his peril that the requisite authority had been given at a duly called meeting of its stockholders." *Gay v. Hudson River Elec. Power Co.*, 190 Fed. 773.

⁵⁷ *Madison & I. R. Co. v. Norwich Sav. Society*, 24 Ind. 457.

tion which has authority to issue bonds may pledge them for the accomplishment of its corporate purposes,⁵⁸ and even for an antecedent debt.⁵⁹ Moreover, the power to "issue" bonds, as the word "issue" is used in constitutional and statutory provisions, includes the power to pledge,⁶⁰ upon the principle that the greater includes the less.⁶¹ It follows that a prohibition against the "issue" of bonds by a corporation prohibits a pledge.⁶² Moreover, provisions forbidding the issuance of bonds except for money, labor or property actually received do not preclude the right to pledge bonds, at least where the purpose is to secure a debt created at the time.⁶³

Even if charter power to "issue" bonds does not include power to pledge its bonds, yet power to issue bonds "or obligations" includes

58 United States. *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892; *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842.

Alabama. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Lehman Bros. v. Tallassee Mfg. Co.*, 64 Ala. 567, 592.

Michigan. *Union Trust Co. v. Electric Park Amusement Co.*, 163 Mich. 687, 697, 130 N. W. 306.

New Jersey. *Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757, 760, 64 Atl. 126; *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423.

Texas. *Western Supply & Manufacturing Co. v. United States & M. Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986.

May be pledged to secure an indebtedness owing an officer of the corporation. *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

59 Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190, 202.

60 United States. *In re Goldville Mfg. Co. of Goldville, South Carolina*, 118 Fed. 892, aff'd 122 Fed. 569; *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759.

California. *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 344, 49 Pac. 197.

New York. *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190.

Tennessee. *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Texas. *Western Supply & Manufacturing Co. v. United States & Mexican Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986.

See also § 971, *supra*.

61 Gilchrist Transp. Co. v. Phenix Ins. Co., 170 Fed. 279.

62 Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. 842; *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 29; *Pfister v. Milwaukee Elec. Ry. Co.*, 83 Wis. 86, 53 N. W. 27. Compare *Mowry v. Farmers' Loan & Trust Co.*, 76 Fed. 38.

63 Illinois Trust & Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 344, 49 Pac. 197.

"When the bonds were so pledged, and money or other property was actually received in consequence of such use of them, it seems to us that in a just and natural sense the bonds were issued 'for' such money or property." *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 344, 49 Pac. 197.

power to issue a contract note and secure it by a pledge of corporate bonds.⁶⁴

The pledgee of corporate bonds has no right to share in the proceeds where the agent who made the pledge had power to sell but not to pledge.⁶⁵

The power to pledge bonds to secure pre-existing indebtedness, as affected by provisions forbidding the issuance of bonds except for money, property received, or work done, has already been noted,⁶⁶ as has the power of the corporation to pledge its bonds at less than par.⁶⁷

§ 1033. Rights of pledgee or purchaser from pledgee. So far as the rights of the pledgee are concerned, the rules relating to pledges in general, in so far as applicable, govern pledges of bonds.⁶⁸ The pledgee of corporate bonds may sell them if the debt for which they were pledged is not paid when due;⁶⁹ and in some states statutes expressly authorize such a sale.⁷⁰ This right to sell exists notwithstanding the corporation has been thrown into bankruptcy,⁷¹ except in case the bonds are not secured by mortgage.⁷² Furthermore, even while a corporation is being voluntarily dissolved, a pledgee may dispose of bonds under a lawful contract empowering him to sell.⁷³

Ordinarily, a purchase by a pledgee at his own sale is voidable at

⁶⁴ Union Trust Co. v. Electric Park Amusement Co., 163 Mich. 687, 17 Det. L. N. 586, 130 N. W. 306.

⁶⁵ Shaw v. Saranac Horse Nail Co., 144 N. Y. 220, 39 N. E. 73, aff'g 78 Hun (N. Y.) 7, 29 N. Y. Supp. 254.

⁶⁶ See § 984, supra.

⁶⁷ See § 988, supra.

⁶⁸ As to the relative status of general creditors and those creditors whose claims are secured by bonds of the corporation, see Adams v. Farmers' Nat. Bank, — Ky. —, 180 S. W. 807.

⁶⁹ Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. 962; Hand v. Savannah & C. R. Co., 21 S. C. 162.

Where a trustee company under a corporation first mortgage thereafter individually loaned to the mortgagor money secured by a pledge of second mortgage bonds, the trustee was entitled to sell the pledged bonds, not

withstanding it had already sued to foreclose the first mortgage and had had a receiver appointed. Guaranty Trust Co. of New York v. Galveston City R. Co., 87 Fed. 813.

⁷⁰ Morris & Whitehead v. East Side Ry. Co., 104 Fed. 409, California statute.

Where bonds are pledged in one state to secure notes payable in another state, the law of the latter state governs as to the right of the pledgee to sell the bonds. Morris & Whitehead v. East Side Ry. Co., 104 Fed. 409.

⁷¹ Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; In re Ironclad Mfg. Co., 192 Fed. 318.

⁷² John Matthews, Inc. v. Knickerbocker Trust Co., 192 Fed. 557, 188 Fed. 445.

⁷³ In re Binghampton General Elec. Co., 143 N. Y. 261, 38 N. E. 297.

the option of the pledgor;⁷⁴ and if the pledgee purchases at his own sale, he must still be treated as a pledgee.⁷⁵ But the pledgee may purchase the bonds at his own sale, subject to the right of persons interested to have the sale set aside in a proper case.⁷⁶

Ordinarily, the pledgee cannot be sued in equity for an accounting on the theory of a constructive trust, where the proceeding has for its ultimate object the recovery of a money decree against the pledgee who is solvent.⁷⁷

A pledge of a bond does not include detached overdue interest coupons, where they are not delivered with the bond and no arrangement is made in regard thereto.⁷⁸

It has been held by some courts that a creditor having collateral security cannot participate in the general assets of the corporation until he has first exhausted such security, but the decided weight of authority is against the proposition.⁷⁹

If the bonds are held as collateral security, the pledgee need not, as in case of a pledge of ordinary chattels, sell them and apply the proceeds to the payment of the debt, but may sue upon them and recover the whole sum due on the bonds without regard to the amount of the pledgee's claim.⁸⁰

The pledgee may have the bonds registered in his own name.⁸¹

While there are a few decisions to the contrary where the pledge is to secure a pre-existing debt, it is now the almost universal rule—and it is so provided by the Negotiable Instruments Law—that a pledgee is a bona fide holder in due course.⁸²

⁷⁴ *Colebrooke*, Collateral Securities, § 332. But see *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 81 Fed. 439, 450, holding this rule inapplicable where the pledgee is given full power, on default to sell at public or private sale, and without advertising or giving to the pledgor any notice or making any demand for payment.

⁷⁵ *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190, 205.

⁷⁶ *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759, 774.

⁷⁷ *Dickinson v. Kempner*, 193 Fed. 204.

⁷⁸ *Rhawn v. Edge Hill Furnace Co.*, 201 Pa. 637, 51 Atl. 360.

⁷⁹ *Doe v. Northwestern Coal & Transportation Co.*, 78 Fed. 62, 72.

⁸⁰ *Stegmaier v. Keystone Coal Co.*, 225 Pa. 221, 74 Atl. 58.

⁸¹ "When one who holds bonds payable to bearer as collateral security procures them to be registered, he is only adopting a measure of safety for the benefit both of himself and of his cestui que trust. I think one who has so held bonds and omitted to have them registered would be derelict in his duty as trustee. The registration of bonds in this customary way is certainly not conversion." *Ritchie v. Burke*, 109 Fed. 16.

⁸² See § 1019, *supra*.

Where the sale is otherwise legal, the fact that the bonds sold for a small sum does not affect the title of the purchaser.⁸³

If bought in by the pledgee, he is entitled to the full face value of the bonds.⁸⁴

§ 1034. Assignment of equity of redemption. Where bonds are pledged as collateral for notes, the corporation may thereafter assign its equity of redemption in the bonds to the holders of the notes; and such an assignment is not an assignment of a mortgage or a lien on land so as to be required to be filed or recorded.⁸⁵

XI. DEFENSES

§ 1035. General rules. The title of bona fide holders of negotiable coupon bonds is good against all equities available as between the original parties.⁸⁶ The mere fact that the intermediate owner of negotiable bonds did not occupy such status that he could have enforced payment thereof does not affect their validity in the hands of a subsequent bona fide purchaser for value.⁸⁷

Bona fide holders of bonds are not affected by the default or misconduct of the person to whom the bonds were originally issued.⁸⁸ A bona fide holder is not affected by the fact that the corporation was not organized within the time prescribed by its charter,⁸⁹ or that the board of directors authorizing the bond issue was not legally constituted,⁹⁰ or that restrictions imposed by the charter on the power of the corporation to negotiate the bonds were violated.⁹¹ Furthermore, it is no defense that the corporate meeting authorizing the bond issue was held outside the state,⁹² or that the mortgage was executed

⁸³ *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. 164.

⁸⁴ *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 86 Fed. 975, 982.

⁸⁵ *Bibber-White Co. v. White River Valley Elec. R. Co.*, 175 Fed. 470.

⁸⁶ *Fox v. Iron Co.*, 17 Leg. Int. (Pa.) 149.

⁸⁷ "Negotiable bonds like these in question stand upon the same footing as to transfer, and as to the title of the holder, as commercial paper." *Lembeek v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757, 64 Atl. 126.

⁸⁸ *Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co.*, 114 Fed. 263.

⁸⁹ *Grant v. Green*, 46 Ill. 469.

⁹⁰ *Macon County v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

⁹¹ *Harrison v. Annapolis & E. R. R. Co.*, 50 Md. 490, 513.

⁹² *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553.

⁹³ "Must a person purchasing railroad bonds in Wall Street or Walnut Street, first send to Illinois, California, or Texas to see whether the meeting of the directors which authorized the mortgage given to secure

out of the state or that the resolution of directors authorizing the mortgage was passed at a meeting held out of the state,⁹³ or that limitations have run against the debt for which the bond was given.⁹⁴ Nor is it a defense, as against a bona fide purchaser, that the directors authorized a sale by the president and treasurer, while the sale was made by the president alone.⁹⁵

Bonds issued by a corporation having no power to issue bonds are invalid even in the hands of bona fide purchasers;⁹⁶ but if the corporation receives and appropriates to its own use the money, property or labor which was the consideration for the issuance of the bonds, it is estopped from denying its liability thereon.⁹⁷

The only defense which can be interposed against a bona fide purchaser for value before maturity is that there was a total want of power to issue the bonds, either because of the power not being inherent or conferred,⁹⁸ or that the circulation of the bonds is prohibited by law on account of the illegality of the consideration.⁹⁹

Equities which a railroad company may have against a construction company for breach of the construction contract cannot be set up to defeat the title of the holders of bonds issued to carry out such contract.¹

Generally, the word "void," as used in a statute making corporate bonds void if issued in violation of certain rules, will be construed as meaning "voidable," if possible, since "a construction which casts upon innocent holders of such bonds all the consequences of a violation of the statute, and suffers the corporation to retain the benefits of such a violation of law, and the original purchasers to escape responsibility, would bring about most deplorable results."²

the bonds was held in a proper place? Whoever may, under supposable circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it." *Galveston R. R. v. Cowdrey*, 11 Wall. (U. S.) 459, 477, 20 L. Ed. 199.

⁹³ *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 459, 20 L. Ed. 199.

⁹⁴ *United States v. Mercantile Trust Co.*, 213 Pa. 411, 62 Atl. 1062.

⁹⁵ *Doty v. Oriental Print Works Co.*, 28 R. I. 372, 67 Atl. 586.

⁹⁶ *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187, 202; *Sykes v. Columbus*, 55 Miss. 115.

⁹⁷ *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187, 202, and see chapter on Effect of Ultra Vires, *infra*.

⁹⁸ *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

⁹⁹ *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

¹ *Wells v. Northern Trust Co.*, 195 Ill. 288, 297, 63 N. E. 136, *aff'g* 90 Ill. App. 460; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

² *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 529, *aff'g* 86 Fed. 929.

It is generally held that it is no defense as against a bona fide purchaser that the bonds were issued in excess of the debt limit of the corporation.³ Especially is this true where the charter or statute merely contemplates that the directors shall be personally liable for any damages to bondholders caused by such overissue.⁴

The defense of usury is not good as against a bona fide purchaser of corporate bonds, where the statute does not expressly declare that instruments infected with usury are "void."⁵ Sometimes, by statute, corporations are expressly prohibited from setting up the defense of usury.⁶ The effect of usury is to be determined, it seems, by the law of the state where the bonds were executed.⁷

The alteration of numbers upon series of negotiable bonds, where the law does not require the bonds to be numbered, is an immaterial one, and no defense as against a bona fide holder.⁸ Furthermore, the effect of alterations of a negotiable instrument as a defense has been materially changed in those states which have enacted the Negotiable Instruments Law.

§ 1036. Failure to comply with conditions precedent or charter restrictions. Ordinarily, charter restrictions on the power to issue bonds are no defense as against bona fide holders.⁹ Thus, the fact

³ State v. Cobb, 64 Ala. 127; Baker v. Guarantee Trust & Safe Deposit Co. (N. J. Eq.) 31 Atl. 174; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548. See also § 979, supra, and see chapter on Effect of Ultra Vires, infra. Contra, Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

Otherwise where the holder is one who was a director at the time the bonds were issued. Steelman v. Baker, 53 N. J. Eq. 672, 673, 33 Atl. 815.

"The indebtedness of a private corporation in excess of the limit fixed by the articles of incorporation is valid to the extent of the consideration received for it." Peatman v. Centerville, Light, Heat & Power Co., 100 Iowa 245, 250, 69 N. W. 541.

⁴ Beebe v. Richmond Light, Heat & Power Co., 13 N. Y. Misc. 737, 35 N. Y. Supp. 1.

⁵ Weed v. Gainesville, J. & S. R. Co., 119 Ga. 576, 594, 46 S. E. 885.

⁶ In re Vigilancia, 68 Fed. 781, aff'd 73 Fed. 452; Lembeck v. Jarvis Terminal Cold Storage Co., 70 N. J. Eq. 757; 64 Atl. 126.

Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913 A 622, 133 N. W. 91, statute applicable only to bonds of telegraph and telephone companies.

⁷ Butler v. Myer, 17 Ind. 77.

⁸ Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126; Birdsall v. Russell, 29 N. Y. 220.

⁹ Elsworth v. St. Louis, A. & T. H. R. Co., 33 Hun (N. Y.) 7, aff'd 98 N. Y. 553.

In Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548, 562, 563, a distinction is drawn between conditions relating either to the form in which the security shall be made or to some preliminary proceeding extraneous to the acts of the corporation or its officers, and those instances in which the

that bonds are issued in violation of a statute which requires that the capital stock shall first be paid up is not a defense as against bona fide holders, and is a defense against holders who are not bona fide holders only so far as to prevent a recovery in excess of the amount actually paid.¹⁰

It is no defense, as against bona fide holders, that the bonds were issued without the consent or authority of the stockholders, at least where they took no steps to repudiate the action of the directors, but allowed the bonds to be sold, and availed themselves of the proceeds.¹¹

The omission of a formal resolution authorizing the execution of bonds is no defense where the corporation received and retained the proceeds.¹² Nor is the fact that bonds contain provisions as to their maturity in violation of the charter of the corporation a defense where the corporation has received and expended the proceeds of the bonds.¹³

Where the guaranty of bonds is authorized by statute, mere irregularities in the exercise of the granted power, such, for instance, as the failure to first obtain the consent of the stockholders of the corporation executing the guaranty, is no defense against a bona fide holder.¹⁴

§ 1037. Want, inadequacy, failure or illegality of consideration. Want of consideration for the bond is no defense as against a bona fide holder.¹⁵ The same is true as to failure of consideration.¹⁶ It is different, however, where the consideration is illegal, in which case no recovery is allowable.¹⁷

It is no defense as against a bona fide holder of railroad bonds that

right to issue such securities is "by the charter conditioned upon the performance of acts by the corporation or its officers relating to the management of the affairs of the company." In the former case it is held that the defense is good against bona fide holders while in the latter case the defense cannot be sustained.

¹⁰ *Shellenberger v. Altoona & P. Connecting R. Co.*, 212 Pa. 413, 108 Am. St. Rep. 876, 61 Atl. 1000. To same effect, *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548, 568.

¹¹ *Tyrell v. Cairo & St. L. R. Co.*, 7 Mo. App. 294.

¹² *Pomeroy v. New York Smelting & Refining Co.* (N. J. Eq.), 48 Atl. 395.

¹³ *Browning v. Mullins*, 12 Ky. L. Rep. 41, 13 S. W. 427.

¹⁴ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Gay v. Hudson River Elec. Power Co.*, 190 Fed. 773, 785. See also § 976, *supra*.

¹⁵ *In re Wyoming Valley Ice Co.*, 153 Fed. 787; *In re Leland*, Fed. Cas. No. 8,229; *Parker v. Flora*, 63 N. C. 474.

¹⁶ *Parker v. Flora*, 63 N. C. 474.

¹⁷ *York v. McNutt*, 13 Tex. 13, 67 Am. Dec. 607.

the original contractor to whom the bonds were issued failed to perform his contract to build the railroad.¹⁸

It is no defense, as against a bona fide holder, that the bonds were originally negotiated at less than their par value in violation of a charter provision or a statute.¹⁹ So the mere fact that bonds are issued for less than seventy-five per cent. of their par value, in violation of a statute making bonds "void" in such a case, is no defense against a bona fide holder of bonds, where the Negotiable Instruments Law, enacted after the former statute, governs the rights of bona fide holders of bonds as well as other negotiable instruments.²⁰ And the fact that a corporation overvalues its own stock in purchasing it and paying therefor in its bonds is no defense to an action on the bonds by a bona fide purchaser for value.²¹

§ 1038. Want of title. Title to coupon bonds payable to bearer passes by delivery to a bona fide purchaser, although his assignor had no title.²²

If negotiable bonds are stolen, a bona fide purchaser takes title as against the real owner.²³

Negotiable bonds of corporations, payable to bearer, are intended to pass from hand to hand in all the money markets of the world. It is the understanding of the commercial world that the purchaser of such bonds may safely rely on the title evidenced by possession as the true title, and that, in the absence of fraud or negligence so gross as to justify the inference of fraud, the title of a bona fide purchaser for value before maturity is unassailable.²⁴ Such negotiable bonds, "in a certain sense, are the representatives of money, and freely pass

¹⁸ Grant v. Green, 46 Ill. 469.

¹⁹ Ellsworth v. St. Louis, A. & T. H. R. Co., 98 N. Y. 555; Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190, 202.

²⁰ "The inconsistency is irreconcilable, and in such case the legislation last enacted must prevail; and this conclusion is in harmony with the holdings of the Supreme Court of Wisconsin as to the effect of the Negotiable Instruments Law in this respect." In re Footville Condensed Milk Co., 229 Fed. 698, construing Wisconsin statutes.

²¹ Hoskins v. Seaside Ice Manufac-

turing & Cold Storage Co., 68 N. J. Eq. 476, 59 Atl. 645.

²² New Orleans, J. & G. N. R. Co. v. Mississippi College, 47 Miss. 560; Mason v. Frick, 105 Pa. St. 162, 51 Am. Rep. 191, Texas Banking & Insurance Co. v. Turnley, 61 Tex. 365.

²³ Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857; Evertson v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9; Cochran v. Fox Chase Bank, 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117.

²⁴ Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co., 65 Fed. 455, 459.

by delivery in the money markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title.”²⁵

§ 1039. Diversion. It is no defense that a negotiable bond was diverted from the purpose for which it was executed, or that the officer or agent intrusted with it for safe-keeping or otherwise wrongfully negotiated it, where the purchaser is a bona fide holder.²⁶ Thus, if bonds payable to bearer are placed in the custody of the president of the company, so as to clothe him with apparent authority to dispose of them, it is no defense as against a bona fide purchaser that the president wrongfully and for his own benefit negotiated the bonds.²⁷ On the other hand, it seems that the owner of bonds, where he has not indorsed them, is not negligent, so far as third persons are concerned, merely because he intrusts them to a relative for safe-keeping, and the latter converts them to his own use.²⁸

§ 1040. Misapplication of proceeds. The purchaser of bonds is under no obligation to see that there is no misapplication of the proceeds,²⁹ and misapplication of the proceeds is no defense as against a bona fide holder.³⁰ And where an officer of a corporation sells

²⁵ “The title of a bona fide holder of such bond ought to stand on as secure a foundation as that of a person who receives a bank note in the ordinary course of business. Any other doctrine would, in my judgment, undermine the very structure of commercial law, and shake the foundations of such paper credits.” *Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co.*, 65 Fed. 455, 459.

²⁶ *Pittsburgh, C., C. & St. L. R. Co. v. Long Island Loan & Trust Co.*, 172 U. S. 493, 511, 43 L. Ed. 528; *Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co.*, 65 Fed. 455; *Western Div. of Western N. C. R. Co. v. Drew*, 3 Woods (U. S.) 691, Fed. Cas. No. 17,434; *Pittsburgh, C., C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 46, 44 N. E. 596.

²⁷ *Long Island Loan & Trust Co. v.*

Columbus, C. & I. C. Ry. Co., 65 Fed. 455; *Pittsburgh, C., C. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596.

²⁸ *Varney v. Curtis*, 213 Mass. 309, L. R. A. 1916 A 629, Ann. Cas. 1914 A 340, 100 N. E. 650.

²⁹ *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197; *Atkinson v. Colorado Title & Trust Co.*, 151 Colo. 528, 151 Pac. 457; *Philadelphia & S. R. R. Co. v. Lewis*, 33 Pa. 33, 75 Am. Dec. 574.

Misapplication or waste of the money received for bonds is not ground for invalidating the bonds. *Robinson v. Dolores No. 2, Land & Canal Co.*, 2 Colo. App. 17, 28, 29 Pac. 750.

³⁰ *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Fox v. Iron Co.*, 17 Leg. Int. (Pa.) 149; *Doty v. Oriental Print Works Co.*, 28 R. I. 372, 67 Atl. 586.

bonds but fails to account to the corporation for the proceeds, the liability of the corporation to the purchaser is not affected by subsequent agreements between the officer and the purchaser whereby the former put up security, where such agreements expressly provided for keeping alive the liability of the corporation.³¹ Moreover, it has been held that even if the holders of bonds had notice that the proceeds of the bonds were to be devoted to a purpose not within the charter powers of the corporation, where not criminal nor against good morals and where the holders did nothing to promote such ultra vires purpose except paying for the bonds, the ultra vires purpose for which the bonds were issued is no defense.³²

§ 1041. Payment. Payment to a prior holder is no defense as against a subsequent bona fide holder, since it is the duty of the corporation to require a surrender of the bond at the time of payment.³³

§ 1042. Estoppel to set up defenses. The corporation may be estopped to set up a defense which otherwise might have been available, by its acts or conduct. Thus, a corporation which has issued bonds may be estopped by its conduct in treating them as valid for years, to deny their validity because of failure to file a certificate at the time of their issuance, as required by statute, showing that the indebtedness of the corporation did not exceed ten per cent. of its preferred stock.³⁴ But where bonds are non-negotiable, the corporation is not estopped from setting up their invalidity for want of a valid delivery, where an officer of the trustee of the mortgage wrongfully obtained possession of the bonds and sold them to persons who made no inquiry as to his right to sell.³⁵

XII. MATURITY, SATISFACTION AND CANCELLATION

§ 1043. General rules. The time when a bond matures is the day fixed therein when the debt is payable, provided of course the bond is payable at a certain time. However, a bond which states it is redeemable in the option of the corporation at any time after a certain date, but otherwise fixes no date for payment of the principal,

³¹ Doty v. Oriental Print Works Co., 28 R. I. 372, 67 Atl. 586.

L. R. A. 743, 43 Am. St. Rep. 209, 16 So. 325.

³² Illinois Trust & Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 343, 49 Pac. 197.

³⁴ Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347.

³³ Trustees of Internal Improvement Fund v. Lewis, 34 Fla. 424, 26

³⁵ Kohn v. Sacramento Electric, Gas & Railroad Co., 168 Cal. 1, 141 Pac. 626.

can never mature against the consent of the corporation.³⁶ Moreover, the bond or mortgage, or both, may provide for an acceleration of the time of payment by defaults in payment of interest instalments or other defaults; and the question which most often arises in connection with such provisions is whether the holder of bonds rather than the trustee may exercise the option of declaring the bonds due, and also whether such provisions make the bond due merely for foreclosure purposes or for all purposes.³⁷

A provision in a mortgage that on "any sale" of the mortgaged property the bonds should become due has been construed to mean a sale under foreclosure.³⁸

No days of grace are allowed either as to interest or principal, it is held in some states.³⁹

The satisfaction of corporate bonds is governed almost entirely by the general rules applicable to all negotiable paper. What constitutes a payment, the place of payment, the medium of payment, etc., are all determined by no rules specially applicable to bonds. By the terms of corporate bonds the registered holder may be deemed to be the owner thereof, and payment need be made to him only.⁴⁰

The authority of the trustee to act for the bondholders is prescribed and limited by the terms of the trust deed, and a payment to the trustee merely as trustee cannot be held to be payment to the bondholders, unless made when and as prescribed by the terms of the deed.⁴¹

Bonds sometimes provide for the issuance of scrip, at the option of the company, as payment of interest.⁴² If the promise to pay bonds is in the alternative, either as to principal or interest, as where it is to pay in money or scrip, the obligor has an option to pay either in the one or the other,⁴³ but if the option is not exercised when the payment becomes due, the bondholders are entitled to payment in money,⁴⁴

³⁶ Union Canal Co. v. Antillo, 4 Watts & S. (Pa.) 553.

³⁷ See § 1063, *infra*.

³⁸ Lisman v. Michigan Peninsular Car Co., 50 N. Y. App. Div. 311, 63 N. Y. Supp. 999.

³⁹ Chaffee v. Middlesex R. Co., 146 Mass. 224, 16 N. E. 34. See also § 1063, *infra*.

⁴⁰ Jennie Clarkson Home for Children v. Chesapeake & O. R. Co., 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348.

⁴¹ Connell v. Kaukauna Gas, Elec-

tric Light & Power Co., — Wis. —, 159 N. W. 927.

⁴² Texas & P. R. Co. v. Marlor, 123 U. S. 687, 699, 31 L. Ed. 303, construing agreement as requiring option to issue scrip to be exercised at the time when the interest was due and not thereafter.

⁴³ Texas & P. Ry. Co. v. Marlor, 123 U. S. 687, 31 L. Ed. 303, *aff'g* 19 Fed. 867.

⁴⁴ Texas & P. Ry. Co. v. Marlor, 123

and the bondholder does not waive his right to demand money merely because he had accepted scrip for past payments.⁴⁵

§ 1044. Payment or purchase. Whether the legal effect of the payment of a bond by the issuing corporation is a payment or a purchase is largely a matter of intention,⁴⁶ the same as in the case of coupons.⁴⁷

Where a corporation reacquires its own bonds, the transaction is not necessarily a payment of the bonds, but may in a proper case be considered as a purchase so as to keep them alive and give the corporation power to reissue them or to have the same rights as other bondholders.⁴⁸ Moreover, it is wholly immaterial whether the corporation pays money upon such a purchase or exchanges other bonds instead.⁴⁹ And even if the corporation should destroy the bonds purchased, and issue duplicates, not intending to extinguish the debt evidenced by the bonds, the lien of the mortgage is not affected by the substitution of the new bonds.⁵⁰ Generally, however, the transaction is considered as a payment.⁵¹ So bonds exchanged for new bonds are generally to be considered as paid and canceled.⁵²

U. S. 687, 31 L. Ed. 303, aff'g 19 Fed. 867.

⁴⁵ *Texas & P. Ry. Co. v. Marlor*, 123 U. S. 687, 31 L. Ed. 303, aff'g 19 Fed. 867.

⁴⁶ See *Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co.*, 181 Fed. 595, aff'd 193 Fed. 963.

⁴⁷ See § 1058, *infra*.

⁴⁸ *Claffin v. South Carolina R. Co.*, 8 Fed. 118; *Knapp v. New York & H. R. Co.*, 15 N. Y. Super. Ct. 297; *Gibbes v. Greenville & C. R. R. Co.*, 15 S. C. 304, when purchase was entered on books as investment and the bonds were for years reported as outstanding. Compare *Shaw v. Saranac Horse-Nail Co.*, 78 Hun (N. Y.) 7, 29 N. Y. Supp. 254.

"There is no principle in the law of corporations or of mortgages which forbids a corporation that has issued a series of mortgage bonds from purchasing part of them back, and reissuing them again before their maturity, when the financial interests

of the corporation will be thereby promoted, unless the organic law of the corporation prohibits the exercise of such a power." *Barry v. Missouri, K. & T. R. Co.*, 34 Fed. 829.

⁴⁹ *Barry v. Missouri, K. & T. Ry. Co.*, 34 Fed. 829.

⁵⁰ *Barry v. Missouri, K. & T. Ry. Co.*, 34 Fed. 829.

⁵¹ *South Covington & C. S. Ry. Co. v. Gest*, 34 Fed. 628; *Routledge, George & Sons*, [1904] 2 Ch. 474. To same effect, *Mississippi Valley Trust Co. v. Washington Northern R. Co.*, 212 Fed. 776.

Effect of consolidation of companies, see *infra*, chapter on Consolidation.

⁵² *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809, 824.

Ordinarily, where a bondholder gives up his bonds and accepts new bonds in lieu thereof, the exchange operates as an extinguishment of the bonds surrendered, where there is no agreement to the contrary. *New York*

It seems that if bonds are pledged by the mortgagor, and thereafter returned to the mortgagor on payment of the debt for which they were pledged, the return vests in the mortgagor no property in such bonds.⁵³

§ 1045. Necessity for demand. Ordinarily no demand is necessary as a condition precedent to the right to recover the amount due on bonds,⁵⁴ and this rule applies equally well to an action to recover interest.⁵⁵ Moreover, it is no defense that the corporation had moneys on hand at the place fixed for payment on the day of maturity,⁵⁶ although such fact, if followed by a payment into court, will preclude the recovery of interest.⁵⁷

If the bank or other custodian with whom the funds are deposited to pay the bonds or coupons subsequently becomes insolvent, the failure to present the bond or coupon while the custodian was solvent is no defense.⁵⁸

If the bonds are payable at the office of the corporation, but at their maturity there is no office of the company at the place, it is sufficient to demand payment elsewhere.⁵⁹

§ 1046. Payment before maturity. A corporation has no right to pay its bonds before maturity, as against objecting bondholders, except in so far as provided for in the bonds or mortgage;⁶⁰ and it

Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co., 102 Fed. 382.

⁵³ *Galena & S. W. R. Co. v. Stahl*, 103 Ill. 67, 71.

⁵⁴ *Security Trust & Safe Deposit Co. v. New Jersey Paper Board & Wall Paper Mfg. Co.*, 57 N. J. Eq. 603, 42 Atl. 746; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62.

⁵⁵ *Texas & P. Ry. Co. v. Marlor*, 123 U. S. 687, 31 L. Ed. 303, aff'g 19 Fed. 867.

"Neither presentment nor demand is a prerequisite to a right of action for the recovery of interest. Neither is necessary when there is a promise to make payment at a specified time. It devolves upon the debtor to prove payment or readiness to pay. There is no distinction in this respect between notes and negotiable bonds."

Marlor v. Texas & P. R. Co., 21 Fed. 383.

⁵⁶ *Adams v. Hackensack Improvement Commission*, 44 N. J. L. 638, 43 Am. Rep. 406.

⁵⁷ *Adams v. Hackensack Improvement Commission*, 44 N. J. L. 638, 43 Am. Rep. 406.

⁵⁸ *Adams v. Hackensack Improvement Commission*, 44 N. J. L. 638, 43 Am. Rep. 406; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62.

⁵⁹ *Alexander v. Atlantic, T. & O. R. Co.*, 67 N. C. 198.

⁶⁰ *Missouri, K. & T. Ry. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309, aff'g 87 Hun (N. Y.) 377, 34 N. Y. Supp. 443; *Lisman v. Michigan Peninsular Car Co.*, 50 N. Y. App. Div. 311, 63 N. Y. Supp. 999.

seems that the legislature cannot compel bondholders to accept payment before maturity.⁶¹

The fact that a sinking fund is provided for and it is provided that the payments therefor should continue until the maturity of the bonds "or for so long a time as will be sufficient to provide a fund large enough to redeem all of said bonds," does not give the mortgage a right to pay off the bonds before maturity, although the sinking fund is sufficient therefor, where the provision for the sinking fund expressly states that the fund is for the payment and "ultimate" redemption of the bonds.⁶² So if the mortgage provides for a sinking fund, and the redemption by such fund of a certain number of bonds each year by lottery, each bondholder has an equity represented by the chance that his bond might not be drawn by lot for redemption until it became payable, especially where the bonds draw a high rate of interest; and the corporation cannot pay the entire sum due into the sinking fund and compel a cancellation of all outstanding bonds before the day of maturity.⁶³

A provision in a mortgage that on "any sale of the property" the bonds shall become due, is to be construed in connection with another provision that the company might at any time redeem the bonds at a certain price above par with interest; and it has been held that the words "any sale of the property" referred to a sale under the terms of the mortgage, so that if the property was sold to the municipality pursuant to the terms of the granting the right of way franchise the bonds must be redeemed not at par but at the stipulated price in case of redemption before maturity.⁶⁴

§ 1047. Sinking funds. The term "sinking fund" merely signifies a fund created for extinguishing or paying a funded debt.⁶⁵ Sinking

⁶¹ *Randolph v. Middleton*, 26 N. J. Eq. 543.

⁶² *Chicago & I. R. Co. v. Pyne*, 30 Fed. 86.

An agreement that a railroad company having a traffic contract with a company which had issued bonds should retain the latter's share of the earnings under the contract and pay them to a trustee to be applied to the redemption of the bonds, where it was agreed that the contract should continue in force thirty years "or for so long a time as will be sufficient to

provide a fund large enough to redeem all of said bonds," does not give the corporation the right to pay off bonds before the expiration of thirty years. *Chicago & I. R. Co. v. Pyne*, 30 Fed. 86.

⁶³ *Missouri, K. & T. Ry. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309.

⁶⁴ *Harnickell v. Omaha Water Co.*, 146 N. Y. App. Div. 693, 131 N. Y. Supp. 489.

⁶⁵ *Chicago & I. R. Co. v. Pyne*, 30 Fed. 86.

funds to pay off bonds are sometimes provided for by statute to be paid from certain revenues,⁶⁶ or by provisions in the bonds themselves or in the accompanying mortgage.⁶⁷ The effect thereof, and the rights of parties, depend on the terms of the sinking fund agreement.⁶⁸

If the bonds provide that the sinking fund is to be invested in certain other bonds, the trustee should not be directed to invest it in still other bonds, without the consent of the bondholders, merely because the bonds specified cannot be purchased except at a premium.⁶⁹

Bonds purchased by the corporation issuing them must, for the purpose of drawing by lot the bonds to be paid annually out of the sinking fund, be considered as still unpaid, so far as the rights of outstanding bondholders to have such bonds included in the lottery are concerned.⁷⁰

Where a mortgage provided that out of the "net annual earnings," if sufficient therefor, a sinking fund of a certain sum should be created, it was held that the "net annual earnings" meant the surplus of earnings after deducting operating and other expenses from gross earnings, and that interest payments otherwise provided for in the peculiar situation out of which the mortgage arose, were not properly

⁶⁶ Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496; *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535, 6 N. E. 534; *Phillips v. Eastern R. Co.*, 138 Mass. 122; *Opinion of the Justices*, 5 Metc. (Mass.) 596, holding that if net income for any one year is not sufficient for the payment, the corporation cannot be required to make up the deficiency from the income of succeeding years.

Construction of Thurman Act, under which twenty-five per cent. of the net earnings of certain railroads were to be paid into the treasury of the United States to liquidate bonds loaned to the company by the government, see *United States v. Central Pac. R. Co.*, 138 U. S. 84, 34 L. Ed. 895; *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289; *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274, rev'g on other grounds 13 Ct. Cl. 401; *Union Pac. Ry. Co. v. United States*, 20 Ct. Cl. 70.

Municipal bonds, see 4 McQuillin, *Municipal Corporations*, § 2345.

⁶⁷ *Fidelity Insurance, Trust & Safe Deposit Co. v. United New Jersey Railroad & Canal Co.*, 36 N. J. Eq. 405, deciding proper mode of investing the fund; *Wilds v. St. Louis, A. & T. H. R. Co.*, 102 N. Y. 410, 7 N. E. 290, aff'g 64 How. Pr. (N. Y.) 418, construing provision in mortgage as requiring corporation to pay interest on bonds bought in by the company, although such bonds were practically extinguished.

⁶⁸ *Brown v. Pennsylvania Canal Co.*, 229 Fed. 444; *Chicago & I. R. Co. v. Pyne*, 30 Fed. 86.

⁶⁹ *Fidelity Insurance, Trust & Safe Deposit Co. v. United New Jersey Railroad & Canal Co.*, 36 N. J. Eq. 405.

⁷⁰ *Missouri, K. & T. Ry. Co. v. Union Trust Co.*, 156 N. Y. 592, 599, 51 N. E. 309. To same effect, *Barry v. Missouri, K. & T. Ry. Co.*, 34 Fed. 829.

chargeable against gross earnings in priority over the annual appropriations to the sinking fund.⁷¹

Where payment of bonds from a sinking fund is sought in equity, the fund being in the hands of the guarantor of the bonds, the questions whether the guaranty was ultra vires and whether the guarantor had power to act as trustee of the fund cannot be considered.⁷²

§ 1048. Collateral security. Where the bonds are secured by stock deposited as collateral, the bondholders cannot ordinarily be deprived of the protection of such security without their consent thereto. But where the right of substituting collateral which will preserve and protect the security of the bonds is given the trustee where he is requested to do so by the company and by the holders of the majority in amount of the outstanding bonds, a court of equity will not enjoin a trustee so requested from substituting collateral which not only does not injure the security of the bonds, but will furnish more adequate protection.⁷³

§ 1049. Cancellation. In a proper case, a corporation may sue in equity to cancel bonds issued by it. Thus, a corporation which has, in violation of a statute, distributed its bonds among its stockholders, without consideration, may sue in equity to cancel the bonds where they have not been transferred.⁷⁴ On the other hand, a corporation cannot, in equity, compel minority bondholders to scale their bonds and accept in place thereof new bonds for a less sum, without additional security.⁷⁵ So a corporation cannot, after receiving the benefits of a void contract pursuant to which bonds were issued, obtain their cancellation in equity on the ground that its agents made the contract without authority, where the corporation itself was a party to the fraud.⁷⁶

Equity will not cancel bonds, at the suit of the corporation, without a return of, or offer to return, the consideration received therefor.⁷⁷

⁷¹ *Pennsylvania Canal Co. v. Brown*, 235 Fed. 669.

⁷² *Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co.*, 116 Fed. 700.

⁷³ *Skelheimer v. Consolidated Tobacco Co. (N. J. Ch.)*, 59 Atl. 363.

⁷⁴ *Gunnison Gas & Water Co. v. Whitaker*, 91 Fed. 191.

Where there has been an unlawful

delivery of bonds, and they are still in the hands of the original holders, a stockholder may have them canceled by a suit in equity. *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899.

⁷⁵ *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114.

⁷⁶ *Lewis v. Meier*, 14 Fed. 311.

⁷⁷ *Wrightsville Hardware Co. v. McElroy*, — Pa. —, 98 Atl. 1052.

Thus, if pledged bonds are void because issued for less than the minimum sum fixed by statute, neither the corporation nor a stockholder can sue to cancel the bonds without a tender of the amount due the pledgee.⁷⁸

XIII. COUPONS

§ 1050. Definition and nature. Coupons are written contracts for the payment of a definite sum of money, on a given day.⁷⁹

As far as corporate bonds are concerned, they are instruments attached to the bonds, representing the instalment of interest due at the various interest periods. They "are, substantially, but copies from the body of the bond in respect to the interest and, as is well known, are given to the holder of the bond for the purpose: first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and second, to enable the holder to realize the interest due, or to become due, by negotiating the coupons to the bearer in business transactions, on whom the duty of collecting them devolves."⁸⁰ It has been said that they are in legal effect promissory notes,⁸¹ although not always considered such, at least for all purposes.⁸² They may be detached before or after maturity; and past due coupons, payable to bearer, when detached from the bonds, are for many purposes independent and separate instruments.⁸³ However, coupons are part of

⁷⁸ *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166, 36 L. R. A. 139; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21.

⁷⁹ *Aurora City v. West*, 74 U. S. 82, 105, 19 L. Ed. 42.

⁸⁰ *The City v. Lamson*, 9 Wall. (U. S.) 477, 483, 19 L. Ed. 725.

⁸¹ *Trustee of Internal Improvement Fund v. Lewis*, 34 Fla. 424, 427, 26 L. R. A. 473, 43 Am. St. Rep. 209, 16 So. 325.

⁸² "Interest warrants, or coupons, * * * when detached from the bonds, have been considered as having many of the qualities of negotiable promissory notes, but we are of opinion that they are not negotiable promissory notes within the meaning of Pub. St., c. 77, § 9. When interest is payable on a note or bond at fixed

times, no grace is allowed. The device of separate, detachable interest warrants payable to bearer, has been adopted for convenience, and courts have invested them, when detached, with many of the qualities of negotiable promissory notes, to carry into effect the intention of the parties apparent on the face of the contract; but they purport to be only promises to pay certain sums of money as interest on the principal obligation. They are not in common speech called 'promissory notes,' nor have they the same history, or in all respects the same characteristics, as promissory notes." *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

⁸³ *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L. R. A. 562, 22 N. E. 155.

a bond, and are affected by its infirmities as well as endowed with its strength, and their character is not changed by detaching them from the bond.⁸⁴ If the coupon is detached, the holder of the coupon becomes equitably the owner of a proportion of the bond.⁸⁵

Coupons always have some relation to the bonds. Thus, it has been said that their force, effect and character may be determined by reference to the bonds; they are secured by the same mortgage, and although unsealed, are specialties like the bonds, and are governed by the same statute of limitations applicable to the bonds; they serve no independent purpose until negotiated or used in some way, and while in the hands of the holder of the bond they remain mere incidents of the bonds, and have no greater or other force or effect than the stipulation for the payment of interest contained in the bonds; and while they are owned and in the possession of the holder of the bonds, it makes no difference whether they are attached to or detached from the bonds.⁸⁶

Interest which has accrued on bonds, in the shape of coupons, where not detached or where detached but still in the hands of the transferor, pass with a transfer of the bond unless expressly reserved.⁸⁷

Matured coupons are to be treated as separable independent promises, and not as interest due upon the bond, in determining the jurisdictional amount involved in an action in a federal court to recover on a bond.⁸⁸

§ 1051. Negotiability. Coupons, where payable to bearer and containing no provisions making them non-negotiable, are negotiable paper,⁸⁹ provided they are not rendered non-negotiable by the terms

This doctrine is carried to the extreme in *Clokey v. Evansville & T. H. R. Co.*, 16 N. Y. App. Div. 304, 44 N. Y. Supp. 631, where it was held that a guaranty of the principle and interest on bonds does not attach to detached coupons in the hands of persons other than holders of the bonds.

⁸⁴ *Hudson Valley R. Co. v. O'Connor*, 95 N. Y. App. Div. 6, 88 N. Y. Supp. 742.

⁸⁵ *Real Estate Trust Co. v. Pennsylvania Sugar Refining Co.*, 237 Pa. 311, 43 L. R. A. (N. S.) 82, 85 Atl. 365.

⁸⁶ *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L. R. A. 562, 22 N. E. 155.

⁸⁷ *Fox v. Hartford & W. H. H. R. Co.*, 70 Conn. 1, 38 Atl. 871; *Hudson Valley R. Co. v. O'Connor*, 95 N. Y. App. Div. 6, 88 N. Y. Supp. 742.

⁸⁸ *Edwards v. Bates County*, 163 U. S. 269, 41 L. Ed. 155, where bond involved was a municipal bond but rule is same as to bond of private corporation.

⁸⁹ *United States. Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

Connecticut. Fox v. Hartford & W. H. H. R. Co., 70 Conn. 1, 38 Atl. 871.

Florida. Trustee of Internal Improvement Fund v. Lewis, 34 Fla. 424, 26 L. R. A. 743, 43 Am. St. Rep. 209, 16 So. 325.

of the bond or mortgage. If the bond is negotiable, the attached coupons are negotiable.⁹⁰ However, if detached, then, like promissory notes, they are not negotiable unless they contain words necessary to negotiability of notes nor where they contain provisions making notes non-negotiable; and in states where the Negotiable Instruments Law has been enacted they are not negotiable unless in compliance therewith. To illustrate: Independently of statute, coupons are not negotiable where not made payable to bearer or order,⁹¹ except perhaps where they are still attached to the bond and the bond is payable to bearer.

Coupons termed "interest warrants" are not negotiable, when detached, where they are not payable to any person by name, or his order, or to the bearer, or to the order of a fictitious person.⁹² It follows that coupons are not necessarily negotiable, where detached, merely because the bonds are themselves negotiable.⁹³ Furthermore, if coupons refer to the bonds and mortgage, and the bonds refer to the mortgage for terms and conditions, and provisions in the mortgage make the time of payment of the coupons subject to a contingency over which the holder has no control, and which might postpone their payment indefinitely, the coupons are not negotiable.⁹⁴ On the other hand, the fact that coupons are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bond,⁹⁵ nor impair the title of one purchasing from another without production of the bond.⁹⁶

The question as to who are bona fide holders of coupons is governed by the same rules applicable to holders of negotiable bills and notes; and the rules already stated in regard to who are bona fide holders of bonds are applicable, except in so far as the nature of the instru-

Mississippi. *Lampton v. Edwards* (Miss.), 54 So. 245.

New York. *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 475, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

Rhode Island. *National Exch. Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375, 91 Am. Dec. 237.

Vermont. *First Nat. Bank of North Bennington v. Town of Mount Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

⁹⁰ *Greene v. Minzesheimer* (N. Y. App. Div.), 110 N. Y. Supp. 429.

⁹¹ *Augusta Bank v. Augusta*, 49 Me.

507; *Jackson v. York & C. R. Co.*, 48 Me. 147; *Myers v. York & C. R. Co.*, 43 Me. 232; *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9.

⁹² *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9.

⁹³ *Evertson v. National Bank of Newport*, 66 N. Y. 14, 23 Am. Rep. 9.

⁹⁴ *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 475, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

⁹⁵ *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9.

⁹⁶ *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9.

ment requires a different rule.⁹⁷ Thus if coupons are overdue when transferred the transferee is not a bona fide holder.⁹⁸ So a reference in coupons to the mortgage and bonds charges the holders with notice of the provisions contained in each of such instruments.⁹⁹

A bona fide holder takes coupons free from prior equities between the parties.¹

§ 1052. Rights as covered by mortgage. A coupon is part of the debt covered by the mortgage which secures its bonds; and when a coupon is detached from the bond and is owned by one person while another owns the bond, the coupon is still a lien under the mortgage.²

Matured coupons are "a constituent part of the mortgage debt, and an assignment of them carries with it by implication an interest in the mortgage security."³ However coupons detached prior to the certification of the bonds by the trustee and their sale and delivery do not come within the protection of the mortgage lien, and the holder is not entitled to payment out of the proceeds of the sale of the property.⁴ So where coupons are detached before the bonds are issued and sold, and the coupons are transferred as separate instruments to persons other than those who purchased the bonds, they are not secured by the mortgage.⁵

§ 1053. Transfer. Coupons are ordinarily payable to bearer. In such case, if otherwise negotiable, they are transferable by delivery, although detached from the bond.⁶ Of course, like other negotiable

⁹⁷ The same rules of commercial law apply to interest coupons as are applied to all other negotiable instruments. *Lampton v. Edwards* (Miss.), 54 So. 245.

⁹⁸ *Lampton v. Edwards* (Miss.), 54 So. 245.

⁹⁹ *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

¹ *Lexington v. Butler*, 14 Wall. (U. S.) 282, 20 L. Ed. 809.

² *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y. 311, 20 Am. Rep. 541; *Long Island Loan & Trust Co. v. Long Island City & N. R. Co.*, 85 N. Y. App. Div. 36, 82 N. Y. Supp. 644; *Miller v. Rutland & W. R. Co.*, 40 Vt. 399, 401, 94 Am. Dec. 413.

³ *Sewell v. Brainerd*, 38 Vt. 364, 372.

⁴ *Holland Trust Co. v. Thomson-Houston Elec. Co.*, 170 N. Y. 68, 62 N. E. 1090, aff'g 62 N. Y. App. Div. 299, 71 N. Y. Supp. 51.

⁵ *Klein v. East River Elec. Light Co.*, 182 N. Y. 27, 34, 74 N. E. 495.

⁶ *Ketchum v. Duncan*, 96 U. S. 659, 662, 24 L. Ed. 868; *Lexington v. Butler*, 14 Wall. (U. S.) 282, 20 L. Ed. 809; *Fox v. Hartford & W. H. H. R. Co.*, 70 Conn. 1, 10, 38 Atl. 871; *Trustee of Internal Improvement Fund v. Lewis*, 34 Fla. 424, 427, 26 L. R. A. 743, 43 Am. St. Rep. 209, 16 So. 325; *Haven v. Grand Junct. R. & D. Co.*, 109 Mass. 88, 96.

instruments, if payable to a certain person or order, they cannot be transferred so as to make the holder a bona fide holder except by indorsement.

§ 1054. Maturity. The time when coupons are payable is generally expressly stated on their face. Sometimes, however, references therein to the bond or mortgage fix the time of payment or add provisions in regard thereto.

If an extension of the time of payment of interest is authorized by the express terms of the bonds and mortgage, by a majority of the bondholders, such an extension is valid only when it is authorized at the time and in the manner provided for in the bonds and mortgage.⁷

Days of grace are now abolished in nearly all the states either by the Negotiable Instruments Law or by other statutes. Prior to such statutes there was some conflict of opinion as to whether coupons were entitled to days of grace.⁸

§ 1055. Rate of interest and provisions relating thereto. In many states usury laws do not apply to bonds, and hence any rate of interest which the corporation may fix is lawful.⁹ However, if usury statutes are applicable, then of course the rate of interest must not exceed the maximum rate fixed by the statute.

Where interest coupons call for interest at a certain rate when declared to be earned and due as provided in the accompanying mortgage, such coupons do not draw interest until there is a default in payment according to the terms of the mortgage.¹⁰

§ 1056. Interest on past due coupons. The general rule is that interest coupons, attached to or detached from bonds, bear interest after maturity,¹¹ at least after demand made for their payment; but

⁷ *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237, holding that defaults in payment of interest could not be waived in advance of the defaults.

⁸ See in the affirmative, *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9. Contra, *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

⁹ *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

¹⁰ *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

¹¹ *United States*. *Aurora City v. West*, 74 U. S. 82, 105, 19 L. Ed. 42. *Connecticut*. *Fox v. Hartford & W. H. H. R. Co.*, 70 Conn. 1, 11, 38 Atl. 871.

Pennsylvania. *Rea v. Pennsylvania Canal Co.*, 249 Pa. 239, 94 Atl. 833.

South Carolina. *Rice v. Shealey*, 71 S. C. 161, 169, 50 S. E. 868.

Virginia. *Gibert v. Washington City, V. M. & G. S. R. Co.*, 33 Gratt. (Va.) 586.

"Being written contracts for the payment of money, and negotiable because payable to bearer, and pass-

there is some dispute whether the interest recoverable after maturity is the legal rate or the rate fixed by the coupons as the rate before maturity.¹²

So far as the necessity for presenting coupons for payment to start the running of interest is concerned, the better and prevailing rule is that while the failure to present coupons for payment does not prevent the running of interest, yet if the corporation shows that it had money ready to pay the coupons at the time and place where they were payable, interest cannot be recovered.¹³

If a demand is necessary, it should be made at the place where the coupons are payable.¹⁴ Demand for payment of interest may be made by the holder of the coupon, without any action of the trustee in the trust deed.¹⁵

§ 1057. Payment—In general. Payment of the bonds from which coupons had been previously detached does not extinguish the coupons.¹⁶

The severing of coupons from the bonds at the time of transfer may, in a proper case, be considered as a cancellation of them.¹⁷ But

ing from hand to hand, as other negotiable instruments, it is quite apparent on general principles that they should draw interest after payment of the principal is unjustly neglected or refused." *Aurora City v. West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42.

In New York, however, interest is not collectible upon past due coupons while they remain in the hands of the holder of the bonds, but is allowable where they have been detached and become separate and independent instruments in the hands of one other than the holder of the bonds. *Williamsburgh Sav. Bank v. Town of Solon*, 136 N. Y. 465, 32 N. E. 1058; *Long Island Loan & Trust Co. v. Long Island City & N. R. Co.*, 85 N. Y. App. Div. 36, 82 N. Y. Supp. 644; *Clokey v. Evansville & T. H. R. Co.*, 16 N. Y. App. Div. 304, 44 N. Y. Supp. 631; *Klein v. East River Elec. Light Co.*, 33 N. Y. Misc. 596, 67 N. Y. Supp. 922.

In New Jersey, compound interest will not be allowed on coupon bonds.

West End Trust Co. v. Wetherill, 77 N. J. Eq. 590, 78 Atl. 756.

¹² See *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 94 Fed. 454.

¹³ *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526 (municipal bond); *H. Abraham & Son v. New Orleans Brewing Ass'n*, 110 La. 1012, 35 So. 268.

As to whether a demand is necessary, there is considerable conflict in the decisions. However, the question is a much wider one than the law relating to bonds, and reference should be made to digests and textbooks relating to interest and commercial paper.

¹⁴ *Taber v. Cincinnati, L. & C. Ry. Co.*, 15 Ind. 459, 463.

¹⁵ *Taber v. Cincinnati L. & C. Ry. Co.*, 15 Ind. 459, 463.

¹⁶ *National Exch. Bank v. Hartford P. & F. R. Co.*, 8 R. I. 375, 91 Am. Dec. 237.

¹⁷ *Chicago & G. T. Ry. Co. v. Turner*, 79 Mich. 133, 151, 44 N. W. 174.

if bonds are pledged as security, after detaching overdue coupons, there is no presumption of payment or cancellation of the detached coupons, and hence the pledgor may participate in the proceeds of the foreclosure sale; and this is so even where the pledgor owned nearly all of the stock of the corporation.¹⁸

Where a mortgage directs the trustee to apply moneys arising from the sale of lands to the payment of interest coupons, the trustee is authorized to purchase therewith overdue coupons which have been deposited with the trustee and scrip issued therefor to the holders, notwithstanding the scrip contract deferred the compulsory payment of the coupons for ten years.¹⁹

§ 1058. — Payment or purchase. It is sometimes difficult to determine whether coupons are paid or purchased, and the question often becomes important where the mortgaged property of the corporation is insufficient to pay the bonds and subsequently maturing coupons.²⁰

Whether there is a purchase or payment of coupon is generally a question of fact, dependent upon the intention of the parties, at least where the person paying the coupons is not the debtor or one acting as its agent.²¹ If the money is paid directly by the corporation (the debtor) or its agent, then the presumption is that there was payment rather than a purchase.²² Furthermore, it is generally immaterial that the money to make the payment was furnished by a third person to the corporation. Thus, the general rule is that where a third person advances money to a corporation to pay off coupons, and the holders of the bonds who present the coupons for payment believe that the corporation is paying and not purchasing the coupons, there is a payment rather than a purchase, although it is agreed between the corporation and the person advancing the money that he is to

¹⁸ "Unless he saw fit to cancel this claim of interest against the corporation, * * * his ownership of most of the stock of the corporation will not raise a presumption that he intended to forego his right to demand payment of the coupons retained by him when he pledged the bonds from which they were detached." *Rhawn v. Edge Hill Furnace Co.*, 201 Pa. 637, 51 Atl. 360.

¹⁹ *Little Rock & F. S. R. Co. v. Huntington*, 120 U. S. 160, 30 L. Ed. 591.

²⁰ See *Lloyd v. Wagner*, 93 Ky. 644, 21 S. W. 334.

²¹ *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 416, 424, 32 L. Ed. 472; *Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co.*, 193 Fed. 963; *Morton Trust Co. v. Home Tel. Co.*, 66 N. J. Eq. 106, 57 Atl. 1020.

²² *United Water Works Co. v. Farmers' Loan & Trust Co.*, 82 Fed. 144, 11 Colo. App. 225, 240, 53 Pac. 511.

hold the coupons as collateral security, where the bondholders are ignorant of such agreement.²³ In other words, where a third person advances money to the corporation to pay off coupons, under an agreement with the corporation that the coupons shall be kept alive for his benefit, such agreement is binding on the corporation but is wholly ineffective as against bondholders who delivered them to the corporation for payment and who supposed they were paid.²⁴ Thus, where a person advanced money to a corporation to pay interest coupons, such coupons having preference over the bonds by the terms of the mortgage, under an agreement that he should hold such coupons as security for the advances, but there was nothing to indicate to the bondholders presenting the coupons for payment that they were being purchased instead of being paid, the bondholders are entitled to all the proceeds of the mortgaged property on a foreclosure sale, as against the person advancing such moneys, and the bondholders hold their bonds discharged from the lien of the coupons.²⁵ However, it has been held that where an officer of a corporation financially embarrassed advances money to pay coupons on its bonds, under an agreement that he is to hold the coupons as a subsisting obligation, he is entitled to enforce such coupons as against one who subsequently bought bonds under the belief that the corporation had paid such coupons on maturity, where there were sufficient assets to pay all other creditors first.²⁶

Where the person making the payment is not the agent of the debtor corporation, the question is largely one of intent, although

²³ *South Covington & C. S. Ry. Co. v. Gest*, 34 Fed. 628; *Cameron v. Tome*, 64 Md. 507, 2 Atl. 837.

Rule applied where the corporation issuing the bonds sent to the trust company at whose office the coupons were payable, a sum less than the whole amount of maturing coupons, and a third person agreed with the trust company, without the knowledge of the holder of the coupons, that it should buy for him any coupons which it had no funds to pay, and the coupon holders supposed the coupons were all paid and not purchased. *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881.

As against other bondholders, a corporation cannot agree with a third

person furnishing the money to pay off coupons that such coupons should be treated as unpaid and the third person considered an original holder with the right to share equally in the proceeds of the sale of the mortgaged property. *Fidelity Insurance, Trust & Safe-Deposit Co. v. Western Pennsylvania & S. C. R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911, 21 Atl. 21.

²⁴ *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y. 311, 20 Am. Rep. 541.

²⁵ *Morton Trust Co. v. Home Tel. Co. of Trenton*, New Jersey, 66 N. J. Eq. 106, 57 Atl. 1020.

²⁶ *Haven v. Grand Junct. Railroad & Depot Co.*, 109 Mass. 88.

ordinarily the presumption is in favor of a purchase rather than payment. Thus, where coupons are paid by a bank which is not the debtor, and not in the usual manner or at the usual place or by the persons accustomed to pay them, there is a purchase rather than a payment, and the intent to sell will be inferred.²⁷ However, where the person paying the coupons owned practically all the stock of the corporation, and he canceled the coupons either by having the word "paid" written across them or otherwise, it has been held that, as a question of fact as to the intention of the parties it was properly found that there was a payment rather than a purchase.²⁸ So where coupons were cashed by a banker who was interested in maintaining the credit of the corporation, and the holders received the money under the belief that the coupons were being paid, it was held that there was payment rather than a purchase.²⁹

Where a sale, compared with payment, is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved; but the intent to sell, or the assent of the former owner to a sale need not be expressly given out but may be inferred from the circumstances of the transaction.³⁰

Where a corporation indorses on the bonds of another corporation an agreement, in case of default in payment of coupons by the obligor, to "purchase" the coupons at their par value, and it does so for many years, the coupons are not paid so as to be extinguished, but are entitled to share in the proceeds of a sale of the mortgaged property.³¹

Of course, in any case, if there is an intent on the part of the holders to sell rather than to accept payment, the purchaser is entitled to hold the coupons as existing obligations and participate in the fund.³²

²⁷ *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868. To same effect, where bond was that of an individual, see *Champion v. Investment Co.*, 45 Kan. 103, 106, 10 L. R. A. 754, 25 Pac. 590.

²⁸ *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 416, 424, 32 L. Ed. 472.

²⁹ *Venner v. Farmers' Loan & Trust Co. of New York*, 90 Fed. 348.

³⁰ *Ketchum v. Duncan*, 96 U. S. 659,

662, 24 L. Ed. 868, followed in *Venner v. Farmers' Loan & Trust Co. of New York*, 90 Fed. 348.

³¹ *Rea v. Pennsylvania Canal Co.*, 245 Pa. 589, 91 Atl. 1053.

³² *Union Trust Co. of Lancaster, Pennsylvania v. Berwick Consol. Gas Co.*, 196 Fed. 511, where coupons were paid by president of the company but with knowledge of the holders that the corporation did not furnish the money. *Duncan v. Mobile & O. R.*

Where the trustee of the mortgage owned two-thirds of the bonds, and it delivered the due coupons on all the bonds to the president of the mortgagor on payment of the amount due thereon, but the trustee knew that the president was not paying out of corporate funds, there was a purchase rather than a payment.³³

If the mortgagor corporation furnishes its fiscal agent with sufficient money to pay coupons, but he misapplies it to the payment of a subsequent lien, he cannot enforce such coupons, afterwards acquired, to the prejudice of bondholders.³⁴

§ 1059. Actions on coupons—General rules. The holder of detached coupons may sue thereon unless the provisions of the mortgage exclude the right in express terms or by necessary implication.³⁵ The right to sue upon coupons may be taken away, however, by provisions in the bonds authorizing an extension of the time of payment of interest by the holders of a majority of the bonds,³⁶ but where there is nothing in the mortgage to the contrary, dissenting bondholders may sue upon coupons although a majority of the bondholders have agreed to waive the payment of interest for a certain number of years and to accept in place thereof scrip certificates.³⁷

Coupons may be sued upon by the holder without the production of the bonds.³⁸ However, while an action may be maintained upon coupons without the production of the bond, the recovery must be based upon the obligation contained in the bond, where referred to in the coupon, and no recovery can be had contrary to the agreement therein expressed.³⁹ If the coupons refer to the bond by its serial number, and the bond refers to the mortgage as to the rights of the holder of the bonds, the conditions prescribed in the mortgage govern the right to sue on the coupons.⁴⁰ If the coupon is detached, it is no defense that the bond itself has been paid.⁴¹

Co., 8 Fed. Cas. 19, aff'd 96 U. S. 659, 24 L. Ed. 868.

³³ Union Trust Co. of Lancaster, Pennsylvania v. Berwick Consol. Gas Co., 196 Fed. 511.

³⁴ Farmers' Loan & Trust Co. v. New England Waterworks Co., 137 Fed. 729.

³⁵ Manning v. Norfolk Southern R. Co., 29 Fed. 838; Fleming v. Fairmont & M. R. Co., 72 W. Va. 835, 49 L. R. A. (N. S.) 155, Ann. Cas. 1915 D 978, 79 S. E. 826.

³⁶ McClelland v. Norfolk Southern

R. Co., 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

³⁷ Manning v. Norfolk Southern R. Co., 29 Fed. 838.

³⁸ Bailey v. Buchanan County, 115 N. Y. 297, 6 L. R. A. 562, 22 N. E. 155.

³⁹ McClelland v. Norfolk Southern R. Co., 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397, 18 N. E. 237.

⁴⁰ St. Louis-Carterville Coal Co. v. Southern Coal & Mining Co., — Mo. App. —, 186 S. W. 1152.

⁴¹ See § 1057, *supra*.

If the coupons are payable at a particular place, failure to demand payment at that place is no defense, unless it is shown that the debtor had a fund on hand at such place at maturity for the purpose of paying coupons.⁴²

However, execution on a judgment obtained in such an action is not leviable on property covered by the mortgage.⁴³

§ 1060. — Time to sue. The general rule is that a suit upon coupons is not barred by limitations unless the time elapsed is sufficient to bar a suit upon the bond.⁴⁴ In other words, the period of limitation applicable to actions on instruments under seal applies rather than the period applicable to simple contract obligations. However, limitations begin to run from the time of the maturity of detached coupons rather than the maturity of the bonds.⁴⁵

Overdue interest on bonds, as represented by negotiable coupons, cannot be recovered in an action on the bonds, where an independent suit on the coupons is barred by limitations.⁴⁶

XIV. RIGHTS AND REMEDIES OF BONDHOLDERS

§ 1061. In general. Leaving for a subsequent chapter questions relating to the rights and remedies of bondholders so far as the mortgaged property or the trustee of the mortgage is concerned,⁴⁷ it is necessary to consider in this connection the rights and remedies of bondholders, independently of the mortgaged security. Of course, in case of negotiable corporate bonds, the rights of a holder are the same as those of the holder of a negotiable bill or note.⁴⁸ If there is no mortgage, and the bonds themselves provide for no lien, the holders have no lien on the corporate assets.⁴⁹

⁴² Philadelphia & B. C. R. Co. v. Johnson, 54 Pa. St. 127.

⁴³ Fleming v. Fairmont & M. R. Co., 72 W. Va. 835, 49 L. R. A. (N. S.) 155, Ann. Cas. 1915 D 978, 79 S. E. 826.

⁴⁴ Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. Ed. 809; The City v. Lamson, 9 Wall. (U. S.) 477, 483, 19 L. Ed. 725; Kelly v. Forty-Second St., M. & St. N. Ave. R. Co., 37 N. Y. App. Div. 500, 508, 55 N. Y. Supp. 1096.

⁴⁵ Clark v. Iowa City, 20 Wall. (U. S.) 583, 20 L. Ed. 427; California Safe Deposit & Trust Co. v. Sierra Valleys R. Co., 158 Cal. 690, Ann. Cas. 1912 A

729, 112 Pac. 274. Explaining Meyer v. Porter, 65 Cal. 67, 2 Pac. 884.

Contra, see First Nat. Bank of Greeley v. Park, 37 Colo. 303, 86 Pac. 106; Walu v. Huntingdon & B. T. R. Co., 16 Phila. (Pa.) 21, 40 Leg. Int. (Pa.) 190.

⁴⁶ Griffin v. Macon County, 36 Fed. 885, 2 L. R. A. 353.

⁴⁷ Infra, chapter on Mortgages.

⁴⁸ Hibbs v. Brown, 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353.

⁴⁹ The holders of debenture bonds ordinarily have no lien on the corporate assets, where no such lien has been created by agreement. Falmouth

The rights of bondholders are determinable by the law of the state where the bonds were executed, delivered and made payable.⁵⁰

A purchaser of bonds from the corporation under the agreement that no more than a certain amount of such bonds should be issued for each completed mile of railroad, obtains rights which inure to the benefit of all in privity with him, such as persons to whom he sells his bonds.⁵¹

Unless otherwise provided by statute, bondholders cannot vote at stockholders' meetings;⁵² and a provision in the bonds or a by-law authorizing them to vote is invalid where constitutional and statutory provisions require the directors to be elected at an annual meeting of the stockholders by a majority in value of the stock.⁵³

A general creditor, as well as a bond creditor, may attack the illegality of a bond issue.⁵⁴

Bondholders sometimes, by mutual agreement, deposit all their bonds with a trustee, in order to aid the issuing corporation, in which case, of course, the powers of the trustee and the rights of the bondholders in connection therewith, depend on the terms of the agreement.⁵⁵

The rights of bondholders, in connection with reorganization schemes, is treated of in a subsequent volume.⁵⁶

§ 1062. Right to sue on bonds or coupons—General rule. As corporate bonds are negotiable, the holder may sue on them,⁵⁷ but one not the holder of negotiable bonds cannot sue thereon.⁵⁸

The bond is the principal debt while the mortgage is the incidental security. Remedies peculiar to each exist, both in law and equity, but they do not clash and destroy each other. They co-exist.⁵⁹

Nat. Bank v. Cape Cod Ship Canal Co., 166 Mass. 550, 44 N. E. 617.

⁵⁰ *Doty v. Oriental Print Works Co.*, 28 R. I. 372, 67 Atl. 586.

⁵¹ *Union Trust Co. of New York v. Nevada & O. R. Co.*, 20 Fed. 80.

⁵² See chapter on Meetings and Elections, *infra*.

⁵³ *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626, *aff'd* 53 Ill. App. 396.

⁵⁴ *Keystone Nat. Bank v. Palos Coal & Coke Co.*, 150 Ala. 245, 43 So. 570.

⁵⁵ See *Mabie v. Seymour*, 80 N. Y. Misc. 280, 140 N. Y. Supp. 1097, where agreement set forth in full.

⁵⁶ *Infra*, chapter on Reorganization.

⁵⁷ *Stegmaier v. Keystone Coal Co.*, 225 Pa. 221, 74 Atl. 58.

⁵⁸ *Lloyd v. Imperial Mach. Stamping & Welding Co.*, 224 Mass. 574, 113 N. E. 456, where owner of bonds had been deprived of their possession by fraud of stockholder.

⁵⁹ *Philadelphia & B. C. R. Co. v. Johnson*, 54 Pa. St. 127.

The common-law right to sue upon a bond or coupons is not affected by the remedies provided in the mortgage unless the provisions of the mortgage exclude this right in express terms or by necessary implication.⁶⁰ Thus, the fact that a mortgage securing bonds provides for a sale only on request of the holders of a certain amount in value of bonds does not bar an action, by holders of a less amount, on the bonds after condition broken.⁶¹ So a clause in a mortgage providing that "no one or more holders of bonds or coupons shall have the right, in any manner whatever, to affect, disturb, or prejudice the lien of this mortgage by his or their action, except in the manner herein provided," merely relates to judicial proceedings for the appointment of a receiver or the foreclosure of the mortgage and does not preclude an action by a bondholder to recover the amount of his bond nor an action on unpaid coupons.⁶² Furthermore, provisions in the mortgage making the remedy by the trustee thereunder exclusive are strictly construed against barring other remedies,⁶³ and cannot avail to deprive a court of chancery of its jurisdiction to supervise the conduct of the trustee in the execution of his trust.⁶⁴

One bondholder may sue for interest due although the principal is not due and although the mortgage provides that, upon default in payment of interest, the trustees shall, on the request of the holders of a certain amount of bonds, proceed, in a specified way, to collect principal and interest for the equal benefit of all the stockholders.⁶⁵ On the other hand, if the mortgage provides another exclusive remedy, a single bondholder cannot sue at law on his bonds, as for instance where the mortgage provides that no action "in equity or at law, upon any of the bonds or coupons hereby secured, or for the foreclosure of this indenture" shall be brought without first giving notice to the trustee and his failure to act, and not unless a majority in amount of the bonds give such notice.⁶⁶

⁶⁰ *Manning v. Norfolk Southern R. Co.*, 29 Fed. 838; *Mt. Sterling Water, Light & Ice Co. v. First Nat. Bank of Wyalusing, Pennsylvania*, 147 Ky. 376, 144 S. W. 370; *Fleming v. Fairmont & M. R. Co.*, 72 W. Va. 835, 49 L. R. A. (N. S.) 155, Ann. Cas. 1915 D 978, 79 S. E. 826. See also *Reinhardt v. Interstate Teleph. (N. J. Ch.)* 63 Atl. 1097. But see, as contra, *Roberts v. Denver, L. & G. R. Co.*, 8 Colo. App. 504, 513, 46 Pac. 880.

⁶¹ *Philadelphia & B. Cent. R. Co. v. Johnson*, 54 Pa. St. 127.

⁶² *Fleming v. Fairmont & M. R. Co.*, 72 W. Va. 835, 49 L. R. A. (N. S.) 155, Ann. Cas. 1915 D 978, 79 S. E. 826.

⁶³ *Mack v. American Elec. Tel. Co.*, 79 N. J. L. 109, 74 Atl. 263; *Reinhardt v. Interstate Tel. Co. (N. J. Ch.)*, 63 Atl. 1097; *Rothschild v. Rio Grande Western Ry. Co.*, 84 Hun (N. Y.) 103, 32 N. Y. Supp. 37.

⁶⁴ *Reinhardt v. Interstate Tel. Co. (N. J. Ch.)*, 63 Atl. 1097.

⁶⁵ *Montgomery County Agr. Society v. Francis*, 103 Pa. St. 378.

⁶⁶ *Belleville Sav. Bank v. Southern*

The right to enforce bonds may be lost by laches,⁶⁷ or the holder may be estopped by his conduct to enforce them.⁶⁸

Where the trustee has brought a foreclosure suit in which a decree was entered, an independent action by a bondholder upon his bond cannot be maintained, where forbidden in effect by the mortgage and for the reason that the decree is *res judicata*.⁶⁹ And a deficiency judgment obtained by the trustee in a foreclosure suit, where authorized by the deed of trust, bars an action by individual bondholders to recover the amounts unpaid on their bonds.⁷⁰

§ 1063. — Scope of provisions accelerating maturity. The right of a bondholder to sue on bonds accrues on their maturity, but provisions in the mortgage as to the effect of defaults in payment of interest or the like may accelerate the maturity of the debt not only for the purposes of sale or foreclosure by the trustee but also so far as the right of individual bondholders to sue is concerned. Of course, primarily, the solution of this question depends on the wording of the mortgage or deed of trust. Its language may be such that it is plain that the provisions relate only to remedies instituted by the trustee. Very often, however, it is not clear from the words used, just what the parties intended in this respect. Sometimes, there is a mere option to declare the debt due upon a default, while in other mortgages the provision is self-executing.

There seems to be some question whether such provisions in the mortgage, even if so worded as to cover individual actions by bondholders, are binding in favor of or against the rights of individual holders of the bonds, where the provisions are not contained in the bonds themselves.

In some states, the test is whether the bonds refer to the mortgage.⁷¹

Coal & Mining Co., 173 Ill. App. 250, criticising *Manning v. Norfolk Southern R. Co.*, 29 Fed. 838, and following *Boley v. Lake St. El. R. Co.*, 64 Ill. App. 305; *Muren v. Southern Coal & Mining Co.*, 177 Mo. App. 600, 160 S. W. 835.

⁶⁷*New Paddock-Hawley Co. v. Fayetteville Wagon Wood & Lumber Co.*, 207 Fed. 786.

⁶⁸*New Paddock-Hawley Co. v. Fayetteville Wagon Wood & Lumber Co.*, 207 Fed. 786.

⁶⁹*Watson v. Chicago, R. I. & P. R. Co.*, 169 N. Y. App. Div. 663, 155 N. Y.

Supp. 808, aff'g 90 N. Y. Misc. 388, 153 N. Y. Supp. 293.

⁷⁰*Grant v. Winona & S. W. Ry. Co.*, 85 Minn. 422, 89 N. W. 60.

⁷¹"The authorities seem to rule that, if the terms of the mortgage are not called into it through apt reference as by reciting that it is subject thereto or other equivalent words, the bond may not be declared due and thus rendered suable by a mere provision in the mortgage alone to that effect; that is, the bonds are not due for all purposes." *Brinsmade v. Johnson*, 192 Mo. App. 684, 179 S. W. 967.

In Alabama, it has been held that provisions in a mortgage maturing the debt on nonpayment of interest relate not only to foreclosure proceedings but also authorizes an action at law on the secured obligation, on such default.⁷² However, there is authority to the contrary.⁷³ Thus, in Rhode Island, it is held that the terms of the mortgage cannot be imported into the bonds so as to give bondholders a right of action for the principal thereof before maturity, where the bonds do not make the terms of the mortgage a part of the contract but merely recite that they are secured by a mortgage; and that a clause in the mortgage providing that in case of default in payment of interest, one-third of the bondholders may require the trustee to sell the property, and that the bonds shall forthwith become due and payable upon the default, is to be construed as a provision only for the purposes of foreclosure by entry or sale, and as not intended to give independent bondholders a right of action, upon default, independently of foreclosure proceedings.⁷⁴ So failure to pay interest, although by the terms of the trust agreement, it gives the "trustee" power to declare the principal due, does not confer any such power on the holder of bonds.⁷⁵

However, a bondholder cannot recover the principal of his bonds, on a default in interest, merely because the bonds provide that in case of such default "in the manner provided in the trust deed and mortgage hereinafter mentioned," then the principal shall become due "in the manner and with the effect provided in the said trust deed or mortgage," where the mortgage merely provides that, on such a default, the trustee, upon the request of a majority of the bondholders, shall "proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale * * *."⁷⁶

⁷² *Chambers v. Marks*, 93 Ala. 412, 9 So. 74 (case of mortgage given by individual to secure promissory notes).

⁷³ *Mallory v. West Shore H. R. R. Co.*, 35 N. Y. Super. Ct. 174; *McClelland v. Bishop*, 42 Ohio St. 113.

⁷⁴ *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 29 L. R. A. 103, 61 Am. St. Rep. 746, 32 Atl. 305.

⁷⁵ "If one-third in amount of the bondholders is required for a sale, out of the proceeds of which the principal is to be paid, it would be quite incom-

patible with this limitation to hold that a single bondholder could precipitate the maturity of the bonds by a suit." *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 155, 29 L. R. A. 103, 61 Am. St. Rep. 746, 32 Atl. 305.

⁷⁶ *Watson v. Chicago, R. I. & P. R. Co.*, 90 N. Y. Misc. 388, 153 N. Y. Supp. 293.

⁷⁷ *Batchelder v. Council Grove Water Co.*, 131 N. Y. 42, 29 N. E. 801, aff'g 59 N. Y. Super. Ct. 262.

§ 1064. Suit to set aside ultra vires act. Bondholders are not authorized to act as "guardians for the public or the parties" in having an alleged ultra vires contract set aside.⁷⁷

§ 1065. Amount of recovery. If the holder is a bona fide purchaser, he is entitled to recover the face value of the bonds without regard to the amount paid for them by him.⁷⁸ So, unless fraud is shown, or some unjust advantage taken, the officers of a corporation may buy its bonds from third persons at their market value, although less than par, and enforce them at their par value.⁷⁹ On the other hand, purchasers of bonds with knowledge of their illegality cannot, in any event, recover more than the amount paid therefor.⁸⁰

If the holder is not a bona fide holder, the recovery thereon is limited to the amount paid for the bond, with interest.⁸¹

Of course if a corporation pledges its own bonds, the pledgee cannot recover from the company more than the amount secured by the pledge.⁸²

The petition of bondholders intervening in a foreclosure of a mortgage to secure bonds that amounts due by certain bondholders who are also holders of unpaid stock be set off against the bonds held by such delinquent holders of stock will not be allowed.⁸³

§ 1066. Obtaining return of bonds. If the bonds are legally issued but are illegally disposed of by corporate officers without considera-

⁷⁷ *Weed v. Gainesville, J. & S. R. Co.*, 119 Ga. 576, 590, 46 S. E. 885.

⁷⁸ *Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 344, 37 L. Ed. 755.

⁷⁹ *Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co.*, 69 N. J. Eq. 718, 61 Atl. 529.

⁸⁰ *Shellenberger v. Altoona & P. Connecting R. Co.*, 212 Pa. 413, 108 Am. St. Rep. 876, 61 Atl. 1000.

⁸¹ *Shellenberger v. Altoona & P. Connecting R. Co.*, 212 Pa. 413, 108 Am. St. Rep. 876, 61 Atl. 1000.

⁸² *Jesup v. City Bank*, 14 Wis. 331, 340.

⁸³ *Fidelity Trust Co. v. Washington-Oregon Corporation*, 217 Fed. 588. In this case the court said: "It was held by this court in *Mississippi Valley Trust Co. v. Washington N. R. Co.* (D. C.) 212 Fed. 776, that: 'Where the

proceeds of corporate mortgage bonds were misappropriated or wrongfully diverted, a subsequent mortgagee could not rely on the misappropriation or wrongful diversion as a payment (or offset), unless the mortgagors had asked that the diversion or misappropriation should be applied as a payment.' The same general principle is applicable in the present case. If there is a liability, as alleged, for unpaid stock, the * * * mortgagor is the party interested who is entitled to recover it. The general creditors are likewise interested in the application of any amounts recovered on such account. One bondholder will not be allowed, in this way, to better the security for his claim, already preferred, over the general creditors."

tion, the remedy is not a suit to annul the bonds but an action by the corporation for a restoration thereof to the rightful custodian.⁸⁴

If bonds are issued without authority, and in violation of statute, the trustee of the bankrupt corporation which issued them may recover their possession from a pledgee to whom the corporation delivered them as collateral security.⁸⁵ However, it has been held that if the bonds are illegal, no action for their surrender or cancellation can be brought by the corporation itself or by a stockholder in its right without a tender of the amount due the pledgee.⁸⁶

§ 1067. Rights of minority bondholders. The general rule is that minority bondholders are not bound by the acts of majority bondholders, unless they have consented thereto.⁸⁷ Stated in another way, in the absence of statute, and where there is no agreement therefor, nothing can be done by a majority of bondholders, however large, which will bind a minority without their consent.⁸⁸ On the other hand, minority bondholders must to some extent be governed by the wishes and acts of the majority bondholders.⁸⁹ This is frequently illustrated by reorganization schemes to which all of the bondholders do not assent.⁹⁰

It has been held by the Supreme Court of the United States that "it seems to be eminently proper that where the legislative power exists, some statutory provision should be made for binding the minority in a reasonable way by the will of the majority;" and that the Canadian Parliament had power to permit a domestic corporation to arrange with its bondholders to substitute new bonds bearing a lower rate of interest, and to provide that the assent of the majority of the bondholders to the arrangement should be sufficient, where provision was made for the protection of the minority in the enjoyment of rights and privileges in the new security identical with those of the majority.⁹¹ So it has been said, in reference to railroad bonds,

⁸⁴ *Keystone Nat. Bank v. Palos Coal & Coke Co.*, 150 Ala. 245, 43 So. 570.

⁸⁵ *In re Progressive Wall Paper Corporation*, 229 Fed. 489.

⁸⁶ *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21.

⁸⁷ *Land Title & Trust Co. v. Asphalt Co. of America*, 121 Fed. 587; *Ikellheimer v. Consolidated Tobacco Co.* (N. J. Eq.), 59 Atl. 363.

⁸⁸ *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 535, 27 L. Ed. 1020.

⁸⁹ *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695.

⁹⁰ *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695, and see *infra*, chapter on Reorganization.

⁹¹ *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020, rev'g 1 Fed. 387, holding also that such legislation does not deprive a person of his property without due process of law.

that "the rights of no holder thereof can be considered, without having proper regard to the rights of other holders of such securities, or others in interest who are to be affected thereby."⁹² And it is held that it is the accepted doctrine that each bondholder, "by implication, is brought into contractual relations with every other bondholder, analogous to that of stockholders. As such, his individual notions and interests are so wrapped up and identified with those of his fellows that they must be measurably subordinated to the judgment and interests of the composite body. The single bondholder, representing only 2 per cent. of the aggregate debt, like this complainant, may not, therefore, pursue such course in self-seeking as will be ruinous to the interests and rights of his fellow bondholders. * * * Consequently, in the absence of fraud and unfairness, the minority may not defeat the wishes of the whole body of associates respecting the security common to all."⁹³ Moreover, equity will not aid minority bondholders who have stood by and acquiesced in the majority adopting a scheme of finance which appeared to be the best for all concerned.⁹⁴

Provisions in bonds whereby a specified majority in value of the bondholders may bind the minority to any change of their rights against the corporation or its property are not enforceable where the majority act corruptly and collusively agree to postpone the payment of interest in order to compel the minority to sell out on the terms offered by the majority.⁹⁵

§ 1068. Rights of committee. The nature and extent of the powers of a bondholders' committee are to be determined, not from any statute or rule of the common law, but from the instrument under which they undertake to act on behalf of the bondholders;⁹⁶ and they have all the powers enumerated in such instrument, together with such incidental powers as may be requisite to enable them to carry out the express powers.⁹⁷ The powers of such committees in reference to reorganization of the corporation is treated of in another chapter.⁹⁸

⁹² Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269.

⁹³ Lyman v. Kansas City & A. R. Co., 101 Fed. 636.

⁹⁴ Buckley v. Union Canal Co., 3 Phila. (Pa.) 152.

⁹⁵ Hackettstown Nat. Bank v. Yuengling Brewing Co., 74 Fed. 110.

⁹⁶ Olcott v. Powers, 60 Hun (N. Y.)

583, 15 N. Y. Supp. 263, where sale of bonds to third person, pursuant to a vote of a majority of the bondholders, was held authorized by the terms of the particular agreement.

⁹⁷ Carter v. First Nat. Bank of Pocahontas, 128 Md. 581, 98 Atl. 77.

⁹⁸ *Infra*, chapter on Reorganization.

When a sale of mortgaged railroad property is decreed, an association of bondholders for the protection of their mutual interest is a necessity, and the appointment of a committee to act for them is advisable and customary; and that "one of the terms of being admitted to such an association should be the deposit of the bonds to be protected is surely most reasonable. If notice of the fullest kind possible is given to all bondholders, and all are invited to come into the association upon the same terms, and the privilege is not withdrawn until there is a really valid reason for doing so, there can be no just complaint by those whose inaction has left them outside that they do not share in the benefits of those who are inside the association, and have taken the risks of its success or failure."⁹⁹

A committee appointed by bondholders to represent them, and given power to exchange the bonds deposited with it, for bonds of a new company or of a consolidated company of equal value, and also to pay certain debts from the bonds received in such exchange, has power to contract with the holders of such debts for the discharge of their debts and to devote a portion of the bonds so received to that purpose.¹

§ 1069. Lost bonds. If negotiable bonds are lost, the owner has the same rights as in case of the loss of other negotiable instruments; and, upon giving a bond of indemnity, new certificates should be issued to him,² or, if an action is brought to recover the debt, a recovery should be permitted on furnishing indemnity against the subsequent enforcement of the lost bonds.³

§ 1070. Stolen bonds. If negotiable bonds are stolen, the owner from whom they were stolen cannot recover from the corporation, where the bonds are outstanding in the hands of a bona fide purchaser.⁴

The title to stolen bonds, where the bonds are negotiable, vests in the transferee where he is a bona fide holder.⁵ It is held, however, that where bonds or coupons are stolen after maturity, the holder, although otherwise a bona fide holder, takes no title as against the

⁹⁹ *Bound v. South Carolina R. Co.*, 78 Fed. 49, 55.

¹ *Brooks v. Dick*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 259.

² *Chesapeake & O. Canal Co. v. Blair*, 45 Md. 102; *New Orleans, J. & G. N. R. Co. v. Mississippi College*, 47 Miss. 560.

³ *Miller v. Rutland & W. R. Co.*, 40 Vt. 399, 94 Am. Dec. 414.

⁴ *Wylie v. Missouri Pac. Ry. Co.*, 41 Fed. 623.

⁵ See § 1015, et seq., supra.

rightful owner.⁶ Of course, if the bonds are not negotiable, the transferee obtains no title.⁷ Thus, the owner of registered bonds which have been stolen and transferred by means of forged indorsements may reclaim them in the hands of the transferee, even though new bonds have been issued to the transferee in his own name, in place of the stolen ones.⁸ Moreover, where a bond expressly states upon its face that it "shall not become obligatory until it shall have been authenticated by a certificate indorsed thereon, duly signed by the trustee aforesaid," and it is stolen before such certificate is attached, and a seal and certificate forged thereon, one who takes the bond from the thief obtains no title.⁹

§ 1071. Execution against mortgaged property. The fact that a bondholder has a right to sue on his bond or coupons does not authorize him, on obtaining a judgment, to levy execution against the property mortgaged to secure the bonds.¹⁰ The levy can be made only on property of the corporation other than the mortgaged property.

⁶ *Arents v. Com.*, 18 Gratt. (Va.) 750, 777.

⁷ *Ledwich v. McKim*, 53 N. Y. 307.

⁸ *Chester County Guarantee Trust & Safe Deposit Co. v. Securities Co.*, 165 N. Y. App. Div. 329, 150 N. Y. Supp. 1010.

⁹ *Maas v. Missouri, K. & T. R. Co.*,

83 N. Y. 223, aff'g 11 Hun (N. Y.) 8.

¹⁰ *Guaranty Trust Co. of New York v. Troy Steel Co.*, 33 N. Y. Misc. 484, 68 N. Y. Supp. 915; *Western Pennsylvania Hospital v. Mercantile Library Hall Co.*, 189 Pa. 269, 42 Atl. 183. See also *infra*, chapter on Executions.

CHAPTER 28

ACQUISITION AND HOLDING OF PERSONAL PROPERTY

§ 1072. General rules.

§ 1073. Purposes for which property may be acquired—In general.

§ 1074. — For use outside of authorized business.

§ 1075. — Taking in payment of debt or as security.

§ 1076. Power to take and hold choses in action—In general.

§ 1077. — Purchase of account or claims.

§ 1078. Power to take as bailee.

§ 1079. Constitutional or statutory restrictions.

§ 1080. Ownership.

§ 1081. Duty to preserve.

§ 1072. General rules. That a corporation has the capacity and power to take and hold personal property for purposes not foreign to the legitimate objects of its creation, admits of no doubt.¹ This includes the power to take and enforce choses in action.² So, under proper conditions a corporation may take a chattel mortgage.³

The power includes the power to take by gift or bequest, as well as by purchase.⁴ But a fraternal insurance order cannot accept a bequest, it seems, where the statute provides that benefits and expenses shall be paid from a fund "derived from assessments, premiums or dues collected from its members, and interest accumulations thereon."⁵

¹ *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. (U. S.) 277, Fed. Cas. No. 1,521; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315.

² See § 1076, *infra*.

³ *In re Bank of Indiahomia (Okla.)*, 89 Pac. 196.

⁴ *United States. Perin v. Carey*, 24 How. 465, 16 L. Ed. 701.

Massachusetts. Phillips Academy v. King, 12 Mass. 546.

Mississippi. Wade v. American Colonization Society, 7 Smedes & M. 663, 45 Am. Dec. 324.

New York. Chamberlain v. Chamberlain, 43 N. Y. 424; *Theological*

Seminary of Auburn v. Kellogg, 16 N. Y. 83; *In re Bogart's Will*, 43 App. Div. 582, 60 N. Y. Supp. 496.

Virginia. Protestant Episcopal Educational Society v. Churchman, 80 Va. 718; *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19, 46 Am. Dec. 183.

West Virginia. Lewisburg Bapt. University v. Tucker, 31 W. Va. 621, 8 S. E. 410.

The *United States* may take a bequest as a body corporate. *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230.

⁵ *Kennett v. Kidd*, 87 Kan. 652, 659, 44 L. R. A. (N. S.) 544, Ann. Cas. 1914 A. 592, 125 Pac. 36.

For reasons given in another section,⁶ it cannot take as joint tenant, but it may take as tenant in common.⁷

On purchasing goods, a corporation may agree to return them on certain conditions.⁸

§ 1073. Purposes for which property may be acquired—In general.

The general rule is that a corporation, in the absence of express prohibition, may purchase personal property of any kind whenever it is reasonably necessary or convenient to enable it to carry on its business and accomplish the objects of its creation;⁹ but it cannot purchase property, or take by gift or bequest, for a purpose which is foreign to the objects of its creation.¹⁰ For example, a mining company may buy timber, when it is necessary for use in its business,¹¹ and a coal mining company may purchase a steamboat for the purpose of transporting and delivering its coal.¹² A railroad corporation may purchase supplies for an eating house on its line of road,¹³ and a corporation engaged in buying and selling farm lands has power to purchase automobiles for use in the business,¹⁴ and a corporation

⁶ See § 1084, *infra*.

⁷ *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412; *Telfair v. Howe*, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

⁸ *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40.

⁹ *United States. Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 277, Fed. Cas. No. 1,521.

California. *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46, 89 Am. Dec. 147.

Iowa. *Rosenbaum v. Horton*, 89 Iowa 692, 57 N. W. 609.

Massachusetts. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315.

Michigan. *Adams Min. Co. v. Senter*, 26 Mich. 73.

Missouri. *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305.

New Jersey. *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 467.

Virginia. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19, 46 Am. Dec. 183.

¹⁰ *United States. Pearce v. Madison & I. R. Co.*, 21 How. 441, 16 L. Ed. 184.

Alabama. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122; *Morgan v. Donovan*, 58 Ala. 241.

Maine. *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

Michigan. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 28 N. W. 628.

Minnesota. *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683.

New Hampshire. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

New York. *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264.

¹¹ *Adams Min. Co. v. Senter*, 26 Mich. 73.

¹² *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305.

¹³ *Abraham v. Oregon & C. R. Co.*, 41 Ore. 550, 69 Pac. 653.

¹⁴ *Western Investment & Land Co. v. First Nat. Bank of Denver*, 23 Colo. App. 143, 128 Pac. 476.

authorized to teach medicine may purchase supplies needed therein.¹⁵ A railroad may agree to purchase the coal output of certain mines where it does not appear that such output will be more than is necessary for its own consumption in operating its road.¹⁶ A national bank may buy wheat to seed a farm which it has been compelled to buy in.¹⁷ It has also been held that a manufacturing company may buy more raw material than it needs at the time, in order to take advantage of a low market.¹⁸ And it has been held that a corporation for maintaining an asylum for aged people may take all the property of an applicant for admission in consideration of admitting and caring for him.¹⁹ A college or university may take personal property for the purpose of endowing a professorship.²⁰ A manufacturing and trading company, authorized to manufacture and sell glass, may buy glass from another manufactory for the purpose of keeping up its stock and supplying its customers while its works are being repaired.²¹ Likewise, a contract of a mining company to furnish certain amounts of ore for a period of years, valid when made, authorizes the company, where it finds itself unable or unwilling to itself produce all or any part of such ore, to purchase ore to fulfill the contract, although if both parties to the contract had contemplated a mere merchandising of ore the contract would be *ultra vires*.²² A corporation created for manufacturing purposes has the power to purchase and hold a patent for an invention whenever it is necessary or proper in the conduct of its business.²³ A corporation created to engage in the wholesale drug business may buy a retail stock of drugs and the fixtures, with the intent to add the stock to its wholesale stock and to dispose of the

¹⁵ *Succession of Hutchinson*, 112 La. 656, 36 So. 639.

¹⁶ *McKell v. Chesapeake & O. Ry. Co.*, 175 Fed. 321, 20 Ann. Cas. 1097.

¹⁷ *First Nat. Bank of Great Bend v. Bannister*, 7 Kan. App. 787, 54 Pac. 20.

¹⁸ *In re National Shoe & Leather Bank's Appeal from Com'rs*, 55 Conn. 469, 12 Atl. 646.

¹⁹ *General German Aged People's Home of Baltimore v. Hammerbacker*, 64 Md. 595, 54 Am. Rep. 782, 3 Atl. 678.

²⁰ *Theological Seminary of Auburn v. Kellogg*, 16 N. Y. 83.

²¹ *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315.

²² "Having assumed a legal obligation which it had authority to assume, it was liable to damages for its non-performance. It would be unreasonable to hold that, if it was more profitable to close its mines and to use its money for the purchase of ore, instead of for the excavation of ore, it could not do so." *Young v. United Zinc Company*, 198 Fed. 593, aff'g 194 Fed. 461.

²³ *Dorsey Harvester Revolving Rake Co. v. Marsh*, Fed. Cas. No. 4,014; *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. (U. S.) 238, Fed. Cas. No. 1,521; *In re British & Foreign Cork Co.*, L. R. 1 Eq. 231.

fixtures as such.²⁴ Power to purchase all articles of merchandise includes bottles.²⁵

It cannot be said as a matter of law that a brewing company's contract to purchase hotel furniture is beyond its powers, where the circumstances of the purchase do not appear.²⁶

Power to erect houses of worship and to prosecute missionary and "benevolent" work authorizes the taking a bequest to build an orphanage.²⁷

§ 1074. — For use outside of authorized business. On the other hand, a corporation has no power to purchase personal property for use in a business or transaction not authorized by its charter. Thus, a railroad company cannot purchase steamboats for the purpose of running a steamboat line beyond the terminus of its road.²⁸ The same is true of railroad companies, steamboat companies, and other corporations not organized for the purpose of dealing generally in goods.²⁹ Thus, a railroad or steamboat company cannot purchase grain for the purpose of selling it again.³⁰ Nor can a turnpike company purchase horses and wagons for the purpose of transporting persons over its road.³¹ And a manufacturing company, while it may purchase raw material necessary for its business of manufacturing, cannot purchase on speculation and merely for the purpose of selling again.³² A national bank has no power to purchase stocks or bonds for speculation or investment nor to purchase or sell them on commission.³³ A

²⁴ *Iowa Drug Co. v. Souers*, 139 Iowa 72, 19 L. R. A. (N. S.) 115, 117 N. W. 300.

²⁵ *Jebeles & Colias Confectionery Co. v. W. H. Hutchinson & Son*, 171 Ala. 106, Ann. Cas. 1913 A 1107, 54 So. 618.

²⁶ *Keating v. American Brewing Co.*, 62 N. Y. App. Div. 501, 71 N. Y. Supp. 95.

²⁷ *Hull v. Pearson*, 36 N. Y. App. Div. 224, 55 N. Y. Supp. 324.

²⁸ *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Parish v. Wheeler*, 22 N. Y. 494.

²⁹ *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

³⁰ *Northwestern Union Packet Co.*

v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

³¹ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

³² *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

³³ *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 122 Pac. 458. See also § 1073, *supra*.

"By this is meant, not that a national bank may not take title to stocks in compromise of a disputed or doubtful claim, or take them in pledge, or purchase them with a view to protecting or satisfying a claim secured by such pledge. The taking in each of such cases would be merely

manufacturing company may purchase through a broker, and for future delivery, material needed by it.³⁴

But neither a manufacturing company, nor a bank, nor any other corporation not expressly authorized, can speculate by dealing in futures on the stock or produce exchange, through an agent or otherwise.³⁵

A coal mining company cannot, unless expressly authorized, purchase coal on speculation for the purpose of selling it again, although it may undoubtedly, in case of a strike or other emergency, buy coal for the purpose of fulfilling its contracts.³⁶ A railroad company cannot purchase the property of a rival carrier for the purpose of withdrawing it from the business and removing competition.³⁷ A savings bank cannot purchase property of any kind on credit, where it is not needed for immediate use or for investment of existing funds.³⁸

§ 1075. — Taking in payment of debt or as security. In the absence of express restrictions, a corporation has the power to take personal property as collateral security for a debt, whether contracted previously or at the time.³⁹ And it may take such property in payment of a debt due to it, in order to prevent loss,⁴⁰ or, for a like purpose, it may buy property at a sale under a judgment, mortgage, or pledge in its favor.⁴¹

Where a national bank holds a chattel mortgage on property worth much less than the secured debt, it may contract with the mortgagor to obtain the title and then sell the property, or, if the mortgagor does

incidental to the business of making loans, etc., for which the bank is organized." *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 122 Pac. 458. See also the next section, *infra*.

³⁴ Thus it is not ultra vires for a cotton mill corporation to purchase cotton for future delivery, through a broker, and put up margins to carry the contract, where the transaction is not for the purpose of speculation, but in the ordinary business of the corporation, and for its own use. *Sampson v. Camperdown Cotton Mills*, 82 Fed. 833.

³⁵ *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264.

³⁶ *Alexander v. Cauldwell*, 83 N. Y. 480.

³⁷ *Morgan v. Donovan*, 58 Ala. 241.

³⁸ *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

³⁹ *Commercial Bank of Manchester v. Nolan*, 7 How. (Miss.) 508; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

⁴⁰ *Rosenbaum v. Horton*, 89 Iowa 692; *First Nat. Bank of Ottumwa v. Reno*, 73 Iowa 145, 34 N. W. 796; *De Groff v. American Linen Thread Co.*, 21 N. Y. 124; *Panhandle Nat. Bank v. Emery*, 78 Tex. 498, 15 S. W. 23.

⁴¹ *Farmers' & Millers' Bank of Milwaukee v. Detroit & M. R. Co.*, 17 Wis. 372.

not voluntarily surrender the property, it may foreclose the mortgage and buy in the property at the sale.⁴² But a national bank cannot, to satisfy a debt owing to it, become the absolute owner of shares in a partnership, although represented by transferable certificates.⁴³

§ 1076. Power to take and hold choses in action—In general. A corporation has the power, by purchase or otherwise, to take and hold choses in action, such as promissory notes, bills of exchange, bonds, etc., and to enforce the same, whenever it is necessary or proper in the conduct of its legitimate business, provided there are no restrictions in its charter or the general law.⁴⁴

A corporation authorized to acquire and hold "personal property" or "commercial paper" may purchase and hold promissory notes,⁴⁵ city warrants,⁴⁶ negotiable bonds,⁴⁷ and the like. Thus, a national bank has implied power to purchase promissory notes.⁴⁸ But by the weight of authority a banking corporation, authorized by its charter merely to discount and negotiate bills and notes, cannot deal in them

⁴² *Dupree v. First Nat. Bank of Merkel*, — Tex. Civ. App. —, 146 S. W. 608.

⁴³ *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036.

The reason for the rule is that as partner the corporation assumes an unlimited personal liability, and goes into business as a member of the firm. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036.

⁴⁴ *United States v. Fleckner*, 8 Wheat. 338, 5 L. Ed. 631.

Alabama. Gee v. Alabama Life Insurance & Trust Co., 13 Ala. 579.

Illinois. Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321.

Missouri. Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 S. W. 504; *Hart v. Missouri State Mut. Fire & Marine Ins. Co.*, 21 Mo. 91.

New Jersey. Bennington Iron Co. v. Rutherford, 18 N. J. L. 467.

Ohio. Bank of Ashland v. Jones, 16 Ohio St. 145.

Wisconsin. Wayland University v. Boorman, 56 Wis. 657, 14 N. W. 819.

In an Ohio case it was held that a corporation formed for the purpose of manufacturing and dealing in a particular line of goods may, instead of incurring the delay and expense incident to the construction of a new manufacturing plant, and building up of an independent business, purchase of an existing partnership, engaged in a like business, its established plant and assets, including its outstanding claims, among which is one for damages to the property caused by another's negligence; and if it does so, it acquires a valid title to the claim for damages, and may maintain an action thereon. *Central Ohio Nat. Gas & Fuel Co. v. Capital City Dairy Co.*, 60 Ohio St. 96, 64 L. R. A. 395, 53 N. E. 711.

⁴⁵ *Wayland University v. Boorman*, 56 Wis. 657, 14 N. W. 819.

⁴⁶ *Aull Sav. Bank v. Lexington*, 74 Mo. 104.

⁴⁷ *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244.

⁴⁸ *Morris v. Third Nat. Bank of Springfield*, 142 Fed. 25.

by buying and selling,⁴⁹ although it has been held that power to discount notes includes the power to purchase them at less than their face value.⁵⁰ A bank may hold a note executed and delivered for its own accommodation, subject to the same rules applicable to individuals who are accommodated parties.⁵¹ A trust company given power to purchase, invest in, and loan money on personal securities, has authority to purchase notes at a discount.⁵² A mercantile corporation may add to its assets by taking over promissory notes where it might largely benefit thereby.⁵³

It seems that power to invest funds includes power to purchase a note and mortgage.⁵⁴

Where bonds sold by a corporation for a certain purpose produce a fund largely in excess of what is needed, the corporation may employ its surplus in purchasing the bonds in the open market.⁵⁵

A corporation, however, has no power to purchase or deal in choses in action if there is an express prohibition in its charter or in the general law, or if the particular transaction is not within the objects for which it was created.⁵⁶ Thus, mining companies, manufacturing companies, and the like, cannot ordinarily deal in or purchase notes,

⁴⁹ **Kentucky.** *Nicholson v. National Bank of Newcastle*, 92 Ky. 251, 16 L. R. A. 223, 17 S. W. 627.

Maryland. *Lazear v. National Union Bank of Maryland*, 52 Md. 78, 36 Am. Rep. 355.

Massachusetts. *First Nat. Bank of Rochester v. Harris*, 108 Mass. 514.

Minnesota. *First Nat. Bank of Rochester v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341; *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683.

New York. *Atlantic State Bank of Brooklyn v. Savery*, 82 N. Y. 291.

Ohio. See *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141; *Niagara County Bank v. Baker*, 15 Ohio St. 68.

⁵⁰ *Morris v. Third Nat. Bank of Springfield, Massachusetts*, 142 Fed. 25.

⁵¹ *Westwater v. Lyons*, 193 Fed. 817.

⁵² *Binghamton Trust Co. v. Auten*, 68 Ark. 294, 57 S. W. 936, decided un-

der New York law and following *Binghamton Trust Co. v. Clark*, 31 N. Y. App. Div. 151, 52 N. Y. Supp. 941.

⁵³ *Coppard v. Farmers' & Merchants' State Bank*, — Tex. Civ. App. —, 184 S. W. 551.

⁵⁴ *Cass v. Yale University*, 107 Ill. App. 518.

⁵⁵ *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 149 N. Y. App. Div. 824, 134 N. Y. Supp. 174.

⁵⁶ **Idaho.** *Salmon River Mining & Smelting Co. v. Dunn*, 2 Idaho 30.

Iowa. *Simpson Centenary College v. Bryan*, 50 Iowa 293.

Missouri. *Bank of Edwardsville v. Simpson*, 1 Mo. 184.

New York. *Indiana v. Woram*, 6 Hill 33, 40 Am. Dec. 378.

Ohio. *White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co.*, 12 Ohio St. 601; *Straus v. Eagle Ins. Co. of Cincinnati*, 5 Ohio St. 59.

bonds, or other choses in action, otherwise than by taking the same in the course of their business or for debts.⁵⁷

In an Ohio case it was held that an insurance corporation, though empowered by its charter to invest its funds and capital stock as should be deemed best by the directors for the safety of the capital and interest of the stockholders, had no power to purchase upon credit the promissory note of one of its insured, who was entitled to indemnity for loss, for the purpose of setting off the note against the claim.⁵⁸

§ 1077. — Purchase of account or claims. A corporation may take an assignment of an account, or of rights under any other contract, in order to secure payment of a debt due to it, or to otherwise save itself from loss;⁵⁹ or it may purchase for such purpose, and enforce a judgment in favor of another.⁶⁰ Thus, a corporation, even though merely a trading corporation, has power to purchase a claim against a third person, secured by liens, to protect its own account, where this is done in good faith and because deemed necessary to protect the corporation's interests.⁶¹

The rule has been truly and clearly stated as follows: "Indeed, we think it among the necessary powers of a commercial corporation that resort may be had by it to any expedient not prohibited by law, and within the course of its legitimate business, which may be dictated by motives of prudence, to collect debts due it, or otherwise to protect and secure its assets for the benefit of its stockholders, provided only its officers proceed in good faith for that purpose only. There is no difference in principle between the purchase of a claim which is or

⁵⁷ *Salmon River Mining & Smelting Co. v. Dunn*, 2 Idaho 30, 3 Pac. 911; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240; *Indiana v. Woram*, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

⁵⁸ *Straus v. Eagle Ins. Co. of Cincinnati*, 5 Ohio St. 59.

⁵⁹ *Lagow v. Badollet*, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258; *Bank of North America v. Tamblin*, 7 Mo. App. 571; *Mahoney v. Butte Hardware Co.*, 19 Mont. 377, 48 Pac. 545.

⁶⁰ *Brown v. Hogg*, 14 Ill. 219.

Where practically all the assets of a corporation have been transferred

to it by its stockholders in fraud of their judgment creditors, it is not ultra vires for it to purchase the judgments, and secure the release of the assets from attachment. *Sutton v. Dudley*, 193 Pa. St. 194, 44 Atl. 438.

⁶¹ *Mahoney v. Butte Hardware Co.*, 27 Mont. 463, 71 Pac. 674, 19 Mont. 377, 48 Pac. 545, in which case it was held that corporation organized for the purpose of dealing in hardware may purchase an account secured by lien against a mining company, if the purchase is made in good faith, to protect its own interests as a creditor of the mining company.

may be secured by mechanic's lien and that of a claim which may be secured by an attachment lien. The fact that the particular expedient resorted to proved ineffective to accomplish the purpose for which it was made does not alter the case or in any wise change the position of the parties."⁶²

On the other hand, it has been held that where a land company purchased certain lots after a municipal public improvement, it had no power to purchase thereafter from the grantor his claim for damages to the lots resulting from such improvement.⁶³ So in a Wisconsin case it was held that it was ultra vires for a trading corporation, engaged in buying and selling goods, and which certain persons had conspired to defraud and had defrauded, to purchase and take an assignment of claims for damages of other persons who were defrauded in pursuance of the same conspiracy.⁶⁴

§ 1078. Power to take as bailee. A corporation has the power to take property as bailee whenever such a transaction is reasonably necessary or incidental to the business for which it was created, but it has no power to become a bailee if the transaction is foreign to the objects of its creation. For example, it has been held that a savings bank, unless expressly authorized, cannot take bonds or other property for safe-keeping.⁶⁵

On the other hand, however, it has been held that an incorporated library board, authorized to hold personal property by gift, purchase, or otherwise, and to provide "for the government and regulation of libraries and other collections," has the power to become bailee of any property—as a collection of coins, for example—which is proper for exhibition in a public museum.⁶⁶

Corporations for the purpose of the business of carriers of goods, warehousemen, innkeepers, and pawnbrokers are clearly authorized to become bailees within the scope of their business, but they cannot,

⁶² Per Chief Justice Brantly in *Mahoney v. Butte Hardware Co.*, 27 Mont. 463, 71 Pac. 674.

⁶³ "Such dealing in litigation is entirely foreign to the objects of its creation, and it is at least doubtful whether claims of this kind against municipalities of the state can be made the subject of bargain and sale by corporations organized under our statutes." *Pueblo v. Shutt Inv. Co.*,

28 Colo. 524, 89 Am. St. Rep. 221, 67 Pac. 162.

⁶⁴ *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 37 L. R. A. 138, 65 Am. St. Rep. 22, 71 N. W. 109, 70 N. W. 289.

⁶⁵ *Greeley v. Nashua Sav. Bank*, 63 N. H. 145.

⁶⁶ *Smith v. Library Board City of Minneapolis*, 58 Minn. 108, 25 L. R. A. 280, 59 N. W. 979.

any more than any other corporation, become bailees for unauthorized purposes.

§ 1079. Constitutional or statutory restrictions. In some jurisdictions the power of corporations, or of particular kinds of corporations, with respect to taking and holding personal property, like their power with respect to real property, is expressly restricted by the constitution or by statute, and sometimes express prohibition or limitation is contained in the charter. Thus, it is sometimes declared that a corporation shall not take or hold more than a certain amount of property.⁶⁷

In determining whether a corporation has more property than it is permitted to hold, any indebtedness for its property must be deducted.⁶⁸

Sometimes banks, railroad companies, and the like, are expressly prohibited from dealing in goods. Such a prohibition, it seems, contemplates dealing in goods as a business, and does not apply to a single isolated transaction.⁶⁹ It is not to be so construed as to prevent a corporation from taking property in good faith in payment of or as security for a debt previously contracted, in order to secure payment of the debt and prevent loss.⁷⁰ Nor does a prohibition against dealing in goods apply to the taking of goods as collateral security for the payment of a debt contracted at the time.⁷¹ But a statute forbidding corporations to engage in "stock-jobbing" prohibits them from dealing in bonds and debentures as well as shares of stock.⁷²

A statutory provision that no bank shall employ its moneys directly or indirectly in trade or commerce by buying or selling goods, wares or merchandise, is not violated by a purchase of bills of lading where there was no intent to purchase the property consigned.⁷³

A corporation which uses its own funds for discounting accounts and commercial paper is not engaged in a banking business which is prohibited except as to banking corporations.⁷⁴

⁶⁷ See *In re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233; *Wetmore v. Parker*, 52 N. Y. 450.

⁶⁸ *Wetmore v. Parker*, 52 N. Y. 450.

⁶⁹ *Graham v. Hendricks*, 22 La. Ann. 523; *Sackett's Harbor Bank v. Lewis County Bank*, 11 Barb. (N. Y.) 213.

⁷⁰ *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

⁷¹ *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

⁷² *State v. Debenture Guarantee & Loan Co.*, 51 La. Ann. 1874, 26 So. 600.

⁷³ *McLean v. City State Bank of Mangum, Oklahoma*, 210 Fed. 21 (Oklahoma statute).

⁷⁴ *Chase & Baker Co. v. National Trust & Credit Co.*, 215 Fed. 633.

Where a bank charter restrained it from dealing or trading, except in bills of exchange, gold or silver, it cannot purchase a note.⁷⁵

The purchase of the assets of a defunct building and loan association is not forbidden as "discounting bills, notes or other evidence of debt."⁷⁶

§ 1080. Ownership. Personal property which is purchased or otherwise acquired belongs to the corporation rather than its members or stockholders. Thus, liquor bought with corporate funds belongs to the corporation and is not the common property of members of the club.⁷⁷ But the mere organization of a corporation to take over the business of a partnership does not of itself transfer the title to the partnership property to the corporation.⁷⁸

§ 1081. Duty to preserve. A corporation which has acquired personal property is bound to take all reasonable means to preserve it and to protect it against loss and depreciation.⁷⁹

⁷⁵ Bank of Edwardsville v. Simpson, 1 Mo. 184, distinguishing Bank of Missouri v. Price, 1 Mo. 54.

⁷⁶ Clark v. Assets Realization Co., 115 Ill. App. 150.

⁷⁷ State v. Country Club, — Tex. Civ. App. —, 173 S. W. 570.

⁷⁸ Ruettell v. Greenwich Ins. Co., 16 N. D. 546, 113 N. W. 1029. See also § 1075, supra.

⁷⁹ Hyde v. Equitable Life Assur. Soc. of United States, 61 N. Y. Misc. 518, 116 N. Y. Supp. 219.

CHAPTER 29

ACQUISITION AND HOLDING OF REAL PROPERTY

I. GENERAL RULES

- § 1082. Power as incidental.
- § 1083. Contracts to purchase.
- § 1084. Tenancy in common and joint tenancy.
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VI. PRESUMPTIONS AND COLLATERAL ATTACK

§ 1114. Presumptions.

§ 1115. Collateral attack.

I. GENERAL RULES

§ 1082. Power as incidental. Frequently, if not generally, the charter of a corporation confers upon it in express terms the power to acquire and hold real property, but an express grant of such power is not necessary. Nothing is better settled in the law of corporations than that a corporation has the capacity and the implied power to take and hold real property in the corporate name, just as an individual may,¹ provided the purpose for which it is acquired and held is not inconsistent with the objects for which it was created,² and provided there are no constitutional or statutory prohibitions or restrictions in the way.³

In a Kentucky case it was said: "No doctrine of the common law is more clearly and undeniably established than that which concedes to corporations an inherent or resulting right to acquire and hold title to land by contract, except so far only as they may be restricted by the objects of their creation, or the limitations of their charters."⁴

§ 1083. Contracts to purchase. In the absence of restrictions in its charter or in some general statute, a corporation has the power to bind itself by a contract to purchase property whenever the object of the purchase is within the powers conferred upon it by its charter.⁵

1 California. Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936.

Kentucky. Lathrop v. Commercial Bank of Scioto, 8 Dana 114, 33 Am. Dec. 481.

Massachusetts. Inhabitants of Sutton v. Cole, 3 Pick. 232.

Michigan. Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Bank of Michigan v. Niles, 1 Dougl. 401, 41 Am. Dec. 575, Walk. 99.

New Jersey. See Freeman v. Sea View Hotel Co., 57 N. J. Eq. 68, 40 Atl. 218.

New York. Nicoll v. New York & E. R. Co., 12 N. Y. 121.

North Carolina. Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594; Rives

v. Dudley, 3 Jones Eq. 126, 67 Am. Dec. 231.

Pennsylvania. Leazure v. Hillegas, 7 Serg. & R. 313.

Vermont. Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

Virginia. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19, 46 Am. Dec. 183.

Washington. Milton v. Crawford, 65 Wash. 145, 118 Pac. 32.

England. Sutton's Hospital Case, 10 Coke 23a, 30b.

² See § 1086, *infra*.

³ See § 1097, *infra*.

⁴ Chief Justice Robertson, in Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

⁵ Morville v. American Tract So-

On the other hand, a corporation has no power to enter at all into a contract to purchase property, if it is prohibited by its charter or some other statute from taking or holding such property, or if the purpose for which it seeks to acquire the property is foreign to the objects for which it was created.⁶

If a purchase of property is beyond the power of a corporation, then a contract to purchase it is beyond the corporate powers. Likewise, if the purchase of certain property is within the corporate power, it follows that a contract to purchase it is within the powers of the corporation. For this reason, the validity of contracts to purchase real property, as affected by the power of the corporation to make the contract, will be treated of in this chapter rather than in the chapter on contracts in general.

§ 1084. Tenancy in common and joint tenancy. Since unity of possession only is necessary to a tenancy in common, a corporation may take and hold land as tenant in common with another.⁷ But in the nature of things it cannot take and hold land in joint tenancy. For the creation of a joint tenancy there must be unity of interest, unity of title, unity of time, and unity of possession, and the distinguishing incident is the right of survivorship. "Two corporations, therefore," said the California court, "cannot hold as joint tenants, because two of the essential unities are wanting, namely: of the same capacity and title. Nor can they hold as joint tenants, for another reason: being each perpetual, there can be no survivorship between them. * * * Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity or survivorship between them."⁸

§ 1085. Terms and conditions. When a corporation has the power to bind itself by contract to purchase property, it may do so on any terms which are not forbidden by its charter or by law.⁹ Thus, where a corporation had the power to purchase land, it was held that it

ciety, 123 Mass. 129, 25 Am. Rep. 40; Old Colony R. Corporation v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; University of Michigan v. Detroit Young Men's Society, 12 Mich. 138.

⁶ See § 1086, *infra*.

⁷ De Witt v. San Francisco, 2 Cal. 289; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; Estell v.

University of South, 12 Lea (Tenn.) 476.

⁸ De Witt v. San Francisco, 2 Cal. 297; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

⁹ See Morville v. American Tract Society, 123 Mass. 129, 25 Am. Rep. 40; University of Michigan v. Detroit Young Men's Society, 12 Mich. 138.

might purchase under a contract allowing it to pay therefor at any time within one hundred years, requiring it to pay taxes and interest in the meantime, and giving no right to possession until payment.¹⁰

A corporation, on purchasing land, may assume incumbrances,¹¹ and may agree to pay such a price as may be fixed by arbitrators.¹² So it may purchase real estate and pay for it by issuing stock, where not forbidden by statute.¹³

II. POWER AS DEPENDENT ON PURPOSE FOR WHICH ACQUIRED OR USED

§ 1086. General rules. The implied power of a corporation to acquire and hold real property is limited by the purposes of the corporation. Even when there is no express restriction either in the charter or in the general law, a corporation has no power to purchase and hold land for a purpose which is entirely foreign to, or only remotely connected with, the objects for which it was created.¹⁴ Thus, a company created to do a mercantile business cannot purchase land not necessary for its business.¹⁵ And if a company has no power to build or operate a railroad, it has no power to take and use an easement for that purpose.¹⁶

On the other hand, the general rule is that a corporation, in the

¹⁰ *University of Michigan v. Detroit Young Men's Society*, 12 Mich. 138.

¹¹ *Woods Inv. Co. v. Palmer*, 8 Colo. App. 132, 45 Pac. 237.

¹² *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60.

¹³ *Bank v. Belington Coal & Coke Co.*, 51 W. Va. 60, 41 S. E. 390.

¹⁴ *United States. Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513.

California. *Coleman v. San Rafael Turnpike Road Co.*, 49 Cal. 517.

Connecticut. *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150; *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529.

Illinois. *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303; *First M. E. Church of Chicago v. Dixon*, 178 Ill. 260, 52 N. E. 887, rev'g 77 Ill. App. 166; *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; *Hough*

v. Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230.

Kentucky. *Thweatt v. Bank of Hopkinsville*, 81 Ky. 1.

Massachusetts. *Inhabitants of Sutton v. Cole*, 3 Pick. 232.

Michigan. *Chapman v. Colby*, 47 Mich. 51, 10 N. W. 74; *Bank of Michigan v. Niles*, 1 Dougl. 401, 41 Am. Dec. 575, Walk. 99.

Missouri. *Pacific R. Co. v. Seeley*, 45 Mo. 212, 100 Am. Dec. 369.

New Jersey. *New Jersey R. & Transp. Co. v. Newark*, 26 N. J. L. 519, 25 N. J. L. 315.

Wisconsin. *Clark v. Farrington*, 11 Wis. 306.

England. *Bostock v. North Staffordshire Ry. Co.*, 4 E. & B. 798.

¹⁵ *Schneider v. Sellers* (Tex. Civ. App.), 81 S. W. 126, modified in 98 Tex. 380, 84 S. W. 417.

¹⁶ *Beasley v. Aberdeen & R. R. Co.*, 145 N. C. 272, 59 S. E. 60.

absence of restrictions in its charter or the general law, has the implied power to acquire real property, by purchase or otherwise, and hold the same, whenever it is reasonably necessary or convenient to enable it to accomplish the objects for which it was created.¹⁷

The property need not be necessary in the sense of indispensable, but it is sufficient if it is convenient and proper under the circumstances, and not inconsistent with the legitimate objects of the corporation.¹⁸ Thus, where a corporation was authorized to purchase and hold real and personal property, and to devote its income to charitable purposes, and to the promotion of inventions and improvements in the mechanic arts, by granting premiums for such inventions and improvements, it was held to have the power to purchase land and erect a building for the purpose of holding exhibitions and meetings.¹⁹ Generally, a corporation may purchase and hold land for the purpose of a place for conducting its business, instead of leasing a place, whatever may be the nature of its business.²⁰ A manufacturing company, instead of incurring the delay and expense incident to the construction of a new manufacturing plant, and building up of an independent business, may purchase the plant and business of an existing partnership engaged in a like business.²¹

Of course if a corporation is created for the purpose of dealing in lands, its power to purchase is unlimited except in so far as restricted

¹⁷ *Illinois*. *Brown v. Hogg*, 14 Ill. 219.

Massachusetts. *Richardson v. Massachusetts Charitable Mechanic Ass'n*, 131 Mass. 174; *Old Colony R. Corporation v. Evans*, 6 Gray 25, 66 Am. Dec. 394.

Michigan. *University of Michigan v. Detroit Young Men's Society*, 12 Mich. 138.

New Jersey. *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 361.

New York. *Moss v. Averell*, 10 N. Y. 449; *Moss v. McCullough*, 7 Barb. 279; *Moss v. Rossie Lead Min. Co.*, 5 Hill 137.

Oregon. *Kelly v. People's Transp. Co.*, 3 Ore. 189.

Virginia. *Bank of Virginia v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706.

See also *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68, 40 Atl. 218.

¹⁸ *Richardson v. Massachusetts*

Charitable Mechanic Ass'n, 131 Mass. 174; *Steinway v. Steinway & Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718; *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

Land is necessary, in the sense in which the term is here used, if it is "obviously appropriate and convenient to carry into effect the franchise granted." *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. L. 537, 545.

¹⁹ *Richardson v. Massachusetts Charitable Mechanic Ass'n*, 131 Mass. 174.

²⁰ *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

²¹ *Central Ohio Nat. Gas & Fuel Co. v. Capital City Dairy Co.*, 60 Ohio St. 96, 64 L. R. A. 395, 53 N. E. 711.

by statute; and a corporation may buy and sell for the purpose of carrying on business.²²

§ 1087. Amount in excess of actual necessity. A corporation can hold only sufficient real estate to effectuate the purposes of its creation, except where expressly authorized by statute. This rule applies to building and loan associations.²³

But when a corporation is expressly or impliedly given the power to purchase land for a particular purpose, or, generally, to accomplish the objects for which it was created, the quantity necessary to be acquired is within the reasonable discretion of the stockholders or directors.²⁴

In purchasing land or erecting buildings, a corporation is not limited to such a quantity of land, or buildings of such a size, as are necessary for its present needs, but it may anticipate future necessities by reason of expected increase or extension of its business.²⁵ For example, if a corporation is empowered to purchase land for the construction of a canal or railroad, the directors have a reasonable discretion as to the quantity necessary for this purpose, and are not restricted to the purchase of just so much as may be necessary for the thread of the canal or the construction of the road.²⁶

In an early Virginia case a banking corporation, authorized by its charter to acquire such real estate as might be necessary for its immediate accommodation, was held to have the power, in order to protect itself against fire, to purchase more land than was absolutely essential for the erection of a banking house, build fireproof houses thereon, and sell them to third persons.²⁷ And in a Vermont case a corporation owning a toll bridge was held to have the power to purchase and take from the owner of adjoining land a conveyance of the right to control

²² *Ronaldson & Puckett Co. v. Bynum*, 122 La. 687, 48 So. 152.

²³ *Africani Home Purchase & Loan Ass'n v. Carroll*, 267 Ill. 380, 108 N. E. 322; *Cynthiana & Raven Creek Turnpike Co. v. Hutchinson*, 22 Ky. L. Rep. 1233, 60 S. W. 378.

²⁴ *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

Where a corporation, requiring land

for its legitimate purposes, in good faith purchases a larger tract than is needed, the transaction is not ultra vires, and it may afterwards sell the surplus. *Lauder v. Peoria Agricultural & Trotting Society*, 71 Ill. App. 475.

²⁵ *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

²⁶ *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

²⁷ *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

all passage over the land for the purpose of avoiding passing over the bridge.²⁸

A corporation created for the purpose of dealing in land has unlimited power to purchase, hold, and sell land, except in so far as there may be express statutory restrictions.²⁹

Statutory prohibitions and regulations in regard to surplus lands are noticed hereafter.³⁰

§ 1088. Taking property in payment of or as security for debt.

Unless there is some express restriction in its charter or in the general law, a corporation may, in order to secure the payment of a debt due to it, take real property either by a direct conveyance from its debtor, or by purchasing the same at an execution or mortgage foreclosure sale, even though it would not otherwise have the power to acquire and hold the property.³¹

A statutory prohibition against holding land does not prevent the taking of real estate as security for loans.³² Thus, a bank, to secure itself from loss, may become the lawful owner of real estate;³³ and in order to protect its mortgage on mining property, may buy it in at execution or judicial sale.³⁴ And a mercantile company may accept real estate in part payment on selling out its property, although it has no authority to carry on a real estate business.³⁵ It has been held also that a railroad corporation has power to take lands in another state in payment of or security for debts due to it.³⁶

A railroad company is not prohibited from taking a note and mortgage on land as security for a debt by a provision of its charter

²⁸ Proprietors of Claremont Bridge v. Royce, 42 Vt. 730.

²⁹ Market St. Ry. Co. v. Hellman, 109 Cal. 571, 590, 42 Pac. 225.

³⁰ See § 1103, *infra*.

³¹ Illinois. Brown v. Hogg, 14 Ill. 219.

Iowa. State Security Bank v. Hoskins, 130 Iowa 339, 8 L. R. A. (N. S.) 376, 106 N. W. 764.

Louisiana. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 So. 152.

Michigan. Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243.

Missouri. Missouri State Bank v. South St. Louis Foundry, 145 Mo. App. 257, 129 S. W. 433.

Texas. Scott v. Farmers' & Mer-

chants' Nat. Bank (Tex. Civ. App.), 66 S. W. 485.

³² Alexander v. Brummett (Tenn. Ch.), 42 S. W. 63. See also § 1105, *infra*.

³³ State Security Bank v. Hoskins, 130 Iowa 339, 8 L. R. A. (N. S.) 376, 106 N. W. 764; Brown v. Bradford, 103 Iowa 378, 72 N. W. 648.

³⁴ Missouri State Bank v. South St. Louis Foundry, 145 Mo. App. 257, 129 S. W. 433.

³⁵ Morissette v. Howard, 62 Kan. 463, 63 Pac. 756.

³⁶ Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243, construing Indiana statutes.

that it shall not hold, purchase, or deal in any lands other than such as are necessary for use in the running of its road. Such a provision is intended to prohibit the company from purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its business, and not to prevent it from acquiring an interest in land incidentally whenever, in the proper exercise of its powers, it becomes necessary for it to do so in order to protect its legal rights.³⁷

§ 1089. Purchase for speculation. Neither a railroad or banking company, nor any other kind of corporation not created for the purpose of dealing in land, has any implied power to purchase or to acquire land merely for the purpose of holding and selling the same on speculation.³⁸ It follows that a railroad company, or a banking company, since it cannot acquire land for the purpose of speculation merely, cannot bind itself by a contract to purchase land for such a purpose.³⁹

This rule applies equally well to an incorporated religious society⁴⁰ and to a building and loan association.⁴¹ Such associations cannot acquire and hold any real estate beyond what is necessary for their corporate business or such as is acquired in the collection of debts.⁴²

³⁷ *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709.

³⁸ *United States. Case v. Kelly*, 133 U. S. 21, 33 L. Ed. 513.

Kentucky. Thweatt v. Bank of Hopkinsville, 81 Ky. 1.

Michigan. Bank of Michigan v. Niles, 1 Dougl. 401, 41 Am. Dec. 575, Walk. 99.

Missouri. Pacific R. Co. v. Seeley, 45 Mo. 212, 100 Am. Dec. 369.

Wisconsin. Waldo v. Chicago, St. P. & F. R. Co., 14 Wis. 575.

³⁹ *Bank of Michigan v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575, Walk. (Mich.) 99.

⁴⁰ *Thompson v. West*, 59 Neb. 677, 49 L. R. A. 337, 82 N. W. 13.

⁴¹ Such an association having power under its charter to raise funds to be loaned to its members, and to purchase real estate upon which it holds an in-
cumbrance, and freely deal with and dispose of the same, has no power to invest its money in real estate upon

which it holds no lien, and in which it has no interest. *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303.

⁴² *Africani Home Purchase & Loan Ass'n v. Carroll*, 267 Ill. 380, 108 N. E. 322.

"If a building and loan association were permitted to invest its money in the purchase of real estate or to traffic or trade in such property, instead of keeping within the powers conferred upon it by loaning such money and collecting it, it would not only be exercising powers not granted, but it would be carrying on a business inconsistent with the purpose of its creation and against the fixed and uniform policy of the state." *National Home Bldg. Ass'n v. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303.

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In states where a corporation cannot be formed to buy and sell real estate, a corporation cannot indirectly purchase land by having a deed made to a person as trustee.⁴³ However, a railroad company may take and hold land as provided for in the statutes, and it will not be presumed that a donation to it was purely for speculative purposes.⁴⁴

§ 1090. Purchase for material on land. It seems that if a corporation may purchase certain material for use in its business, it may purchase land on which such material is found, at least under ordinary circumstances. Thus, a corporation created to carry on the cooperage business, with power to manufacture barrels, etc., has incidental power to purchase timberland for the timber to be used in the manufacture of such articles.⁴⁵ And a railroad company may purchase land for a supply of gravel to keep its road in repair,⁴⁶ or for the timber growing on it to be used in the construction of the road,⁴⁷ or for fuel and crossties.⁴⁸

§ 1091. Purchase to utilize waste products. It has been held that a manufacturing and trading company has power to purchase farm lands to utilize the waste around its oil mill, by using it to fertilize the land.⁴⁹ However, this decision is of doubtful authority, at least if the waste could be disposed of to advantage by selling it or otherwise disposing of it.⁵⁰

§ 1092. Purchase for benefit of employees. Whether the acquisition of land or buildings, or both, for use by employees as homes, clubs, playgrounds, etc., is within the incidental powers of a corporation, is not altogether clear, notwithstanding the growing tendency to add to the comforts and pleasure of employees in such ways. It would seem that the circumstances of the particular case are of more weight than precedents, but that the tendency of the courts is more and more toward holding such acts to be within the corporate powers.⁵¹ Thus

⁴³ Walker v. Taylor, 252 Ill. 424, 96 N. E. 1055.

⁴⁴ Wooten v. Dermott Town-Site Co., — Tex. Civ. App. —, 173 S. W. 598.

⁴⁵ Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 S. W. 348.

⁴⁶ Small v. McMurphy, 11 Tex. Civ. App. 409, 32 S. W. 788.

⁴⁷ Overmyer's Lessee v. Williams, 15 Ohio 26.

⁴⁸ Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594.

⁴⁹ Kohlruss v. Zachery, 139 Ga. 625, 46 L. R. A. (N. S.) 72, 77 S. E. 812.

⁵⁰ Such was the view taken by Hill, J., in his dissent on this point in the above decision.

⁵¹ See remarks of Justice Beekman in Steinway v. Steinway & Sons, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718.

it has been held by a lower court in New York that a manufacturing company may purchase land, not only for the purpose of erecting its factories, but also, if it is reasonably necessary, for the purpose of erecting dwellings for its employees.⁵² But in the Pullman Palace Car case in Illinois it was held that the car company could not purchase land for the purpose of erecting houses to be let to its employees,⁵³ and there is a decision to the same effect in New Jersey.⁵⁴ Moreover, it was held in Illinois that the Pullman Company, as a manufacturing company, had no power to own and operate a farm for the production of vegetables to be sold to its employees.⁵⁵ It was also held in the Pullman case that inasmuch as its manufacturing plant was within a few miles of Chicago, there was no incidental power to buy land and create a municipality by building houses, stores, schools, hotels, churches, etc., near the plant, for employees;⁵⁶ and a distinction was drawn as to cases holding corporations operating mines or sawmills had implied power to construct dwellings and boarding houses for their employees, on the ground that in such cases the works or mills were necessarily located at mines or near large forests.⁵⁷

Where a statute permitted insurance companies to acquire and own such real estate as "shall be requisite for its convenient accommodation in the transaction of its business," it was held that they have

⁵² *Steinway v. Steinway & Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718.

⁵³ *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

⁵⁴ *State v. Commissioners of Mansfield*, 3 Zab. (N. J.) 510, 57 Am. Dec. 409.

⁵⁵ *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

⁵⁶ The argument that the providing homes for employees was necessary was said to be fallacious, in that it "ignores the palpable fact that no duty of providing houses for its workmen was pressed upon the company by surrounding conditions or circumstances, as a necessity, but was adopted as a matter of choice, based, it may have been, upon motives which were, in part, benevolent or charitable

in their nature. * * * It is beyond reason to conclude that, had the way been left open, private capital and individual enterprise would have overlooked this desirable field of operations, or that merchants, tradesmen, butchers and other classes of business men would not have appeared and entered into business rivalry for the custom of the workmen and their families, and that the prosecution of the business of the corporation would have suffered because its workmen could not find homes or places where the articles necessary to supply their wants and add to their comfort could be purchased." *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 152, 64 L. R. A. 366, 51 N. E. 664.

⁵⁷ *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 151, 64 L. R. A. 366, 51 N. E. 664.

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power to purchase real estate for use as a hospital for the care of consumptive employees.⁵⁸

§ 1093. Conduit to pass title. A corporation, although not legally entitled to hold real estate, may be a conduit to pass title, or may obtain the property and pass a good title thereto to one who is legally authorized to acquire and hold it.⁵⁹

§ 1094. Application of rules to particular corporations—In general. A brewing company may purchase real estate to be used to increase the sale of its beer.⁶⁰

The surface of land may be purchased by a coal mining company to secure the coal underneath, and may use the surface for agricultural or other purposes.⁶¹

A plank road company has been held to have power to acquire a

⁵⁸ *People v. Hotchkiss*, 136 N. Y. App. Div. 150, 120 N. Y. Supp. 649.

Attention is called to the most excellent statement of the reasons for the rule by Mr. Justice John M. Kellogg who, after referring to the enlarged duties of employers in recent years, proceeds as follows: "We see corporations pensioning old and infirm employees, establishing benefits for the sick and disabled, permitting regular vacations with continuing pay, aiding in sickness, and doing many humane and praiseworthy acts which formerly might have been questioned as not fairly within the powers or duties of the corporation. These acts are not to be defended on the ground of gratuity or charity, but they enter into the relation of the employer and employee, become as it were a part of the inducement for the employee to enter the employment and serve faithfully for the wage agreed upon, and become a part of the terms of employment. The considerate employer, who treats his employees well, is thus able to secure better service, and upon more satisfactory terms, than the unwilling, illiberal employer. A corporation with 13,280 employees is called

upon to exercise great care in selecting and managing them, so as to receive the best service. Upon their loyalty and efficiency much of its success must depend. The employment, training, disciplining, and managing of such a force, and obtaining from it the best results, is an important part of the relator's business. It is well within the corporate power to assume, as it has done, the care and treatment of such of its employees as are afflicted with tuberculosis; and, unless it is shown to be wasteful of the company's money and unproductive of beneficial results, the practice may stand as well within the scope of its business." *People v. Hotchkiss*, 136 N. Y. App. Div. 150, 120 N. Y. Supp. 649.

⁵⁹ *Mansfield v. Neff*, 43 Utah 258, 134 Pac. 1160, following *Smith v. Sheeley*, 12 Wall. (U. S.) 358, 20 L. Ed. 430.

⁶⁰ *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

⁶¹ *La Salle County Carbon Coal Co. v. Sanitary Dist. of Chicago*, 260 Ill. 423, 103 N. E. 175.

house and lot for its tollgate keeper to reside in, outside the limits of its right of way.⁶²

The acquisition of land and water rights by a water company by purchase is authorized as an incident to its business of securing and selling water, and it may purchase and hold a privilege of damming and flooding formerly used by a sawmill, although the running of a mill is beyond its charter powers.⁶³

§ 1095. — Railroad companies. A railroad company not only has the power to acquire such land as may be necessary for its road and stations, but it also has the power to acquire such as may be necessary or convenient for car and engine houses, water tanks, repair shops, coal and wood yards, sidings, and turnouts, etc.,⁶⁴ or for stock yards for cattle transported over its road,⁶⁵ or for dumping grounds for waste earth taken out in constructing its road,⁶⁶ or for procuring gravel, sand, or other material necessary in the construction of its road.⁶⁷ A railroad company may also acquire land for depot grounds and approaches,⁶⁸ and may take title to land in trust for the purposes of a public square around the depot, for the common use of both the railroad and the town.⁶⁹

While a railroad company may hold a tract of land as a park, it is necessary that "the land so held must lie at or near the depot, so as to be of easy access to its passengers and employees," and "it must be reasonable in size, taking into consideration the extent of travel to and from such depot and the number of employees whose duties require them to be there."⁷⁰

It was held in a Massachusetts case that a railroad company could

⁶² *Detroit & S. Plank-Road Co. v. Detroit*, 81 Mich. 562, 46 N. W. 12.

⁶³ *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

⁶⁴ *Indiana*. *Pfaff v. Terre Haute & I. R. Co.*, 108 Ind. 144, 9 N. E. 93.

New Jersey. *Camden & A. R. & Transp. Co. v. Commissioners of Mansfield*, 23 N. J. L. 510, 57 L. R. A. 409; *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 361.

New York. *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

Ohio. *Toledo & W. Ry. Co. v. Daniels*, 16 Ohio St. 390.

Pennsylvania. *Cleveland & P. R.*

Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

⁶⁵ *New York Cent. & H. River R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326.

⁶⁶ *Lodge v. Philadelphia, W. & B. R. Co.*, 8 Phila. (Pa.) 345.

⁶⁷ See § 1090, *supra*.

⁶⁸ *In re Petition of New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

⁶⁹ *Hickory v. Southern R. Co.*, 137 N. C. 189, 203, 49 S. E. 202.

⁷⁰ *Louisville Property Co. v. Com.*, 146 Ky. 827, 837, 38 L. R. A. (N. S.) 830, 143 S. W. 412.

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purchase land for the purpose of having gravel dug therefrom, and transported at a certain freight over its line, to be delivered to and used by a third party; ⁷¹ but the soundness of this decision is doubtful, to say the least.⁷²

On the other hand, it has been held that a railroad company cannot purchase and hold surplus lands not needed for the construction or operation of its road, merely because it can thereby obtain a right of way through the land at less than it would otherwise have to pay.⁷³ Nor has a railroad company any implied power to purchase an interest in mining lands.⁷⁴

A street railway company cannot acquire blocks of land in consideration of its extending its street car lines, where such land is not essential to the operation of its line and it is not expressly or impliedly authorized to do so by its charter.⁷⁵

§ 1096. — Banks. The purposes for which a national bank may purchase, hold and convey real estate are expressly enumerated by federal statutes.⁷⁶

III. STATUTES OR CONSTITUTIONAL PROVISIONS AS GRANTING OR LIMITING POWER

§ 1097. Grant of power—General considerations. Statutes often expressly confer on certain classes of corporations the power to acquire and hold real property.⁷⁷ Of course, if a corporation is expressly authorized by its charter to purchase certain property, there can be no question as to its power, if the property purchased comes within the property so enumerated or designated in the charter.⁷⁸

A grant of power to a corporation to sell land to another corporation confers upon the latter the power to purchase and hold the land.⁷⁹

⁷¹ *Old Colony R. Corporation v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394.

⁷² *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 181; *Boston & New York Air Line R. Co. v. Coffin*, 50 Conn. 150; *Camden & A. Railroad & Transp. Co. v. Mansfield*, 23 N. J. L. 510, 57 Am. Dec. 409; *Eldridge v. Smith*, 34 Vt. 484.

⁷³ *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150.

⁷⁴ *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180.

⁷⁵ *Scott v. Farmers' & Merchants'*

Nat. Bank (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485, rev'd on other grounds 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

⁷⁶ *Schofield v. Baker*, 212 Fed. 504, 509 (purchase of tidelands by receiver). See also § 1105, *infra*.

⁷⁷ *First Presbyterian Church v. McKallor*, 35 N. Y. App. Div. 98, 54 N. Y. Supp. 740 (religious corporation).

⁷⁸ *Jebeles & Colias Confectionery Co. v. Hutchinson & Son*, 171 Ala. 106, Ann. Cas. 1913 A 1107, 54 So. 618.

⁷⁹ *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich. 351, 51 N. W. 1063.

Express power to a dock corporation to purchase and sell real estate does not include power to deal in real estate by buying and selling it.⁸⁰

Power conferred on a railroad company to "build" branch lines or "extend" its line includes power to purchase branch lines.⁸¹ Likewise, power to "build, own and control" telephone lines includes power to "purchase" lines already constructed.⁸²

Where the purposes for which corporations may take and hold property are expressly enumerated, they may not take and hold for the accomplishment of other purposes distinct therefrom.⁸³

A mutual benefit association given the power by statute to purchase real estate is not deprived of such power by by-laws concerning the custody of cash while in the hands of the treasurer.⁸⁴

The right to "hold" real estate includes the right to "acquire" it, and hence a statute authorizing corporations to "hold" real estate includes power to "acquire" it.⁸⁵ From a statutory authorization to hold real property, the power to make use thereof may be deduced.⁸⁶

Where the right to purchase a franchise is limited to the purchase for use in the transaction of the business of the corporation, it cannot buy it when it is insolvent and wholly unable to procure a franchise elsewhere, and hence not in a position to use the franchise in its business.⁸⁷

§ 1098. — Enumeration of purposes as excluding others not named. If the charter of a corporation expressly declares that the corporation shall have the power to take and hold land for certain purposes, enumerating them, it is to be construed as impliedly prohibiting it from acquiring and holding property for any other purposes than those specified.⁸⁸ This doctrine was applied in a leading case in the Supreme Court of the United States in construing the charter of a railroad company which empowered it to take lands for right of way, and also such as might be needed for depot buildings, engine houses,

⁸⁰ *Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318, 112 N. E. 982.

⁸¹ *Central Trust Co. v. Washington County R. Co.*, 124 Fed. 813.

⁸² *Ege v. Centerville Tel. Exch. Co.*, 33 S. D. 648, 147 N. W. 70.

⁸³ Next section, *infra*.

⁸⁴ *Colaluca v. Societa Co-operativa Di Mutuo Soccorso Fratelli Bandiera*, 30 R. I. 304, 75 Atl. 265.

⁸⁵ *Hubbard v. Worcester Art Museum*, 179 Fed. 406.

⁸⁶ *Nye v. Whittemore*, 193 Mass. 208, 79 N. E. 253.

⁸⁷ *Jasper v. Appalachian Gas Co.*, 152 Ky. 68, Ann. Cas. 1915 B 192, 153 S. W. 50.

⁸⁸ *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369.

machine shops, and other purposes connected with the use and management of the railroad. "This enumeration of the purposes for which the corporation could acquire title to real estate," said Mr. Justice Miller, "must necessarily be held exclusive of all other purposes"; and it was held that the company had no power to take donations of land from citizens interested in the construction of its road, not for right of way or other purposes enumerated in its charter, but to be held for other purposes or to be converted into money.⁸⁹

Where a corporation was created under a general statute authorizing such corporations to hold land for assembly, library, laboratory and other rooms necessary for its purposes, it cannot acquire land for hunting and fishing purposes.⁹⁰

§ 1099. Express or implied prohibition—In general. As already explained, corporations are impliedly prohibited from taking and holding real property for purposes foreign to the object for which they were created.⁹¹ There are also other prohibitions, express or implied.

The capacity to take and hold land which was vested in corporations by the common law was considered contrary to the policy of English institutions, and was restricted by the statutes known as the statutes of mortmain, which prohibited corporations, whether ecclesiastical or lay, from taking and holding lands without license from the king or from parliament.⁹²

Except in Pennsylvania,⁹³ the English statutes of mortmain have not been regarded as in force in the United States,⁹⁴ but in many states there are constitutional or statutory provisions expressly restricting the power of corporations to take and hold land.⁹⁵ Thus, in Mary-

⁸⁹ Case v. Kelly, 133 U. S. 21, 33 L. Ed. 513.

⁹⁰ Prairie Slough Fishing & Hunting Club v. Kessler, 252 Mo. 424, 159 S. W. 1080.

⁹¹ See § 1086, *supra*.

⁹² 1 Bl. Com. 478; 2 Kent's Com. 282.

⁹³ Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Pittsburg Methodist Church v. Remington, 1 Watts (Pa.) 218, 26 Am. Dec. 61.

⁹⁴ Connecticut. White v. Howard, 38 Conn. 342.

Kentucky. Lathrop v. Commercial Bank of Scioto, 8 Dana 114, 33 Am.

Dec. 481; Moore v. Moore, 4 Dana 354, 29 Am. Dec. 417.

North Carolina. Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594.

Vermont. Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

Virginia. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19, 46 Am. Dec. 183.

⁹⁵ In some states a corporation is prohibited from acquiring or holding real estate unless a certain number or proportion of its stockholders are citizens of the United States. Where a corporation is organized under the laws of the state, it will be presumed, in the absence of evidence to the con-

land, under the bill of rights, there must be special legislative sanction to enable a religious corporation to take land either by sale, gift, or devise.⁹⁶

A general statutory or constitutional prohibition against conveyances or devises to corporations is not to be construed as retroactive, so as to affect conveyances or devises which have already taken effect.⁹⁷ A statute providing that purchasers of state lands shall be citizens of the United States or have declared their intention to become such, does not forbid the purchase of such lands by a corporation.⁹⁸

A statute prohibiting companies, the main business of which is the acquisition and ownership of land from thereafter acquiring any land in the state does not apply to a "land and cattle" company which owned no more land than was necessary in its business of raising cattle.⁹⁹ When a corporation is prohibited from taking or holding land, it cannot purchase and take indirectly through an agent.¹ Nor can it take and hold land as trustee.²

Such prohibitions do not prevent a corporation from taking land as security for a debt or to protect its interests.³

§ 1100. — Trust for benefit of corporation and equitable conversion. It has been said that a prohibition against holding land prevents a corporation from taking the beneficial interest in land by having another take the legal title in trust for its benefit;⁴ but it has been held that it does not prevent a conveyance of land to a trustee

trary, that a sufficient percentage of its stockholders are citizens, so as to entitle it to acquire and hold real estate. *Northwestern Tel. Exch. Co. v. Chicago, Milwaukee & St. P. Ry. Co.*, 76 Minn. 334, 79 N. W. 315.

⁹⁶ *Catholic Cathedral Church of Baltimore v. Manning*, 72 Md. 116, 19 Atl. 599.

That the legislature may ratify a conveyance of land to a religious corporation, see *Catholic Cathedral Church of Baltimore v. Manning*, 72 Md. 116, 19 Atl. 599.

⁹⁷ *Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18.

⁹⁸ *Beaver Lumber Co. v. Barker*, 74 Ore. 535, 146 Pac. 88.

Rule applied to purchase of mining

claims. *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522, 538.

⁹⁹ *Kirby v. Pitchfork Land & Cattle Co.*, 61 Tex. Civ. App. 229, 129 S. W. 1151.

¹ *Cox v. Gould*, 4 Blatchf. (U. S.) 341, Fed. Cas. No. 3,301. But see *Fisk v. Patton*, 7 Utah 399, 27 Pac. 1.

² *United States Trust Co. of New York v. Lee*, 73 Ill. 142, 24 Am. Rep. 236.

³ See § 1088, *supra*.

⁴ *Coleman v. San Rafael Turnpike Road Co.*, 49 Cal. 417; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Theological Seminary of Auburn v. Childs*, 4 Paige (N. Y.) 419. Compare, however, *McCartee v. Orphan Asylum Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

to sell the same and apply the proceeds in satisfaction of a debt due to a corporation, or otherwise for its benefit.⁵

Generally, when land is conveyed or devised to a trustee, to sell the same and pay the money to a corporation, there is, under the doctrine of equitable conversion, a gift, not of the land, but of the money; and the transaction, therefore, is not within a prohibition against the corporation's taking or holding real estate under a devise or otherwise.⁶

§ 1101. — Prohibition against holding as prohibition against taking. In a leading case in Pennsylvania it was held that a statute or charter forbidding a corporation to "purchase and hold" real property was a prohibition against holding merely, and did not render void a conveyance of land to a corporation, but that the corporation acquired a title under the conveyance which it could convey to another, subject only to the right of the state to institute proceedings to defeat the title.⁷ The better opinion, however, is that a prohibition against holding land is a prohibition against taking the same.⁸ As was said in a Michigan case: "The disability to hold lands seems almost necessarily to imply a disability to become the grantee and

⁵ *Zantzingers v. Gunton*, 19 Wall. (U. S.) 32, 22 L. Ed. 96; *Germain v. Baltes*, 113 Ill. 29. And see *Wright v. Trustees of M. E. Church of New York City*, Hoffm. (N. Y.) 202; *Fisk v. Patton*, 7 Utah 399, 27 Pac. 1. But compare the cases cited in the note preceding.

⁶ *United States*. *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458.

Delaware. *State v. Wiltbank's Adm'r*, 2 Harr. 22.

Illinois. *Germain v. Baltes*, 113 Ill. 29.

Maryland. *Church Extension of M. E. Church v. Smith*, 56 Md. 362; *Orrick v. Boehm*, 49 Md. 72.

New York. *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Wright v. M. E. Church of New York City*, Hoffm. 202; *Draper v. Harvard College*, 57 How. Pr. 269; *Theological Seminary of Auburn v. Childs*, 4 Paige 419. But see *King v. Rundle*, 15 Barb. 150.

South Carolina. *American Bible Society v. Noble*, 11 Rich. Eq. 156.

Wisconsin. *Milwaukee Protestant Home for Aged v. Becher*, 87 Wis. 409, 58 N. W. 774; *Dodge v. Williams*, 46 Wis. 70, 50 N. W. 1103, 1 N. W. 92.

If a statute prohibits and declares void devises to religious corporations, the object being to restrict the testamentary power of owners of property, and not to prevent such corporations from acquiring property, a devise of land in trust to sell the same, and pay the proceeds to such a corporation, is void. *State v. Wiltbank's Adm'r*, 2 Harr. (Del.) 18.

⁷ *Beazure v. Hillegas*, 7 Serg. & R. (Pa.) 313.

⁸ *Bank of Michigan v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575, Walk. (Mich.) 99; *In re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387; *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

vendor of real estate. There can be no grant of land without a grantee capable of taking; and he who takes and conveys to another must necessarily be, for the time intervening, the holder of the estate. If the restriction in the charter takes away the capacity to hold, it must, therefore, take away the power of receiving the estate for the purpose of conveying to another. The corporation cannot deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance holding that estate; and a title derived through it, to be good, must necessarily imply the right of the corporation to take the estate and hold the title until conveyed."⁹

§ 1102. — Restriction as to quantity or value. In the absence of express restrictions there is no limitation upon the quantity or value of the property which a corporation may hold, other than such as results from the rule that it cannot hold property for a purpose which is foreign to the objects for which it was created.¹⁰ In some jurisdictions, however, there are express constitutional or statutory provisions that a corporation, or a particular kind of corporation, shall not take or hold land in excess of a certain quantity or value, and, of course, a corporation has no right to exceed the limit so fixed.¹¹ Nor has a corporation the power to exceed such a limit fixed by its charter.¹²

If the statute merely limits the quantity of land which a corporation may hold, there is no limitation as to value.¹³ Nor does a limitation as to the amount or value of personal property constitute any restriction upon the holding of real property.¹⁴

Generally, such a limitation in a statute applies in terms to corpora-

⁹ *Bank of Michigan v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575, Walk. (Mich.) 99.

¹⁰ *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 590, 42 Pac. 225; *Andrews v. Andrews*, 110 Ill. 223; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

¹¹ *Cromie v. Louisville Orphans' Home Society*, 3 Bush (Ky.) 365; *In re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Wood v. Hammond*, 16 R. I. 98.

In determining the value of property owned by a corporation, it has been held that the corporation's indebtedness for the property must be

deducted. *Wetmore v. Parker*, 52 N. Y. 450.

Increase in the value of property, and consequent increase in the income of a corporation from its vested estates, does not divest its title. *Bogardus v. Rector, etc., of Trinity Church*, 4 Sandf. Ch. (N. Y.) 758.

¹² *Bank of Michigan v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575, Walk. (Mich.) 99.

¹³ *Andrews v. Andrews*, 110 Ill. 223.

¹⁴ Such a limitation, therefore, does not affect a devise of real estate in trust to sell the same, and with the proceeds erect a building for a corporation. *Cruse v. Axtell*, 50 Ind. 49.

tions of a particular kind only, and does not affect other corporations. Thus, prohibition against the holding of land by a corporation organized for the purpose of "religious worship" does not affect the capacity of an incorporated Young Men's Christian Association,¹⁵ nor of a corporation for missionary purposes only.¹⁶

§ 1103. — Restriction to amount reasonably necessary. It has already been noticed that corporations, other than land companies, cannot hold more land than is reasonably necessary.¹⁷ This rule is sometimes a statutory one.

Where the land holdings of a mining company are limited by statute to such property "as the purposes of the corporation shall require," land holdings of other companies in which the corporation owns stock are not to be considered in determining whether the statutory limit is exceeded.¹⁸

Statutory limitations on the amount of real property that a corporation may hold, by including only what is reasonably necessary for the transaction of its business, do not prevent a brewing company holding property to be leased to a saloon to sell the beer produced by the company.¹⁹

Furthermore, constitutional provisions or statutes sometimes expressly provide as to disposing of property not necessary for carrying on business. Thus, in Kentucky, a constitutional provision forbids corporations to hold land not necessary for carrying on their business, for longer than five years. It is held that this provision is not violated where realty is held by a corporation for use in its business, although such use will not be actually exercised within five years from the date the property was acquired, where it is reasonably certain that it will be necessary for such use.²⁰ So where the land is subject to

¹⁵ *Hamsher v. Hamsher*, 132 Ill. 273, 8 L. R. A. 556, 23 N. E. 1123.

¹⁶ *Gilmer v. Stone*, 120 U. S. 586, 30 L. Ed. 734.

¹⁷ See § 1087, *supra*.

¹⁸ *Bigelow v. Calumet & Hecla Min. Co.*, 167 Fed. 704, 720.

¹⁹ *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927.

²⁰ *Com. v. Mengel Box Co.*, 152 Ky. 287, 153 S. W. 771; *Louisville & N. R. Co. v. Com.*, 151 Ky. 325, 151 S. W. 934, modified in 151 Ky. 774, 44 L. R. A. (N. S.) 301, 152 S. W. 976; *Com. v.*

Louisville Property Co. (Ky.), 132 S. W. 413, *aff'g* on rehearing 121 S. W. 399. To same effect, see *Louisville Property Co. v. Com.*, 146 Ky. 827, 38 L. R. A. (N. S.) 830, 143 S. W. 412, where the provision was held not to operate against the holding of land which would be ultimately needed for additional trackage.

"A corporation organized for business purposes, and with the power to carry on business enterprises, should be allowed the same liberty within the scope of its charter rights and subject

escheat after five years, the land may be sold after the five years but before the commencement of escheat proceedings.²¹ The five years does not run during the time the company was enjoined from using the property, but does begin to run from the time the corporation abandoned its business.²² It applies even to a corporation created to buy and sell property.²³

This provision cannot be evaded by causing the title to be taken by a dummy corporation.²⁴

In Louisiana, it is held that an upper story of a building is not

to the limitations imposed by law, as would be permitted to an individual engaged in a similar business. It is not the purpose of the constitution or the law to place in the way of the success of corporations unreasonable obstacles, or to hinder them from acting as prudent business men would act under like or similar circumstances. Having this view of the privileges that corporations should enjoy, we do not think the constitution should be so construed as to deny a corporation the opportunity to look forward to the time when its needs in the conduct of its business will be greater than at present, or to deprive it of the right to prepare in advance for conditions that it may reasonably expect will come up in the future. If a corporation was not allowed to carry into execution plans that the good judgment of its officers believe to be essential to its growth and prosperity, it would discourage people from investing their money in these agents that are so indispensable to the business of the state and country. From these considerations and others that might be mentioned, we conclude that the time limitation imposed by the constitution was not intended to deny a corporation the right in good faith to acquire real estate for a proper and necessary future use in the transaction of its legitimate business, and hold the same for a longer period than five years, if it is so held with the

intention in good faith of devoting it to a proper and necessary use, and it will be necessary for such purpose when so used. It is not so much the time for which real estate is held, but the purpose for which it was acquired, the intention with which it is held, and the use to which it is to be put, and the necessity for this use, that determines the right of the corporation to hold it." *Louisville Property Co. v. Com.*, 146 Ky. 827, 38 L. R. A. (N. S.) 830, 143 S. W. 412.

"Here, this lot was purchased by the corporation in good faith for the purpose of using it in the necessary conduct of its business, to wit, as a home or building in which to carry on its business. Circumstances made it advisable not to devote it to this use, but it was always held with the good faith intention of so using it when the demands of business required that it be done, and it would be necessary for such use when devoted to it." *German Ins. Co. v. Com.*, 141 Ky. 606, 133 S. W. 793.

²¹ *Louisville Ins. Co. v. Com.*, 147 Ky. 72, 143 S. W. 1044; *Louisville School Board v. King*, 32 Ky. L. Rep. 687, 107 S. W. 247.

²² *Com. v. Kentucky Traction Co. of Louisville*, 140 Ky. 387, 131 S. W. 16.

²³ *Com. v. Louisville Property Co.* (Ky.), 121 S. W. 399.

²⁴ *Com. v. Louisville Property Co.* (Ky.), 121 S. W. 399.

within a constitutional provision requiring corporations to dispose of lands within ten years if not in use according to the purpose of the charter.²⁵

National banks are prohibited by statute from holding possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to them, for a longer period than five years;²⁶ and while state laws cannot interfere with national banks, yet after such five year period, state laws become operative so far as the property being subject to escheat is concerned.²⁷

§ 1104. — Purchase to procure monopoly. A corporation has no power to purchase the property of other persons or corporations engaged in the same business, for the purpose of obtaining control of such business and creating a monopoly. Such a transaction is not only ultra vires, but it is also contrary to public policy and illegal.²⁸ This rule also applies to purchases of stock in other companies.²⁹

§ 1105. — Exception of particular purposes. Statutes prohibiting corporations from taking and holding real property, such as the National Banking Act, for example,³⁰ and charters making like provisions, generally contain exceptions which allow corporations to hold such real estate as may be necessary for their immediate accommodation in the transaction of their business;³¹ or to take a mortgage on land as security for debts,³² or debts previously contracted;³³ or to take a conveyance of land in payment or satisfaction of debts previously contracted;³⁴ or to purchase at sales under judgments, decrees, or

²⁵ State v. New Orleans Warehouse Co., 109 La. 64, 33 So. 81.

²⁶ U. S. Rev. Stat. § 5137, 5 Fed. St. Ann. p. 93.

²⁷ First Nat. Bank v. Com., 143 Ky. 816, 34 L. R. A. (N. S.) 54, Ann. Cas. 1912 D 378, 137 S. W. 518.

²⁸ Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188.

See generally *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739; *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823; *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 L. R. A. 452, 86 S. W. 213; *State v. Continental Tobacco Co.*, 177 Mo. 1, 75 S. W. 737.

²⁹ See Chap. 30, *infra*.

³⁰ U. S. Rev. Stat. § 5137.

³¹ See *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

³² See *Sparks v. State Bank*, 7 Blackf. (Ind.) 469; *Thomaston Bank v. Stimpson*, 21 Me. 195.

³³ *Warner v. De Witt Co. Nat. Bank*, 4 Ill. App. 305.

³⁴ *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Mapes v. Scott*, 94 Ill. 379; *Turner v. First Nat. Bank of Madison*, 78 Ind. 19; *Thomaston Bank v. Stimpson*, 21 Me. 195; *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.) 411.

Such an exception does not permit a corporation to take a conveyance of land in consideration of a transfer by it to the grantor of drafts to which

mortgages in their favor,³⁵ or at a sale under a mortgage given for a debt previously contracted.³⁶

Real estate thus acquired is generally required by the statute to be disposed of by the corporation at public or private sale within a certain time, the object being to permit the corporations to secure payment of their claims, and not to acquire and hold the land longer than is reasonably necessary for this purpose.³⁷

§ 1106. Conditions precedent. Purchases of real estate are sometimes made dependent on the consent of all or a certain per cent. of the stockholders.³⁸ Sometimes the necessity of such consent exists only in the case of a purchase of "additional" ground and not where the purchase is the original or first purchase of ground by the corporation. Thus, in California, a purchase of "additional mining ground" by a mining corporation is not valid unless ratified by two-thirds of the stockholders.³⁹ In New York, the right of a cemetery corporation to take or acquire land for cemetery purposes is made dependent on the consent of a board of supervisors of the county.⁴⁰

IV. MODE OF ACQUISITION

§ 1107. General rules. Title to real estate may be acquired by a corporation by grant,⁴¹ purchase,⁴² devise,⁴³ exercise of the power of eminent domain,⁴⁴ dedication,⁴⁵ estoppel,⁴⁶ adverse possession,⁴⁷ or the grantor is not a party. State Bank v. Coquillard, 6 Ind. 232.

³⁵ As to the construction of such a provision, see

United States. Russell v. Topping, 5 McLean 194, Fed. Cas. No. 12,163.

Alabama. Martin v. Branch Bank, 15 Ala. 587, 50 Am. Dec. 147.

Illinois. Brown v. Hogg, 14 Ill. 219.

Indiana. Holmes v. Boyd, 90 Ind. 332.

New York. Chautauqua County Bank v. Risley, 4 Den. 480.

³⁶ See Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. Ed. 733; John A. Roebeling Sons' Co. v. First Nat. Bank of Richmond, Virginia, 30 Fed. 744; Heath v. Second Nat. Bank of Lafayette, 70 Ind. 106; Wherry v. Hale, 77 Mo. 20.

³⁷ As to compliance with this provision and the effect of failure to comply, see Home Ins. Co. v. Head, 30

Hun (N. Y.) 405; London & C. Loan & Agency Co. v. Graham, 16 Ont. 329.

³⁸ See chapter on Stock and Stockholders, *infra*.

³⁹ Granite Gold Min. Co. v. Maginnes, 118 Cal. 131, 50 Pac. 269.

⁴⁰ Palmer v. Hickory Grove Cemetery, 84 N. Y. App. Div. 600, 82 N. Y. Supp. 973.

⁴¹ McClure v. Missouri River, Ft. S. & G. R. Co., 9 Kan. 373.

⁴² See cases cited in preceding notes.

⁴³ *Infra*, next section.

⁴⁴ See Chap. 36, *infra*.

⁴⁵ Hunter v. Sandy Hill, 6 Hill (N. Y.) 407.

⁴⁶ Chicago, R. I. & P. R. Co. v. Hayes, 49 Colo. 333, 113 Pac. 315; Town of Newpoint v. Cleveland, C., C. & St. L. R. Co., 99 Ind. App. 147, 107 N. E. 560.

⁴⁷ Sherlock v. Louisville, N. A. & C.

license.⁴⁸ In fact the rule now undoubtedly is that a corporation may acquire property in any way in which an individual can, unless the charter of the corporation is expressly or impliedly to the contrary.

Statutory authority to take and hold such voluntary grants of real estate and personal property as should be made to the company to aid the construction and maintenance of its railway, does not exclude other methods of acquisition.⁴⁹ But it has been held that express power to take lands by voluntary grant and donation or by condemnation does not include power to take lands by dedication.⁵⁰

§ 1108. Power to take by devise. Under the English statute of wills, corporations could not take land by devise, since bodies politic and corporate were expressly excepted. And in New York it is expressly declared by statute that no devise to a corporation shall be valid unless its charter or a statute expressly authorizes it to take by devise.⁵¹ Under this statute it was held that charter power to

Ry. Co., 115 Ind. 22, 17 N. E. 171; *Town of Newpoint v. Cleveland, C., C. & St. L. R. Co.*, 99 Ind. App. 147, 107 N. E. 560; *Inhabitants of Rehoboth v. Catholic Congregational Church*, 23 Pick. (Mass.) 139; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319.

However, there is dictum to support the view that an easement for a railroad right of way cannot be acquired by occupation under color of title where the owner has not given his consent thereto and the occupation is lawfully taken by right of eminent domain. In other words, where the owner of land has no right to prevent the entry and continues occupation of a company which has the right of eminent domain, the company cannot acquire title by prescription. The court said: "But it would seem that the reason for presuming a grant by the continued occupation of the land for 20 years is wanting. This rule is founded upon the idea that, if there had not been a grant, the owner would have put an end to the wrongful occupation before the expiration of 20

years. In this case, and that of other railroads, it is not necessary that they should have a grant to authorize their entry and occupation." *Narron v. Wilmington & W. R. Co.*, 122 N. C. 856, 858, 40 L. R. A. 415, 29 S. E. 356.

⁴⁸ *Town of Newpoint v. Cleveland, C., C. & St. L. R. Co.*, 59 Ind. App. 147, 107 N. E. 560.

⁴⁹ *Ryan v. Leavenworth, A. & N. W. Ry. Co.*, 21 Kan. 365.

⁵⁰ *Minneapolis, St. P. & S. S. M. Ry. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319.

⁵¹ See *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133; *White v. Howard*, 46 N. Y. 144; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *McCartee v. Orphan Asylum Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

This statute prevents a devise of the rents and profits of land for the benefit of a corporation not expressly authorized to take by devise. *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290.

That a state or the United States

acquire lands "by direct purchase or otherwise" gave it authority to take by devise,⁵² and also that a grant of power to take "by purchase" gives power to take by devise, "for the word 'purchase' includes all means of acquiring property not coming to one by descent or the mere act or operation of the law."⁵³

In Maryland, under the bill of rights, a devise to a religious corporation, to be valid, must have special sanction from the legislature.⁵⁴

In most states, however, the statute of wills is general, and it is held that there is nothing to prevent a corporation from taking by devise.⁵⁵ Power to acquire real property includes power to take it by devise, unless there is a statute to the contrary.⁵⁶

A fraternal insurance company, being authorized by statute to hold only such real estate as is necessary to provide suitable accommodations for holding meetings and transacting business, cannot take real

is not a person, within the statute of wills of New York, authorizing devises to any person capable by law of holding real estate, see *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *In re Fox's Will*, 52 N. Y. 530, 11 Am. Rep. 751.

⁵² *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290.

⁵³ *Peckham, J.*, in *In Re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233. *Contra*, *McCartee v. Orphan Asylum Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

⁵⁴ The sanction of the legislature must be expressly given to each specific devise to render it valid, but it may be given after the testator's death, if the corporation was in existence at the time of his death. *Church Extension of M. E. Church v. Smith*, 56 Md. 392.

Power to take by devise is not included in the power to take and hold "subscriptions or contributions." *Brown v. Thompkins*, 49 Md. 423.

⁵⁵ *Connecticut. White v. Howard*, 38 Conn. 342.

Ohio. American Bible Society v. Marshall, 15 Ohio St. 537.

Pennsylvania. Thompson v. Swoope, 24 Pa. St. 474.

South Carolina. McIntosh v. Charleston, 45 S. C. 584, 23 S. E. 943.

Virginia. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19, 46 Am. Dec. 183.

In Nebraska it has been held that an incorporated educational institution may take property of any description by devise. *McLeod v. Lincoln Medical College*, 69 Neb. 550, 98 N. W. 672, 96 N. W. 265.

Where the amount devised to a charitable corporation is greater than it is authorized to take at the time, under a statute subsequently enacted authorizing it to hold property greater in amount than the devise, the court may appoint the corporation trustee to administer the fund, under the doctrine of cy pres. *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025, 80 N. E. 490.

That the United States may take by devise as a body politic or corporate, see *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230.

⁵⁶ *Hubbard v. Worcester Art Museum*, 179 Fed. 406.

property by will, where the property is not to be used for such purposes.⁵⁷

With respect to the validity of a devise to a corporation not at the time in being, the decisions are not wholly harmonious.⁵⁸

Where there is a devise to a corporation not authorized to take by devise, a court of equity cannot convert the land into personalty or money, and direct its payment to the corporation.⁵⁹

When a corporation claims property under a devise in another state than that by or under the laws of which it was created, it has been held that it brings its charter with it, and that its capacity to take is governed thereby, but it does not bring with it the statute of wills of the state of its creation. Therefore, if its charter allows it generally to take real estate for purposes not foreign to the objects of its creation, and the law of the state in which the property is devised to it allows foreign corporations to take by devise, the devise is valid, and is not affected by the fact that it cannot take by devise in the state of its creation under the statute of wills of that state. It was so held where a New York corporation, which could not take by devise in New

⁵⁷ *Kennett v. Kidd*, 87 Kan. 652, 44 L. R. A. (N. S.) 544, Ann. Cas. 1914 A 592, 125 Pac. 36.

⁵⁸ A legacy cannot pass to a corporation not yet in being. In *re Chesebrough's Estate*, 34 N. Y. Misc. 365, 69 N. Y. Supp. 848. Compare with this *Biscoe v. Thweatt*, 74 Ark. 545, 4 Ann. Cas. 1136, 86 S. W. 432, where the court recognized the validity of a charitable devise to a body not then incorporated.

The charter of a university expired. Some two years later it was renewed, a bequest having been made to it in the interim. The court held the bequest could be sustained as its name indicated the object of its existence and the purpose for which the bequest was made. The court said further that it was established in South Carolina that a bequest made to an unincorporated society is good. *Snider v. Snider*, 70 S. C. 555, 106 Am. St. Rep. 754, 50 S. E. 504.

A remainder was given to a chari-

table association of women, unincorporated, known as the "Dorcas Society of Trenton," to take effect upon the incorporation of the members. This association disbanded without incorporating but a corporation was later created with eight incorporators, four of them having been members of the original society, the other four having died. The name of the corporation was the "Trenton Society for Organizing Charity." The purposes of the corporation were the same as those of the original society. The court held that the remainder should pass to the corporation. *Trenton Soc. for Organizing Charity v. Howell* (N. J.), 63 Atl. 1110.

The right of an unincorporated, educational society to receive a charitable devise is not lost by its subsequent incorporation. In *re Winchester's Estate*, 133 Cal. 271, 54 L. R. A. 281, 65 Pac. 475.

⁵⁹ *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133.

York, claimed under a devise of land in Connecticut.⁶⁰ However, the contrary has been held in Illinois and Texas, on the ground that a foreign corporation cannot exercise powers prohibited in its home state.⁶¹

On the other hand, it has been held that the fact that the charter of a corporation authorizes it to take land by devise does not render valid a devise to it in a state in which a statute prohibits foreign corporations from taking by devise.⁶²

§ 1109. Transfer by statute or charter. Land belonging to a partnership does not vest in a corporation formed to carry on the business of the corporation,⁶³ and a deed to certain persons "as incorporators" of a named company does not pass title to the corporation afterwards formed.⁶⁴ Nor does the mere incorporation of tenants in common to enable them to carry on more conveniently a common object vest in the corporation a title to the land which had been previously used by the individuals for the same purpose.⁶⁵ However, title to the property of the persons or society formed into a corporation may be transferred to the corporation by appropriate provisions in a statute,⁶⁶ provided such provisions are clear and unmistakable as to their intent.

V. TITLE ACQUIRED AND LIABILITIES ASSUMED

§ 1110. General rules. Generally speaking, as to the title acquired, when it purchases real property, a corporation stands upon the same footing as a private individual.⁶⁷

A solvent corporation holds its property in absolute right just as does a natural person. It is a distinct entity and one may deal with it, with respect to its property, the same as he might with a natural person. Were it otherwise, one purchasing property from the cor-

⁶⁰ *White v. Howard*, 38 Conn. 342.

⁶¹ *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133; *House of Mercy of New York v. Davidson*, 90 Tex. 529, 39 S. W. 924. Compare *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183.

⁶² *White v. Howard*, 46 N. Y. 144.

⁶³ *Schneider v. Sellers* (Tex. Civ. App.), 81 S. W. 126, modified in 98 Tex. 380, 84 S. W. 417.

⁶⁴ *McCandless v. Inland Acid Co.*,

112 Ga. 291, 37 S. E. 419. See also Chap. 5, *supra*.

⁶⁵ *Leffingwell v. Elliott*, 8 Pick. (Mass.) 455, 19 Am. Dec. 343.

⁶⁶ *Church-Wardens v. Savannah*, 82 Ga. 656, 9 S. E. 537.

⁶⁷ *Fulkerson v. Taylor*, 102 Va. 314, 46 S. E. 309, holding that the same principles apply to allowances for improvements, in condemnation proceedings, when claim is made therefor by a corporation, as apply when made by private individuals.

poration could not do so without danger that the property received would be subject to a trust in favor of corporate creditors.⁶⁸

The legal title to corporate property is in the corporation while the beneficial interest is in those who own the stock.⁶⁹

A quasi public corporation which purchases the property of a like corporation generally acquires all of the seller's franchise rights.⁷⁰

When a railroad company acquires, even by a deed in fee, a right of way which intervenes between navigable water and the adjacent upland, the owner of the upland retains all the riparian rights which are incident to the ownership of uplands.⁷¹

Where a corporation has power to purchase and take, although for specified purposes only, a deed properly executed vests it fully with the title, even though the property is acquired and used for other purposes only.⁷²

Whether title passes where the purchase or acquisition is *ultra vires* is treated of in a subsequent chapter.⁷³

§ 1111. Power to take fee simple. Where property is acquired by condemnation, the corporation sometimes takes only the right to use the property while it is operating as a corporation, as in case of a railroad right of way. So a turnpike company takes only an easement in land acquired for highway purposes.⁷⁴ However, a railroad company can acquire a fee simple estate in land, by agreement with the owner, as well as any lesser title;⁷⁵ and the contention that a railroad or other company cannot acquire, by voluntary conveyance of the owner, any greater title than it would acquire by condemnation, is not tenable.⁷⁶ Thus, a railroad company may acquire title in fee to lands for its right of way, depot grounds and other railroad necessities.⁷⁷ Moreover, even if a railroad company has no power to acquire

⁶⁸ *Hearst v. Putnam Min. Co.*, 28 Utah 184, 66 L. R. A. 784, 107 Am. St. Rep. 698, 77 Pac. 753.

⁶⁹ *State v. Brinkop*, 238 Mo. 298, 143 S. W. 444.

⁷⁰ *Detroit v. Detroit United Ry.*, 173 Mich. 314, 139 N. W. 56.

⁷¹ *In re City of Buffalo*, 206 N. Y. 319, 329, 90 N. E. 850.

⁷² *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32.

⁷³ See Chap. 37, *infra*.

⁷⁴ *Brooklyn, Q. C. & S. R. Co. v. Bird*, 76 N. Y. Misc. 62, 134 N. Y. Supp. 1.

⁷⁵ *New York, B. & E. R. Co. v. Motil*, 81 Conn. 466, 471, 71 Atl. 563; *In re City of Buffalo*, 206 N. Y. 319, 330, 90 N. E. 850; *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439.

⁷⁶ *Spierling v. Ohl*, 232 Ill. 581, 585, 13 Ann. Cas. 430, 83 N. E. 1068; *Carter v. Ridge Turnpike Co.*, 22 Pa. Super. Ct. 162.

⁷⁷ *Stevens v. Galveston, H. & S. A. R. Co.*, — Tex. Civ. App. —, 169 S. W. 644.

a fee in its right of way, but only an easement, yet the conveyance of a fee to it transfers the title and is valid until assailed in a direct proceeding by the government.⁷⁸

A bridge company expressly authorized to purchase such real estate as, in the opinion of the directors, will be required for the site of a bridge, and of suitable approaches leading thereto, has power to acquire an estate in fee simple and is not limited to a lease.⁷⁹

§ 1112. Title as limited to life of corporation. It has been contended that when the period of its existence is limited by its charter, a corporation cannot take and enjoy a title in fee simple, but only an estate for years, but the contrary rule is well settled. Such a corporation cannot hold the title to land after the period of its existence has expired, but it may hold a fee simple for the purpose of alienation, and for the purpose of enjoyment during the period of its existence.⁸⁰

"It is erroneous," it was said in a leading New York case, "to say that an estate in fee cannot be fully enjoyed by * * * a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized. It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient."⁸¹

The effect of dissolution will be shown in another chapter.⁸²

⁷⁸ Attorney General v. Smith, 109 Wis. 532, 85 N. W. 512.

⁷⁹ Covington & C. Bridge Co. v. Magruder, 63 Ohio St. 455, 59 N. E. 216.

"It may not be desirable to construct the abutments and approaches of an interstate highway upon a mere leasehold, although the lease may be with the privilege of renewing it forever. The embarrassment of paying rent forever, for the site, may be a good reason for preferring to own the site of the structure, and for not negotiating for and accepting a mere right to occupy the land on the terms of the owners." Covington & C. Bridge Co. v. Magruder, 63 Ohio St. 455, 476, 59 N. E. 216.

⁸⁰ People v. O'Brien, 111 N. Y. 1,

2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Yates v. Van De Bogert, 56 N. Y. 526; Nicoll v. New York & E. R. Co., 12 N. Y. 128; In re Consolidated Gas Co. of New York, 106 N. Y. Supp. 407; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594; Asheville Division No. 15, Sons of Temperance v. Aston, 92 N. C. 578; Rives v. Dudley, 3 Jones Eq. (N. C.) 126, 67 Am. Dec. 231; Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

⁸¹ Parker, J., in Nicoll v. New York & E. R. Co., 12 N. Y. 128.

⁸² See chapter on Forfeiture, Dissolution, etc., infra.

§ 1113. Liabilities assumed. A sale by a partnership of its property to a corporation does not make the corporation liable for the debts of the partnership, although some of the stockholders were members of the firm.⁸³ So a railroad company purchasing the property of another railroad company does not take subject to an unrecorded contract to maintain a depot in a certain place, where neither the books of the seller company nor the minutes of its directors show such a contract.⁸⁴

But while the purchase of the property of a corporation by another corporation does not make the former liable to perform the contracts of the latter, it may become liable by assuming such contracts and undertaking to perform them for a long period.⁸⁵

VI. PRESUMPTIONS AND COLLATERAL ATTACK

§ 1114. Presumptions. When a corporation, authorized to hold real property under some circumstances or for some purposes, purchases and takes a conveyance of property, it will be presumed that it did so for an authorized purpose until the contrary is affirmatively shown, since the presumption is that a corporation has not exceeded its powers.⁸⁶

§ 1115. Collateral attack. The right of a corporation to purchase property cannot be collaterally attacked,⁸⁷ and no one but the state can object.⁸⁸

⁸³ *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373. See also Chap. 12, *supra*.

⁸⁴ *Southern Kansas Ry. Co. v. Logue* (Tex. Civ. App.), 139 S. W. 11.

⁸⁵ *Edgar Lumber Co. v. Cornie Stave Co.*, 95 Ark. 449, 130 S. W. 452. See also chapter on Consolidation and Merger, *infra*.

⁸⁶ *California*. *Diamond Coal Co. v. Cook*, 129 Cal. xviii, 61 Pac. 578, 913; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84.

Kentucky. *Kentucky Lumber Co. v. Green*, 87 Ky. 257, 8 S. W. 439.

Michigan. *University of Michigan*

v. Detroit Young Men's Society, 12 Mich. 158.

New York. *Yates v. Van de Bogert*, 56 N. Y. 526; *Chautauqua County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347.

North Carolina. *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 594.

⁸⁷ *Advance Thresher Co. v. Rockafellow*, 16 S. D. 462, 93 N. W. 652. See also Chap. 37, *infra*.

⁸⁸ *Springer v. Chicago Real Estate, Loan & Trust Co.*, 202 Ill. 17, 66 N. E. 850, *aff'd* 102 Ill. App. 294; *Knowles v. Northern Texas Traction Co.* (Tex. Civ. App.), 121 S. W. 232. See also Chap. 37, *infra*.

CHAPTER 30

PURCHASE AND OWNERSHIP OF STOCK

I. POWER TO TAKE AND HOLD STOCK IN ANOTHER CORPORATION

- § 1116. General rule—Rule in England.
- § 1117. — Rule in United States.
- § 1118. — United States rule applied to particular corporations.
- § 1119. Power to subscribe as distinguished from power to invest.
- § 1120. Effect of grant of power in articles of incorporation.
- § 1121. Incidental power to promote business interests.
- § 1122. Statutory authority.
- § 1123. Statutory restriction or prohibition.
- § 1124. Power to organize subsidiary companies.
- § 1125. Effect of purchaser or seller being a foreign corporation.
- § 1126. Taking stock in payment of antecedent debts.
- § 1127. Taking stock in payment on sale of property.
- § 1128. Taking stock as collateral.
- § 1129. Taking stock to effect compromise.
- § 1130. Speculating in stock.
- § 1131. Purchase of stock to control corporation.
- § 1132. Presumption of authority.
- § 1133. Rights and liabilities as to shares acquired.

II. POWER OF CORPORATION TO TAKE AND HOLD ITS OWN STOCK

- § 1134. Rule in England.
- § 1135. Rule in United States—Minority rule.
- § 1136. — Majority rule.
- § 1137. Agreement to repurchase stock sold.
- § 1138. Express or implied charter or statutory authority.
- § 1139. Express prohibition or restriction.
- § 1140. Power to take by gift or bequest.
- § 1141. Fraud upon or prejudice to creditors or stockholders.
- § 1142. Taking stock as collateral.
- § 1143. Taking stock in payment of debts.
- § 1144. Taking stock to effect compromise.
- § 1145. Effect of purchase.
- § 1146. Who may attack.

I. POWER TO TAKE AND HOLD STOCK IN ANOTHER CORPORATION

§ 1116. General rule—Rule in England. In England it seems to be settled that a corporation, unless expressly prohibited, has the power to purchase and hold shares of stock in other corporations,

provided the transaction is not inconsistent with its nature or object, and provided the shares are not acquired for an improper purpose. It has been so held in the case of ordinary banking and trading companies,¹ and in the case of a corporation organized for the purpose of "undertaking, assisting, and participating in financial, commercial, and industrial operations and undertakings * * * both singly and in connection with other persons, firms, companies, and corporations."²

§ 1117. — Rule in United States. In the United States there are some cases to the same effect as the English rule,³ but they are opposed to the decided weight of authority both in the federal and state courts. The prevailing doctrine is that a corporation has no power either to subscribe for or purchase shares of stock in another corporation, unless such power is expressly conferred upon it by its charter or other statute, or unless the circumstances are such that the transaction is a necessary or reasonable means of carrying out or accomplishing the objects for which it was created.⁴ Moreover, purchases of stock of

¹ In *re Asiatic Banking Corporation*, 4 Ch. App. 252; In *re Barned's Banking Co.*, 3 Ch. App. 105. Compare, however, *Great Eastern Ry. Co. v. Turner*, 8 Ch. App. 149; In *re European Society Arbitration Acts*, 8 Ch. Div. 704; *Joint Stock Discount Co. v. Brown*, L. R. 3 Eq. 139.

² In *re Financial Corporation*, 28 Wkly. Rep. 760.

"A corporation may deal in the shares of other corporations, without express power so to do, provided the nature of its business be such as to render such transactions conducive to its prosperity." *Green's Brice*, *Ultra Vires*, 91.

³ *Booth v. Robinson*, 55 Md. 419 (where it was held that one steamboat company could buy stock in another such company); *White v. G. W. Marquardt & Son*, 105 Iowa 145, 74 N. W. 930 (where it was held that a trading company could sell its goods for stock in another corporation). And see *Latimer v. Citizens' State Bank*, 102 Iowa 162, 71 N. W. 1090; *Calumet Paper Co. v. Stotts Inv. Co.*,

96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

⁴ **United States.** *De La Vergre Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 66; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198; *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 679; *Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. 369; *Pauly v. Coronado Beach Co.*, 56 Fed. 428; *Easun v. Buckeye Brewing Co.*, 51 Fed. 156.

Alabama. *McAlester Mfg. Co. v. Florence Cotton & Iron Co.*, 128 Ala. 240, 30 So. 632; *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

Arkansas. *Lester & Haltom v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

Connecticut. *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *Mechanics' &*

other corporations have been held to be contrary to public policy, in addition to being beyond the power of the corporation.⁵

Where there is nothing in the constitution or laws of a state prohibiting a corporation from acquiring stock in another corporation and thereafter a new constitution is adopted and under authority thereof laws are enacted granting to corporations organized thereunder

Working Men's Mut. Sav. Bank & Building Ass'n v. Meriden Agency Co., 24 Conn. 159.

Georgia. *Military Interstate Ass'n v. Savannah, T. & I. of H. Ry. Co.*, 105 Ga. 420, 31 S. E. 200; *Hazlehurst v. Savannah, G. & R. Co.*, 43 Ga. 57; *Central R. Co. v. Collins*, 40 Ga. 582.

Illinois. *Dunbar v. American Telephone & Telegraph Co.*, 238 Ill. 456, 87 N. E. 521, rev'g on other grounds 142 Ill. App. 6; *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *McCoy v. World's Columbian Exposition*, 87 Ill. App. 605, aff'd 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043; *Martin v. Ohio Stove Co.*, 78 Ill. App. 105.

Louisiana. *New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173, 26 Am. Rep. 90.

Maine. *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

Minnesota. *Hunt v. Hauser Malt- ing Co.*, 90 Minn. 282, 96 N. W. 85.

Missouri. *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135.

Montana. *McGinnis v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

Nebraska. *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

New Hampshire. *Pearson v. Concord R. Co.*, 62 N. H. 537, 13 Am. St. Rep. 590.

New Jersey. *State v. Atlantic City & S. R. Co.*, 77 N. J. L. 465, 72 Atl.

111; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 5. See also *Geer v. Amalgamated Copper Co.*, 61 N. J. Eq. 364, 49 Atl. 159, restraining purchase on ground that price was grossly excessive.

New York. *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. 20.

Ohio. *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486; *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594.

Tennessee. *Wood v. Green*, 131 Tenn. 583, 175 S. W. 1139; *Hermitage Hotel Co. v. Dyer*, 125 Tenn. 302, 142 S. W. 1117; *Clark v. Memphis St. Ry. Co.*, 123 Tenn. 232, 130 S. W. 751; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

Washington. *Denny Hotel Co. of Seattle v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

If an owner of a mill leases it to a consolidated corporation and then becomes general manager of the corporation, but thereafter repudiates the lease and takes possession of the leased property, he cannot defend his possession on the theory that the consolidated corporation had no power to hold stock in other corporations. *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27.

⁵ See *Robotham v. Prudential Ins. Co. of America*, 64 N. J. Eq. 673, 53 Atl. 842.

authority to acquire stock in other corporations, such new constitution and enactments indicate that a previous acquisition by one corporation of stock in another was not contrary to the public policy of the state. Ground would perhaps exist in such case for the contention that such new constitution and statutory enactments legalized a prior acquisition by one corporation of stock in another.⁶

When a corporation has no power to subscribe for or purchase stock in another corporation, it cannot do so indirectly through a trustee or agent.⁷ "To hold otherwise would be to sustain a transaction illegal in its character, accomplished by indirection, when it could not be done if the methods were direct."⁸

§ 1118. — United States rule applied to particular corporations.

This rule in the United States that one corporation cannot ordinarily purchase stock in another corporation has been applied to various kinds of corporations. Thus, the rule has been applied to subscriptions to or purchases of shares in a telegraph company by a lumber company;⁹ in a banking company by a manufacturing or trading company,¹⁰ and vice versa;¹¹ in a railroad company by another railroad company,¹² or a banking company;¹³ in an insurance company by a banking company,¹⁴ or by another insurance company;¹⁵ in a

⁶ Joseph Bancroft & Sons Co. v. Bloede, 106 Fed. 396, 52 L. R. A. 734, construing Delaware statutes.

⁷ O'Brien v. Dunn Iron Min. Co., 141 Mich. 616, 105 N. W. 133; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; McCampbell v. Fountain Head R. Co. (Tenn.), 77 S. W. 1070.

⁸ Dunbar v. American Telephone & Telegraph Co., 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423.

⁹ Peshtigo Co. v. Great Western Tel. Co., 50 Ill. App. 624.

¹⁰ Summer v. Marcy, 3 Woodb. & M. 105, Fed. Cas. No. 13,609. And see Mechanics' & Working Men's Mut. Sav. Bank & Building Ass'n v. Meriden Agency Co., 24 Conn. 159.

¹¹ Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43, 28 Am. Rep. 9.

¹² Central R. Co. v. Collins, 40 Ga. 582; Pearson v. Concord R. Co., 62 N. H. 537, 13 Am. St. Rep. 590; Milbank v. New York, Lake Erie & W. R. Co., 64 How. Pr. (N. Y.) 20.

A railroad company cannot hold stock of a street railway company operating beyond the termini of the railroad, and thereby control the operations of the street railway. State v. Atlantic City & S. R. Co., 77 N. J. L. 465, 72 Atl. 111.

¹³ Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14.

¹⁴ Bank of Commerce v. Hart, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

A corporation, however, may become a member of a mutual insurance company for the purpose of obtaining insurance. See § 1121, *infra*.

¹⁵ Berry v. Yates, 24 Barb. (N. Y.) 199.

building and loan association by a corporation organized for the purpose of doing a general insurance agency, commission, and brokerage business;¹⁶ in one manufacturing company by another manufacturing company;¹⁷ or by a land or town site company in a manufacturing company;¹⁸ in one gas company by another gas company;¹⁹ in one mining company by another;²⁰ by a manufacturing company in a bank;²¹ or in one banking company by another,²² or by an insurance company in a banking corporation.²³

National banks have no express power to deal in stocks, nor is such power incidental to any of the powers conferred;²⁴ and a national bank cannot hold the stock of another national bank as an investment.²⁵

A railroad company is without power to subscribe to stock of a land company.²⁶

So far as the want of power to purchase shares of stock in another

¹⁶ *Mechanics' & Working Men's Mut. Sav. Bank & Building Ass'n v. Meriden Agency Co.*, 24 Conn. 159.

¹⁷ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 31 L. R. A. 415; *Martin v. Ohio Stove Co.*, 78 Ill. App. 105; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

¹⁸ *Pauly v. Coronado Beach Co.*, 56 Fed. 428.

¹⁹ *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

In Illinois, statute now authorizes such purchase in some cases. *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768.

²⁰ *McMillan v. Carson Hill Union Min. Co.*, 12 Phila. (Pa.) 404.

²¹ *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85.

²² *Metropolitan Trust Co. of New York v. McKinnon*, 172 Fed. 846; *Vandagriff v. Rich Hill Bank*, 163 Fed. 823; *Shaw v. National German-American Bank of St. Paul, Minnesota*, 132 Fed. 658 (holding that a

national bank cannot be assessed thereon as a stockholder); *Schofield v. Goodrich Bros. Banking Co.*, 98 Fed. 271; *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594.

²³ *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

²⁴ *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 122 Pac. 458.

²⁵ *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198; *Shaw v. National German-American Bank*, 132 Fed. 658; *Chemical Nat. Bank of New York v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071.

"There can be no doubt that a corporation," said the court in a federal case, "instituted for a specific purpose, such as banking, cannot deal in stocks,—purchase them for investment or speculation." *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734.

²⁶ *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070.

company is concerned, it is immaterial that the corporations are engaged in a similar business.²⁷

The reason for denying the right to purchase stocks of a similar corporation is that in conferring the charter powers the state intended them to be exercised solely through the agency of the corporation upon which they were conferred, and not by delegation to the officers of another corporation.²⁸ A fortiori, the rule applies to a purchase of stock in another corporation created for an entirely different object. "Were this not so," said the Ohio court, "one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock."²⁹

§ 1119. Power to subscribe as distinguished from power to invest.

It has already been noticed that a corporation is not a person within a statute authorizing "persons" to form a corporation.³⁰ And it is well settled that, except where it is otherwise provided by statute, a corporation cannot become an original subscriber for stock in another corporation.³¹ Moreover, it seems that statutory power to "acquire"

²⁷ *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427. See also *supra*, this paragraph.

²⁸ *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 342.

²⁹ *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594. See, to the same effect, *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

³⁰ See § 107, *supra*.

A statute providing that any "person" or any "two or more persons" may form a corporation, etc., does not authorize a corporation to become a subscriber for shares in another corporation. The word "person" in such

a statute refers to natural persons only, in their individual capacity. *Denny Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

³¹ *Alabama*. *McAlester Mfg. Co. v. Florence Cotton & Iron Co.*, 128 Ala. 240, 30 So. 632.

Nebraska. *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unoff.) 888, 93 N. W. 225.

New Jersey. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

Ohio. *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

Tennessee. *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070.

Washington. *Denny Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

stock in another company is to be distinguished from power to "purchase" such stock, in that the latter word gives no power to subscribe for new stock in a company but only to purchase outstanding stock.³²

Power "to invest their money or other property or assets in enterprises which they deem calculated to advance their interests" does not include power to subscribe for stock in the formation of other corporations.³³ Likewise, it has been held that express power conferred on an insurance company "to invest their money in * * * stocks or choses in action, and to sell the same," does not authorize it to subscribe to the capital stock of another corporation in process of organization.³⁴

Express authority to invest in the stock of other companies does not give unlimited power to initiate or to promote new enterprises different in character and scope, and perhaps exceeding in magnitude that for which original charter powers were granted. The power is not "to be so exercised as to enlarge the general scope of the business of the corporation by promoting other distinct corporate enterprises, whether in a different field or in the same field," and "it is very doubtful" whether such statutes confer power "to set up and practically create a new corporation in the same line of business which should control its creator."³⁵

§ 1120. Effect of grant of power in articles of incorporation. As has already been noticed, it is generally held that powers cannot be conferred on a corporation by mere mention thereof in the articles of incorporation.³⁶ This rule has been held applicable to the power to purchase stock in other corporations.³⁷

§ 1121. Incidental power to promote business interests. Of course the mere fact that the purchase of shares, or subscription to the stock, of another company, may be profitable or of benefit to the purchasing company does not authorize such purchase or subscription.³⁸ Thus, it has been held that a corporation created for the

See also cases cited under prior section stating rule generally as to purchases or subscriptions.

³² *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842.

³³ *McAlester v. Florence Cotton & Iron Co.*, 128 Ala. 240, 30 So. 632.

³⁴ *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

³⁵ *Robinson v. Holbrook*, 148 Fed. 107.

³⁶ See Chap. 21, *supra*.

³⁷ *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 508, 65 Pac. 765.

³⁸ *Central R. Co. v. Collins*, 40 Ga. 582.

purpose of manufacturing iron cannot subscribe for stock in a railroad company, though the construction and operation of the railroad will enable it to obtain cheaper coal for use in its business;³⁹ and that a corporation created for the purpose of docking and repairing steamships cannot subscribe for stock in a corporation created for the purpose of owning and navigating steamships.⁴⁰ Likewise, it has been held that a corporation created for the purpose of manufacturing and dealing in furniture cannot subscribe for stock in a hotel company.⁴¹ And in a federal case the power of a land company to subscribe for stock in a manufacturing corporation was denied,⁴² and it was held, in the Pullman Palace Car case, that the car company had no implied power to hold shares of stock in an iron and steel company, although the products of the latter constituted a necessary part of the material required in the construction of the sleeping cars, and all its product was used by the Pullman Company.⁴³

On the other hand, a corporation may take stock in another company without express authority, provided there is no express prohibition, whenever the circumstances are such as to render the transaction a necessary or proper means of accomplishing the objects of its creation. "Whether the purchase of stock in one corporation by another is ultra vires or not," it was said in an Indiana case, "must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which under the statute it might accomplish."⁴⁴

It has been said also that if the nature and objects of a corporation require it to invest funds, it may invest the same in the stock of other corporations, unless there is some express or implied charter or statutory restriction, as in case of religious and charitable corporations, of corporations for literary and scientific purposes, of insurance companies, trust companies, and the like.⁴⁵

Although some of the decisions already cited in this section tend to establish a contrary rule, it would seem to be the better rule that a

³⁹ Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 46.

⁴⁰ New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90.

⁴¹ Knowles v. Sanderecock, 107 Cal. 629, 40 Pac. 1047; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135.

⁴² Pauly v. Coronado Beach Co., 56 Fed. 428.

⁴³ People v. Pullman's Palace Car Co., 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

⁴⁴ Hill v. Nisbet, 100 Ind. 341, 349.

⁴⁵ Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

corporation may purchase stock in a corporation in aid of its business where it would have the power to buy all the product of such corporation. Thus, in a recent Missouri decision, it is held that a railroad company may acquire stock in coal and elevator companies when the purpose is to facilitate its business, and that it is immaterial that the company purchases a majority or practically all the shares of stock of such companies;⁴⁶ and the court said: "If the railroad company could do that business with its own means, why could it not secure itself in the matter of obtaining coal for fuel or a convenience in handling grain by acquiring stock in a coal or elevator company, if it would be more convenient, and if the public was not injured thereby?"⁴⁷ So in a later case in Missouri it was held that a railroad company may own the stock of an express company organized as a carrier of express freight, and also the stock of a refrigerator car company which owns cars devised and used for the transportation of products which require refrigeration while in transit, on the theory that "both companies are engaged in business which the railroad company could carry on itself; and if it could do so directly it may do so indirectly by owning the stock of the companies engaged directly in the business."⁴⁸ Likewise, it was held in a federal case that a corporation created to manufacture, bleach and dye cottons had power to exchange part of its stock for stock in a dyeing corporation formed by its consulting chemist, where the formulas of the chemist were his own discovery and secret, and were used by the manufacturing company only.⁴⁹ And it has been held in Pennsylvania that a land and development company which has power to construct a short railway to develop its lands may subscribe for stock in a railroad furnishing access to such lands;⁵⁰ and in that state it would seem that a corporation for the making of

⁴⁶ *State v. Missouri Pac. R. Co.*, 237 Mo. 338, 141 S. W. 643.

⁴⁷ *State v. Missouri Pac. R. Co.*, 237 Mo. 338, 141 S. W. 643.

⁴⁸ *State v. Missouri Pac. R. Co.*, 241 Mo. 1, 13, 144 S. W. 863.

⁴⁹ *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734.

"The individual Bloede was mortal. When his life ended, these discoveries, secret formulas, and secret processes of his would pass to his legal representatives,—perhaps would be disclosed to the world at large or get into the hands of competitors." To secure permanency, controlling offi-

cials of the corporation induced him to incorporate and purchased over half the shares of his corporation for paid-up shares of their own stock. "The purchase removed all risks of the life of Bloede" and "gave them an interest in a business incident with their own, and which could easily and naturally combine with their own. It would appear that this purchase was directly under the intention and within the power of its charter." *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734.

⁵⁰ *In re Watt's Appeal*, 78 Pa. St. 370.

springs has power to purchase, with its surplus, stock of a steel manufacturing corporation, especially where the purchase is made to secure steel for its springs on favorable terms.⁵¹

A manufacturing corporation, in order to insure its property, may become a member of a mutual fire insurance company.⁵²

§ 1122. Statutory authority. The general rule that a corporation cannot subscribe for or purchase stock in another corporation is based upon the ground that such a transaction is generally foreign to the objects of its creation, and not upon any notion that the nature of a corporation renders it incapable of taking and holding stock in other corporations. A corporation, therefore, may take and hold stock in another corporation whenever it is expressly authorized to do so.⁵³

⁵¹ *Layng v. French Spring Co.*, 149 Pa. St. 408, 24 Atl. 215, where, however, the purchasing company was a limited partnership.

⁵² *St. Paul Trust Co. v. Wampach Mfg. Co.*, 50 Minn. 93, 52 N. W. 274.

⁵³ *United States v. Northern Securities Co.*, 193 U. S. 197, 331, 48 L. Ed. 679; *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. 381, 16 L. Ed. 604; *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798; *Ingraham v. National Salt Co.*, 130 Fed. 676; *Windmuller v. Standard Distilling & Distributing Co.*, 114 Fed. 491.

California. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

Georgia. *Trust Co. of Georgia v. State*, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323.

Kentucky. *Greene v. Middlesborough Town & Lands Co.*, 28 Ky. L. Rep. 303, 89 S. W. 228.

New Jersey. *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 54 Atl. 570.

New York. *Oelbermann v. New York & N. Ry. Co.*, 77 Hun 332, 29 N. Y. Supp. 545, 7 Misc. 352, 27 N. Y. Supp. 945.

Pennsylvania. *Motter v. Kennett Tp. Elec. Co.*, 212 Pa. 613, 62 Atl. 104.

Washington. *State v. Superior Court for Pacific County*, 56 Wash.

214, 105 Pac. 637 (holding statute not unconstitutional because it gives opportunity to stifle competition).

A foreign railroad company may hold stock in a domestic railroad company when the latter's charter provides that "any state or any citizen, corporation or company of this or any other state or country" may subscribe for and hold stock therein, and where the former's charter gives it power to acquire and hold stock therein. *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

It seems that in Iowa, where the law allows corporations to be formed with any powers not in excess of the powers possessed by natural persons, a corporation whose articles give it the power to purchase, hold, and sell both real and personal property may buy shares of stock in another corporation, although it may be formed for some particular business, as manufacturing and dealing in a particular commodity, or lending money and making investments, etc. See *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782; *Iowa Lumber Co. v. Foster*, 49 Iowa 25, 31 Am. Rep. 140. Compare, however, *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Of course, a corporation created in part "to own and hold stocks of other corporations" may purchase stock in other corporations.⁵⁴

Statutes in some states authorize all corporations, at least where not prohibited by any provision in the charter or articles of incorporation, to acquire, either by purchase or, in some states, by subscription or purchase, stock of any other company.⁵⁵

In other states, certain corporations are excepted from the operation of the statute. In most states, however, the statute applies only to railroad companies, and in most of these states the power is limited to the purchase of stocks in other noncompeting railroad companies.⁵⁶ A statute authorizing any railroad company to acquire by lease or purchase, by purchase of stock or otherwise as the parties may agree, the road of another noncompeting company, authorizes the purchase of a majority of the stock of another road.⁵⁷

In some states, statutes authorize mining corporations to hold stocks in other corporations,⁵⁸ or in other mining companies.⁵⁹

Special statutes often govern the right of insurance companies to purchase stock in other corporations.⁶⁰ However, a plan of an insurance company to exchange majority holdings of stock with a trust company, is beyond the power of the company because it severs the beneficial interest from the voting power of the stock and results in self-perpetuating boards of directors.⁶¹

In New York the general statute authorizes the purchase, if authority so to do is contained in the articles of incorporation, or if the corporation, the stock of which is purchased, is engaged in a similar business "or engaged in the manufacture, use or sale of the property, or in the

⁵⁴ *Parker v. Hill*, 68 Wash. 134, 122 Pac. 618.

⁵⁵ In Ohio, the 1902 statute authorizing private corporations to "purchase, or otherwise acquire, and hold, shares of stock in other kindred but not competing corporations, whether domestic or foreign," providing a trust is not created, applies to railroad companies notwithstanding other statutes relate solely to purchases by railroad companies, the statutes being cumulative. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁵⁶ "While it has been the declared policy of the state (Ohio) to prohibit railroads from purchasing or controlling competitive or rival lines, it

has also been its declared policy to encourage the formation of trunk lines and their buying, building, and operating branch or feeding lines." *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 152.

⁵⁷ *Lisman v. Knickerbocker Trust Co.*, 211 Fed. 413, construing Michigan statute.

⁵⁸ *McGinnis v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

⁵⁹ *Bigelow v. Calumet & Hecla Min. Co.*, 167 Fed. 721 (Michigan statute).

⁶⁰ *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842.

⁶¹ *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842.

construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which, the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate.”⁶² However, this statute, in so far as it authorizes corporations to buy stocks of any other corporation engaged in a similar business, is limited to purchases which do not create a monopoly or an unlawful restraint of trade.⁶³

The tendency of the legislative enactments, led by such states as Delaware and New Jersey, is undoubtedly in the direction of extending the power of corporations to hold shares in other corporations.⁶⁴

The New Jersey statute authorizing purchases of stock is construed to permit it as a primary power only when the purpose to do so is expressed in the certificate of incorporation, and as an incidental power only when its exercise is necessary or convenient to enable the holding corporation to attain the objects for which it was created.⁶⁵ Under such statute, a foreign corporation can hold stock in a New Jersey corporation.⁶⁶

Statutory power to consolidate with another corporation includes power to purchase its stock.⁶⁷ Thus, where a corporation created for the purpose of acquiring land, dealing in lumber, and engaging in mining, manufacturing and transportation, is expressly authorized by

⁶² New York Laws 1902, c. 601, art. 3, § 40.

The New York statute “does not permit one corporation to create another, endow it with capital from its own assets, and take all its shares of stock in exchange.” *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 87 N. E. 670, aff’g 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439.

⁶³ *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, construing New York laws.

⁶⁴ See *Noyes, Intercorporate Relations*, § 271.

⁶⁵ *State v. Atlantic City & S. R. Co.*, 77 N. J. L. 465, 72 Atl. 111; *Gerhard v. Welsh*, 80 N. J. Eq. 203, 82 Atl. 871.

A building and loan association cannot purchase shares in a manufacturing company as an investment, under

the New Jersey statute. *Gerhard v. Welsh*, 80 N. J. Eq. 203, 82 Atl. 871.

⁶⁶ *Hyams v. Old Dominion Co.*, 113 Me. 294, L. R. A. 1915 D 1128, 93 Atl. 747.

⁶⁷ *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433; *McGinnis v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

A sale by one corporation to another, in consideration of shares in the purchasing company, of all the vendor company’s assets, except certain shares in the purchasing company held by the vendor company, is authorized by a grant of power to the vendor to “amalgamate” with another company. *Wall v. London & Northern Assets Corporation*, [1898] 2 Ch. 469, 67 L. J. Ch. 596.

its charter to "effect a temporary or permanent consolidation with any railroad or transportation company," it may do so by purchasing the stock of a railroad company, and thus obtaining control of it.⁶⁸ And where one railroad company is authorized to purchase the property and franchises of another company, it may accomplish such purpose by purchasing and holding its stock.⁶⁹

A corporation authorized by its charter to buy "personal property of every description" may purchase, by subscription, stock in another company.⁷⁰

On the other hand, express authority to invest in "public" stocks does not include stocks of a private corporation but means stocks of the state or nation.⁷¹

A statute authorizing the "loan" of corporate funds of a building and loan association on undoubted security does not empower it to purchase outright shares in a manufacturing corporation.⁷² Moreover, authority to purchase "securities of any kind" does not include shares of stock.⁷³ And express power "to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations" does not, it has been held, confer a general grant of power wholly irrespective of the purpose for which a corporation is organized.⁷⁴

A statute requiring state banks to make reports to the state auditor, stating, among other things, "the par value and actual market value of all stock or bond investments" does not authorize them to purchase stocks of another company as an investment.⁷⁵

Whether power to acquire stocks includes power to "subscribe" for stock has already been considered.⁷⁶ Whether a corporation may be formed to acquire and hold, or buy and sell, shares of stock, under a particular statute, is treated of in another chapter.⁷⁷

⁶⁸ *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, aff'g 57 Fed. 47. For somewhat similar cases, see *Hill v. Nisbet*, 100 Ind. 341; *Atchison, T. & S. F. R. Co. v. Cochran*, 43 Kan. 225, 7 L. R. A. 414, 19 Am. St. Rep. 129, 23 Pac. 151; *Ryan v. Leavenworth, A. & N. Ry. Co.*, 21 Kan. 365; *Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50.

⁶⁹ *Lisman v. Knickerbocker Trust Co.*, 211 Fed. 413 (construing Michigan statute); *Hill v. Nisbet*, 100 Ind. 341; *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich. 351, 51 N. W. 1063.

⁷⁰ *Quitman Oil Co. v. McRée*, — Ga. App. —, 88 S. E. 921.

⁷¹ *Wood v. Green*, 131 Tenn. 583, 175 S. W. 1139.

⁷² *Gerhard v. Welsh*, 80 N. J. Eq. 203, 82 Atl. 871.

⁷³ *Bank of Commerce v. Hart*, 37 Neb. 197, 201, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

⁷⁴ *Riley v. Callahan Min. Co.*, 28 Idaho 525, 155 Pac. 665.

⁷⁵ *Schofield v. Goodrich Bros. Banking Co.*, 98 Fed. 271.

⁷⁶ See § 1119, *supra*.

⁷⁷ See § 129, *supra*.

Where a corporation which has power to purchase the shares of another corporation pays therefor with its own stock on an agreed basis plus a certain sum in cash in ten semiannual payments, the purchase is not *ultra vires* merely because the method adopted for making payments amounts to a guaranty of dividends upon such stock.⁷⁸

A statute authorizing stock purchases by corporations, passed after the incorporation of a company, applies thereto, even though the articles of incorporation do not in terms include such power, where the power to pass the statute is directly given by the constitution of the state.⁷⁹

§ 1123. Statutory restriction or prohibition. Constitutional provisions or statutes often expressly or impliedly forbid the purchase of stocks of other corporations, at least in so far as some corporations are concerned. Thus, a constitutional provision forbidding corporations to engage in any business other than is expressly authorized in their charters, or the law under which they are organized, has been held to prevent a corporation from subscribing to stock in a corporation though its business might increase the profits of the subscribing company.⁸⁰

In Missouri, however, it has been held that a constitutional provision that "no corporation shall engage in business other than that expressly authorized in its charter" does not refer to the ownership of stock in another company,⁸¹ although it would doubtless be a violation of such provision if a company such as a railroad corporation should acquire and use the stock of another corporation, in the business of which a railroad company could not lawfully engage, as a cover behind which to carry on such business, i. e., as a mere means of evading the letter of the law.⁸²

A constitutional provision that certain corporations shall in no way

⁷⁸ *Strickland v. National Salt Co.*, 72 N. J. Eq. 170, 64 Atl. 982.

⁷⁹ *Bigelow v. Calumet & H. Min. Co.*, 167 Fed. 704, construing Michigan statute.

⁸⁰ "To own stock in another corporation is to become interested in the business of such corporation. A stockholder is engaged in the business of the corporation, within the meaning of this section of the constitution." *Knowles v. Sanderecock*, 107 Cal. 629,

40 Pac. 1047, where a furniture company in a small town subscribed to stock of a company organized to build a hotel in that town. To the same effect, see *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

⁸¹ *State v. Missouri Pac. R. Co.*, 237 Mo. 338, 141 S. W. 643.

⁸² *State v. Missouri Pac. R. Co.*, 237 Mo. 338, 141 S. W. 643.

control corporations having parallel or competing lines precludes the right to buy the stock of a competing line.⁸³

In some states, statutes forbid corporations purchasing or holding the stocks of other corporations, with certain exceptions,⁸⁴ while in other states the consent of stockholders is necessary.⁸⁵ In such a case, although the agreement to purchase is made in another state where it is authorized, it will not be enforced in a state the statute of which forbids the purchase.⁸⁶

Where a statute forbids a corporation to "directly or indirectly" purchase or own the capital stock or any part thereof of any other corporation "if such other corporation be engaged in the same kind of business and be a competitor therein," a bank cannot purchase shares of stock of another bank in the same general territory,⁸⁷ and it cannot even take such stock in payment of the indebtedness of a customer.⁸⁸

The New Jersey statute forbidding corporations to purchase, hold or sell shares of stock of any other corporations applies only to domestic corporations which have been or may be hereafter organized under the "General Incorporation Act," as distinguished from foreign corporations or from domestic corporations created by special charter or under general laws other than the "General Incorporation Act."⁸⁹

⁸³ *Pennsylvania R. Co. v. Com.* (Pa.), 7 Atl. 368.

⁸⁴ *Attorney General v. New York, N. H. & H. R. Co.*, 198 Mass. 413, 84 N. E. 737 (construing Massachusetts statute forbidding railroad corporations, except in certain cases, from holding stock of other corporations); *Kelly v. Bank of Commerce*, 101 Miss. 692, 57 So. 978; *Bollschweiler v. Packer House Hotel Co.*, 83 N. J. Eq. 459, 91 Atl. 1027.

Where, by statute, no corporation may be organized under general laws to operate a railroad, and the anti-trust act prohibits a corporation from purchasing or owning stock of another corporation, articles of incorporation will not be granted where the power sought, *inter alia*, is the operation of sawmills and the owning and dealing in shares of any corporation, not a competitor, organized under the laws

of the United States or one of the states. *Woodberry v. McClurg*, 78 Miss. 831, 29 So. 514.

⁸⁵ A statute may prohibit a corporation from using its funds in purchasing stock of other corporations, unless the consent of all stockholders of each corporation be first obtained. *Midland Steel Co. v. Citizens' Nat. Bank*, 26 Ind. App. 71, 59 N. E. 211.

⁸⁶ *Park Heights & Seaside Park Bridge Co. v. Brooks & Brooks Corporation* (N. J. L.), 94 Atl. 83.

⁸⁷ *People's Bank v. Lamar County Bank*, 107 Miss. 852, 67 So. 961, 66 So. 219.

⁸⁸ *People's Bank v. Lamar County Bank*, 107 Miss. 852, 67 So. 961, 66 So. 219.

⁸⁹ *Island Heights & Seaside Park Bridge Co. v. Brooks & Brooks Corporation*, 88 N. J. L. 613, 97 Atl. 267.

§ 1124. **Power to organize subsidiary companies.** A corporation authorized to manufacture and sell liquors and to purchase the stocks of other corporations for such purpose, may organize selling companies in other states and hold their stock.⁹⁰ So a manufacturing corporation, whose articles embrace a very wide variety of business, including the purchase or other acquisition of shares of stock of other corporations, may form a new corporation to conduct a similar manufacturing business, with the stock largely held by the parent company, where the purpose is to increase the business and profits of the latter.⁹¹

In Ohio, the representatives of a corporation may subscribe for it to the capital stock of another corporation caused by it to be formed through them.⁹²

In any event, the formation of a selling corporation owned and controlled by a manufacturing corporation, cannot be complained of by a minority stockholder, where the selling corporation is a benefit and is not used as a means to enrich some officer or director or majority stockholder at the expense of the minority holders.⁹³

§ 1125. **Effect of purchaser or seller being a foreign corporation.** It has been held in a federal case that, without regard to what the law is where the purchasing and selling corporations are both domestic corporations, where "the law of the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and create the obligations imposed by the law of the corporation subscribing for the stock, such subscription is ultra vires of the latter corporation, and is illegal and void."⁹⁴ Moreover, if, in a particular state, a domestic corporation cannot own stock in another domestic corporation, a foreign corporation cannot own stock in a domestic corporation in that state, regardless of the powers of the foreign corporation in its own state.⁹⁵

⁹⁰ "Under this provision, no question is or can be raised as to the power of purchasing stocks of existing companies for the purpose of accomplishing the distribution of the product; and, in my judgment, the organization of subsidiary companies for the same purpose and with the same object may be fairly and reasonably regarded as incidental to or consequential upon the business which is expressly authorized, and convenient for the attainment of its objects * * *," *Dittman v. Distilling Co.*

of America, 64 N. J. Eq. 537, 54 Atl. 570.

⁹¹ *Rubino v. Pressed Steel Car Co.* (N. J. Ch.), 53 Atl. 1050.

⁹² *Kardo Co. v. Adams*, 231 Fed. 950, 965.

⁹³ *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd without opinion 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

⁹⁴ *Merz Capsule Co. v. United States Capsule Co.*, 67 Fed. 414, 418.

⁹⁵ *Coler v. Tacoma Railway & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep.

The rule existing in a state in which a domestic corporation buys all the property of a foreign corporation, that a corporation cannot purchase stock of another corporation, should be applied in an action, brought in the state in which the selling corporation was created, to restrain the sale.⁹⁶

§ 1126. Taking stock in payment of antecedent debts. A corporation may take stock in payment of a debt.⁹⁷ Furthermore, there is no good reason why a corporation, when it has the power to enter into a contract under which another may become indebted to it, may not take stock in another corporation in payment, even when the contract is made with this understanding, provided there is no express prohibition, and provided the purpose is to sell the stock, and not to hold it.⁹⁸ However this may be, a corporation certainly has the power to take stock in another corporation in good faith in payment of a debt previously contracted, in order to collect the debt and prevent a loss.⁹⁹

Such a transaction is very generally expressly excepted from a charter or statutory prohibition against the taking and holding of stock in one corporation by another; and, even when there is no express exception, it is held that a prohibition, express or implied, against purchasing and holding stock or dealing in stock, does not apply to the taking of stock in good faith in payment of a debt.¹ However, a

786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

⁹⁶ *Coler v. Tacoma Railway & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

⁹⁷ *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591, 103 N. W. 958; *Hyde v. Equitable Life Assur. Soc. of United States*, 61 N. Y. Misc. 518, 116 N. Y. Supp. 219.

⁹⁸ *Infra*, next section.

⁹⁹ *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 679; *Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. 369; *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591, 103 N. W. 958; *Latimer v. Citizens' State Bank*, 102 Iowa 162, 71 N. W. 225; *Holmes & Griggs Mfg. Co. v. Holmes*

& Wessel Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831. And see *Sumner v. Marcy*, 3 Woodb. & M. (U. S.) 105, Fed. Cas. No. 13,609; *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

¹ *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 679; *Holmes & Griggs Mfg. Co. v. Holmes & Wessel Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; *Tourtelolet v. Whithed*, 9 N. D. 407, 84 N. W. 8.

The rule authorizing a national bank to take stock in another corporation in satisfaction of a debt permits a state bank to do likewise unless barred by statute. *Hill v. Shilling*, 69 Neb. 152, 95 N. W. 24.

national bank which has lent money to a corporation cannot, on a reorganization of the latter, become an organizer and take stock in the new and speculative concern, engaged in a different line of business;² and the same rule applies to a manufacturing corporation which accepts stock in settlement of a pre-existing debt.³ Moreover, where a coal company sold coal cars to a receiver of a railroad in exchange for receiver's certificates which were a prior lien on the railroad company's property, and the sale was a conditional one, the selling company could not, where the receiver had sold out to a reorganized company, take stock in the new company and in return surrender its receiver's certificates, since the claim against the receiver could easily have been collected and the coal company had no claim against the reorganized company.⁴

§ 1127. Taking stock in payment on sale of property. It has been held that a manufacturing corporation cannot sell goods to a railroad or other corporation, and take payment therefor in stock of the latter;⁵ and this proposition is no doubt sound law when the intention is to hold the stock as an investment or for the purpose of controlling the other corporation. There is no reason, however, why a corporation which has the power to dispose of property should not be allowed, in the absence of express prohibition, to sell it for stock in another corporation, provided the transaction is for the bona fide purpose of advantageously disposing of the property, and the stock is taken with a view of selling it and converting it into money.⁶

It has even been held that a manufacturing company, or other purely private corporation which owes no special duties to the public, may, in the absence of express prohibition, sell all of its property

² "To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a pre-existing debt, does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture." *First Nat. Bank v. Converse*, 200 U. S. 425, 439, 50 L. Ed. 537.

³ *Converse v. Gardner Governor Co.*, 174 Fed. 30; *Converse v. Emerson, Talcott & Co.*, 242 Ill. 619, 90 N. E. 269, aff'g 148 Ill. App. 604.

⁴ *Irvine v. Chicago, W. & V. Coal Co.*, 200 Fed. 953.

⁵ *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

⁶ *White v. G. W. Marquardt & Son (Iowa)*, 70 N. W. 193, aff'd on rehearing 105 Iowa 145, 74 N. W. 930; *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 495; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

to another corporation, and take stock in the other corporation in payment therefor, provided all the stockholders consent, and provided the transaction is for the bona fide purpose of winding up the corporation and distributing the stock among the stockholders.⁷

§ 1128. Taking stock as collateral. There is a dictum in an Ohio case to the effect that a corporation cannot make a loan and take a pledge of stock in another corporation as collateral, on the ground that, as in the case of a purchase of stock,⁸ it would enable the corporation to engage in a different business from that authorized by its charter. This result, said the court, would not follow any the less certainly if the shares were received in pledge only to secure the payment of a debt, provided they were transferred on the books of the company to the name of the pledgee, for a person in whose name the stock of a corporation stands on its books is, as to the corporation, a stockholder, and has the right to vote upon the stock.⁹

This view, however, cannot be sustained. It has repeatedly been held in effect, both in England and in the federal and state courts in this country, that, whenever a corporation has the power to lend money or enter into any other contract, it has the power, unless prohibited by its charter or some other statute, to take a pledge of stock in another corporation to secure payment of the loan or performance of the contract.¹⁰ And it has been held that lending money and

⁷ See § 1122, *supra*.

⁸ See § 1123, *supra*.

⁹ *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594. The actual decision in this case was merely that a banking corporation which lends money on the security of stock in another corporation cannot compel the latter to transfer the shares on its books so as to entitle it to vote as the holder of them. Furthermore, the corporation was expressly prohibited from taking and holding shares in another corporation.

¹⁰ **United States.** *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198; *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 633, 25 L. Ed. 448; *Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. 369. See also *Taylor County Court v. Baltimore & O. R. Co.*, 35 Fed. 161;

Shoemaker v. National Mechanics' Bank, 2 Abb. 416, Fed. Cas. No. 12-801.

California. *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

Iowa. See *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

New Hampshire. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New York. See *Talmage v. Pell*, 7 N. Y. 328; *United States Trust Co. v. Brady*, 20 Barb. 119.

Tennessee. *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

England. In *re Asiatic Banking Corporation*, 4 Ch. App. 252.

taking a pledge of stock of a corporation as collateral are not within a charter or statutory prohibition against subscribing for or purchasing stock except in payment of a bona fide debt.¹¹

§ 1129. Taking stock to effect compromise. A corporation may also take stock in another corporation in good faith in order to effect a compromise of a contested claim against it. Thus, it has been held that a national bank, though it has no power to deal in the stock of other corporations, may, in a fair and bona fide compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time that, by turning the stocks into money under more favorable circumstances than then existed, a loss which would otherwise accrue from the transaction might be averted or diminished.¹² Such a transaction is not within an express prohibition against dealing in stocks.¹³

§ 1130. Speculating in stock. A corporation, even though it may have the power to take and hold shares of stock in other corporations as an investment, or as collateral security for a loan or other debt, or in payment of a debt, has no power to go upon the stock exchange and buy shares as a speculation.¹⁴

Thus a corporation authorized to lend money on real, chattel, or personal security, to buy, sell, hold, and transfer notes and other securities, and evidences of indebtedness, to make contracts, acquire and transfer property, in like manner as private individuals, has power to take stock in another corporation as collateral security for signing a note on which the corporation obtains money. *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

¹¹ *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198; *Taylor County Court v. Baltimore & O. R. Co.*, 35 Fed. 161. *Contra*, *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594.

So it is within the power of a national bank to accept stock in another corporation as collateral to loans made by it in the usual course of business. Upon foreclosure of such pledge it may become the owner thereof. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84.

¹² *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 679, aff'g 39 Md. 600.

¹³ *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. Ed. 679.

¹⁴ *In re Asiatic Banking Corporation*, 4 Ch. App. 252, per Giffard, L. J.

It is clearly beyond the implied power of a corporation to purchase stock of other corporations for purely speculative purposes. To permit a corporation to do so would be to permit it to intrust its success or failure to the management of other persons.¹⁵ So a national bank cannot purchase stocks for the purpose of selling them at a profit.¹⁶

§ 1131. Purchase of stock to control corporation. The general rule that a corporation cannot purchase and hold stock in another corporation is peculiarly applicable where the object in doing so is to obtain control of the business of the other corporation and remove competition. In such a case, and even where the purchase would otherwise be valid, the purchase and holding of the stock is contrary to public policy and illegal.¹⁷

The reason for the rule is that it tends to a monopoly.¹⁸ In other words, a corporation will not be permitted to purchase the stock of

¹⁵ *First Nat. Bank of Ottawa v. Converse*, 200 U. S. 425, 50 L. Ed. 537.

¹⁶ *Barron v. McKinnon*, 196 Fed. 933; *First Nat. Bank v. Jenkins*, 73 N. Y. Misc. 277, 130 N. Y. Supp. 947.

¹⁷ *United States. De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 66; *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787.

Georgia. Central R. Co. v. Collins, 40 Ga. 582.

Illinois. Dunbar v. American Telephone & Telegraph Co., 238 Ill. 456, 87 N. E. 521, rev'g 142 Ill. App. 6, 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

New Hampshire. Pearson v. Concord R. Co., 62 N. H. 537, 13 Am. St. Rep. 590.

New Jersey. Elkins v. Camden & A. R. Co., 36 N. J. Eq. 5.

New York. People v. North River Sugar Refining Co., 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834.

Tennessee. Mallory v. Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396.

Thus a statute making it lawful for a manufacturing company to hold the stock of any corporation engaged in the business of mining, manufacturing, or transporting such matters as are required in the prosecution of its business, so long as it shall furnish or transport such materials, etc., does not give a manufacturing company the power to purchase the stock of an insolvent rival concern, which has ceased to do business, for the purpose of preventing its reorganization and obtaining its patronage. *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 66.

¹⁸ "The purpose and intent in granting a charter is that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this state will not permit the control of one corporation by another. Especially, is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by

another corporation for the purpose of gaining control over such corporation, and cutting out competition between itself and the latter. That a complete monopoly would not result does not alter the rule. A purchase of stock for such purpose is something more than a mere exceeding of the corporate power and is void rather than voidable.¹⁹

A trust company expressly authorized "to buy and sell all kinds of government, state, municipal, and other bonds, and all kinds of negotiable and non-negotiable paper, stocks and other investment securities," cannot purchase all the stock of another corporation for the purpose of controlling its management.²⁰ Nor does a statutory grant of power to "invest" in the stock of another company include power to purchase stock for control.²¹

On the other hand, where made in good faith, the purchase of stock by an insurance company, authorized to purchase stock in other corporations, is not unlawful simply because the amount of the stock purchased happens to give to the insurance company a controlling interest.²²

A statute authorizing mining companies to purchase stock of other domestic mining companies is not to be construed as limiting the right of purchase to purchases for investment only but to authorize purchases for control, except so far as in conflict with antitrust and antimonopoly laws.²³

another in a like business is unlawful as tending to monopoly." *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

¹⁹ *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423.

²⁰ *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 737.

The power to buy and sell stocks and other investment securities, conferred on a trust company, gives it neither express nor implied authority to purchase the stock of other corporations, for the purpose of controlling their management. *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S. W. 669.

²¹ *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842.

Directors of an insurance company will not be permitted to exchange majority holdings of stock with a trust company for the purpose of controlling the selection of directors of each corporation. To permit directors so to do would result in taking all control over each corporation from the minority stockholders and reducing the value of their holdings by stripping the minority stock of all real voting power. *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842, where the court held, also, that an injunction restraining the directors from carrying out the plan would not be refused simply because the plan might prove abortive, giving to dissenting stockholders redress in a court of equity.

²² *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842.

²³ *Bigelow v. Calumet & Hecla Min.*

In fact, the favorite method, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock.²⁴ And where there is a broad power to purchase the stock of other corporations, it seems to be held in New Jersey that such a purchase is allowable, even where competition is diminished or temporarily destroyed thereby.²⁵ However, all questions relating to monopolies will be treated of hereafter at length in a separate chapter.²⁶

§ 1132. Presumption of authority. Since corporations may acquire stock in other corporations for some purposes, it must be presumed that the taking of stock in one corporation by another was *intra vires*, unless the contrary appears.²⁷

§ 1133. Rights and liabilities as to shares acquired. When a corporation has the power to take and hold shares in another corporation, and becomes the legal holder of shares, it has the same rights as a shareholder, and is subject to the same liabilities, as a natural person. Like a natural person holding shares, it is entitled to dividends, and is subject to the liability imposed by statute upon the shareholders to contribute to pay the debts of the corporation.²⁸

Whether a corporation owns a part, a majority, or all the stock of another company, its rights and powers are those of a stockholder only,²⁹ and the controlled company is a necessary party to an action against it, even if its stock is entirely held by another corporation joined as a party.³⁰ So a corporation holding stock of another cor-

Co., 167 Fed. 704, 708, *aff'd* 167 Fed. 721.

²⁴ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 152.

²⁵ *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723.

²⁶ See chapter of Monopolies and Trusts, *infra*.

²⁷ *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089; *Ryan v. Leavenworth, A. & N. Ry. Co.*, 21 Kan. 365; *In re Rochester, H. & L. R. Co.*, 110 N. Y. 119, 17 N. E. 678.

²⁸ *In re Asiatic Banking Corporation*, 4 Ch. App. 252.

A trading or manufacturing corpo-

ration purchasing stock under due authority subjects itself to liability incident thereto the same as natural persons. Especially is this true when the company has accepted dividends on the stock. *Hunt v. Hauser Malt-ing Co.*, 95 Minn. 206, 103 N. W. 1032; *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84. Compare *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70.

²⁹ *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 597, 29 L. Ed. 499.

³⁰ *Jessup v. Illinois Cent. R. Co.*, 36 Fed. 735.

poration, under full legal authority, has the right to vote the stock so held.³¹

The ownership by one corporation of all the stock of another corporation does not constitute the former the owner of the corporate property of the latter.³² "The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member."³³

The fact that a corporation is the only stockholder in another corporation gives it no right to appropriate and use the assets of the latter company.³⁴ But if one corporation owns all the shares of another corporation, the former may, as such sole shareholder, assent to any disposition of the assets which would be valid with the assent of all the shareholders.³⁵

The fact that one railroad company owns a greater part of the stock of another railroad company imposes no greater liability nor different relation than it would if the same stock were owned by an individual.³⁶ And the ownership by one corporation of a majority of the stock of another does not give the former ownership of or a legal interest in the property of the latter, nor merge the two, nor destroy the legal identity or individuality of either.³⁷ So the fact that a corporation owns the majority of the stock of another company sued for infringement of a patent does not make the former liable, where it does not in any way control the latter except as it lawfully may as a majority stockholder thereof.³⁸

Where one corporation purchases the majority of the stock of another, the purchasing corporation is entitled to control the affairs of the corporation in which it has become the owner, and the former may pledge its credit in borrowing money for equipment purposes for the latter company.³⁹ Moreover, "while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which

³¹ See chapter on Meetings and Elections, *infra*.

³² *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812, 818.

³³ *Exchange Bank of Macon v. Macon Const. Co.*, 97 Ga. 1, 33 L. R. A. 800, 25 S. E. 326. See also *State v. Tacoma Railway & Power Co.*, 61 Wash. 507, 32 L. R. A. (N. S.) 720, 112 Pac. 506, and cases cited therein.

³⁴ *American Sugar Refining Co. v. Rutan*, 123 Fed. 979.

³⁵ *Sabre v. United Traction & Electric Co.*, 225 Fed. 601, 605.

³⁶ *Southern Pac. R. Co. v. W. T. Meadors & Co.*, 104 Tex. 469, 140 S. W. 427.

³⁷ *State v. Chicago & N. W. Ry. Co.*, — Minn. —, 158 N. W. 627.

³⁸ *Westinghouse Elec. & Mfg. Co. v. Allis-Chalmers Co.*, 168 Fed. 91.

³⁹ *Venner v. New York Cent. & H. River R. Co.*, 160 N. Y. App. Div. 127,

it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions" of the commodities clause of the federal Hepburn Act making it unlawful for any railroad company to transport from one state to another, "any article or commodity," other than certain articles, "manufactured, mined or produced by it, or under its authority, or which it may own, in whole or in part, or in which it may have any interest, direct or indirect," with certain exceptions.⁴⁰

One of the separate links in a system controlled by a holding company, such as the Southern Pacific Company, cannot escape regulation by the Interstate Commerce Commission, because designated as a wharfage company.⁴¹

The fact that the stockholders of two corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation.⁴²

On the other hand, if one corporation becomes the owner of all the stock of another corporation, it has been said that "the court may, in some instances and for some purposes, ignore the existence of the latter and treat the dominant company as if it alone were the owner and operator of the business of the controlled corporation"; but the corporate powers of the dominant corporation cannot be enlarged by such control.⁴³

These questions will be considered more in detail in subsequent chapters.⁴⁴

The effect of ultra vires purchases of stock by corporations is considered in a subsequent chapter.⁴⁵

II. POWER OF CORPORATION TO TAKE AND HOLD ITS OWN STOCK

§ 1134. Rule in England. In England, though it is held that a corporation may deal in the shares of other corporations,⁴⁶ it is held

145 N. Y. Supp. 725, aff'g 81 Misc. 298, 143 N. Y. Supp. 211.

⁴⁰ *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. Ed. 458. Compare *United States v. Delaware & H. Co.*, 213 U. S. 366, 53 L. Ed. 836.

⁴¹ *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310.

⁴² *In re Watertown Paper Co.*, 169 Fed. 252.

⁴³ *Sabre v. United Traction & Electric Co.*, 225 Fed. 601, 604.

⁴⁴ See chapter on Consolidation and Merger, *infra*.

⁴⁵ See Chap. 37, *infra*.

⁴⁶ See § 1116, *supra*.

that it cannot purchase shares of its own stock, unless it is expressly authorized to do so, whether its purpose be to reissue them or to retire them.⁴⁷

"There is a great difference," it is said, "between dealing in the shares of other companies and in its own. The former is ordinary business, attended only with the usual risks of ordinary transactions, but the latter tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself. Consequently, a corporation, to possess such a power, must have it conferred by the plainest and most explicit language."⁴⁸

§ 1135. Rule in United States—Minority rule. In the United States the decisions on this question are conflicting. Some of the courts have held, as in England, that a corporation cannot purchase its own shares of stock, either to retire them or to reissue them, unless such power is expressly conferred by its charter or some other statute.⁴⁹

⁴⁷ *Trevor v. Whitworth*, 12 App. Cas. 409; *In re London, H. & C. Exch. Bank*, 5 Ch. App. 444; *Hope v. International Financial Society*, 4 Ch. Div. 327.

⁴⁸ *Green's Brice, Ultra Vires*, 95.

In a leading English case it was said: "I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase

the shares, and not out of the funds of the company." Lord Herschell in *Trevor v. Whitworth*, 12 App. Cas. 409.

⁴⁹ *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S. W. 1156; *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142. See also *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 31 L. R. A. 497, 59 Am. St. Rep. 751, 65 N. W. 471, which tends to support this rule.

In Alabama it seems that such a purchase is voidable at the instance of the creditors of the corporation. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235; *Dacovich v. Canizas*, 152 Ala. 287, 44 So. 473; *Hall v. Alabama Terminal & Improvement Co.*, 143 Ala. 464, 2 L. R. A. (N. S.) 130, 39 So. 285; *Hall v. Henderson*, 126 Ala. 449, 481, 61 L. R. A. 621, 85 Am. St. Rep. 53, 5 Ann. Cas. 363, 28 So. 531. Compare *Cooper v. Frederick*, 9 Ala. 738.

This seems to be the rule in Kansas,⁵⁰ Maryland,⁵¹ New Hampshire,⁵² Ohio,⁵³ Tennessee,⁵⁴ and Washington.⁵⁵

This view is based, not only upon the ground that a corporation cannot increase or diminish the amount of the capital stock as fixed by the legislature⁵⁶ (a reason which would not apply where shares are purchased and reissued), and on the ground that such a transaction is a fraud upon stockholders and creditors⁵⁷ (a reason which would not apply where there are no creditors and all the shareholders consent), but also, and chiefly, on the ground that it is foreign to the purposes for which the corporation was created, and therefore a violation of its charter, and a diversion of its funds to an unauthorized purpose.⁵⁸

It follows that in these jurisdictions a purchase of its own shares by a corporation is none the less ultra vires because it is made in good faith, with the consent of all the stockholders, and without any intention to defraud creditors.⁵⁹

In a recent case in the federal courts, Judge Hand criticises the majority rule, except where limited to purchases from surplus, as follows: "If a corporation has received property into its treasury of the value of its authorized shares, that is no doubt subject to the vicissitudes of its enterprises, which will be represented by public knowledge of its success or of the value of its shares. If, however, it purchases its own shares, this affects neither the value of the other

⁵⁰ *Steele v. Farmers' & Merchants' Mut. Tel. Ass'n*, 95 Kan. 580, 148 Pac. 661 (where, however, a general statute as to use of assets, merely declaratory of the common law, was relied on); *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 65.

⁵¹ *Bear Creek Lumber Co. v. Second Nat. Bank of Cumberland*, 120 Md. 566, 87 Atl. 1084.

⁵² *Latulippe v. New England Inv. Co.*, 77 N. H. 31, 86 Atl. 361; *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

⁵³ *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425; *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258.

⁵⁴ *Cartwright v. Dickinson*, 88 Tenn. 476, 479, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

"The wiser and better public policy upholds the rule that corporations have no power to traffic in their own stock." *Herring v. Ruskin Co-operative Ass'n* (Tenn. Ch. App.), 52 S. W. 327.

⁵⁵ *Yeaton v. Eagle Oil & Refining Co.*, 4 Wash. 183, 29 Pac. 1051.

⁵⁶ *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70; *Sutherland v. Olcott*, 95 N. Y. 100.

⁵⁷ *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

⁵⁸ *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425; *Trevor v. Whitworth*, 12 App. Cas. 409.

⁵⁹ See the cases above cited.

shares, the success of its enterprises, nor the amount of its apparent share capital. It is merely a method of secret distribution, against the deceit of which its creditors have absolutely no means of protection. The fund which they have the right to rely upon has been surreptitiously taken from them. It seems to me very little relief against the evils which such a right causes to limit it to cases where the corporation is thought to be solvent. It is a strange thing, I think, that there have been cases which permit the practice, which seems to me to be inevitably mischievous commercially.”⁶⁰

The rule cannot be evaded by purchasing and holding the stock through an agent or trustee.⁶¹

The rule is not necessarily inconsistent with the forfeiture or surrender of shares in case of nonpayment of assessments.⁶²

§ 1136. — Majority rule. In most jurisdictions, the doctrine that a corporation cannot purchase and hold its own stock, unless expressly authorized to do so, is not recognized. On the contrary, most of the courts in which the question has arisen have held that it may do so without express authority, in the absence of express restrictions, provided it acts in good faith and without prejudice to the rights of creditors.⁶³ At any event, it has well been said that “there is no

⁶⁰ *In re Tichenor-Grand Co.*, 203 Fed. 720.

⁶¹ *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Trevor v. Whitworth*, 12 App. Cas. 409.

⁶² See §§ 662-665, *supra*.

⁶³ *United States*. *Johnson County v. Thayer*, 94 U. S. 631, 24 L. Ed. 133; *Burnes v. Burnes*, 137 Fed. 781, *aff'g* 132 Fed. 485; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. 89.

Arizona. *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94, rehearing denied 12 Ariz. 105, 95 Pac. 803.

Delaware. *In re International Radiator Co.*, — Del. —, 92 Atl. 255.

Georgia. *Hartridge v. Rockwell*, R. M. Charl. 260.

Illinois. *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, *aff'g* 92 Ill. App. 287; *Clapp v. Peterson*, 104 Ill. 26; *Chetlain v. Republic Life*

Ins. Co., 86 Ill. 220; *Chicago, P. & S. W. R. Co. v. Town of Marseilles*, 84 Ill. 145, 643.

Iowa. *Tierney v. Butler*, 144 Iowa 553, 123 N. W. 213; *State v. Higby Co.*, 130 Iowa 69, 114 Am. St. Rep. 409, 106 N. W. 382; *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742; *Rollins v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037; *Iowa Lumber Co. v. Foster*, 49 Iowa 25, 31 Am. Rep. 140.

Louisiana. See *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

Massachusetts. *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432; *Dupee v. Boston Water Power Co.*, 114 Mass. 37.

Michigan. *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto." ⁶⁴

Private corporations, said the Illinois court, "may purchase their stock in exchange for money or other property, and hold, reissue or

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

Montana. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

Nebraska. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

New Jersey. *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

New York. *City Bank v. Bruce*, 17 N. Y. 507.

"It was in 1858 that the New York Court of Appeals promulgated the doctrine that, in the absence of prohibition by statute, a corporation may purchase its own stock, hold it unextinguished, and reissue the same. *City Bank of Columbus v. Bruce*, 17 N. Y. 507." This rule "has ever since been recognized, followed and adopted by the courts of this state." *Moses v. Soule*, 63 N. Y. Misc. 203, 118 N. Y. Supp. 410, aff'd without opinion 136 N. Y. App. Div. 904, 120 N. Y. Supp. 1136. But it has been held in New York that a corporation can purchase its own stock only out of surplus earnings, which is deemed to be simply reducing the nominal capital stock by increasing the value of the actual capital stock in a like amount. *G. H. McGill Co. v. Underwood*, 161 N. Y. App. Div. 30, 146 N. Y. Supp. 362. A solvent corporation may purchase stock of its retiring president to be reissued to his successor. *Joseph v. Raff*, 82 N. Y. App. Div. 47, 81 N. Y. Supp. 546, aff'd without opinion 176 N. Y. 611, 68 N. E. 1118.

North Carolina. *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501.

Pennsylvania. *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74.

Rhode Island. See *Adam v. New England Inv. Co.*, 33 R. I. 193, 80 Atl. 426.

Texas. *W. R. Case & Sons Cutlery Co. v. Folsom*, — Tex. Civ. App. —, 170 S. W. 1066; *San Antonio Hardware Co. v. Sanger*, — Tex. Civ. App. —, 151 S. W. 1104.

Vermont. See *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 18 Vt. 131, 138.

Virginia. *United States Mineral Co. v. Camden & Driscoll*, 106 Va. 663, 117 Am. St. Rep. 1028, 56 S. E. 561.

Wisconsin. *Atlanta & Walworth Butter & Cheese Ass'n v. Smith*, 141 Wis. 377, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42, 123 N. W. 106; *Gilchrist v. Highfield*, 140 Wis. 476, 17 Ann. Cas. 1257, 123 N. W. 102; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226.

"Many cases cited by textbook writers as following the English rule will be found on examination to be based on the fraudulent nature of the transaction involved, not want of corporate power. Many other cases cited will be found grounded on the general doctrine that all assets of a corporation, whether a going institution or not, constitute a trust fund for creditors, which has no support in this jurisdiction." *Atlanta & W. Butter & Cheese Ass'n v. Smith*, 141 Wis. 377, 32 L. R. A. (N. S.) 137, 131 Am. St. Rep. 42, 123 N. W. 106.

⁶⁴ *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive, this implying that the corporation is neither insolvent nor in process of dissolution," and provided "the rights of creditors are not affected."⁶⁵

In a Georgia case it was said in speaking of a bank: "If, from the course of business, or the state of things, the capital of the bank cannot be usefully employed in loans, there can be no objection against the purchase of its own stock. In such purchases a part of the capital stock is withdrawn, but it is represented by the stock purchased; when dividends are declared, the profits of so much of the stock as may have been purchased belong to the remaining stockholders, and is nothing more than the profit to which they would have been entitled, if instead of appropriating so much of the capital to the purchase of stock, it had been used for making loans."⁶⁶

However, even if the right to purchase its own stock is recognized, the right to purchase should be confined within strict limits.⁶⁷

It is held in some states that a corporation, whether solvent or insolvent, cannot buy back its own stock from one or more of its stockholders in such amount as to reduce the outstanding capital stock of the corporation to an amount below the minimum capital stock stated in the charter.⁶⁸ And in Arkansas, where the statute provides that in no event shall the paid-up capital stock of certain classes of corporations be less than a certain sum, such a company has no power to purchase shares of its own stock.⁶⁹ Moreover, a corporation cannot transfer all or a part of its property to a stockholder in exchange for its shares of stock in the corporation.⁷⁰

⁶⁵ Clapp v. Peterson, 104 Ill. 26.

⁶⁶ Hartridge v. Rockwell, R. M. Charlt. (Ga.) 260.

⁶⁷ In re Fechheimer Fishel Co., 212 Fed. 357, 361.

⁶⁸ Dalton Grocery Co. v. Blanton, 8 Ga. App. 809, 70 S. E. 183.

⁶⁹ "Such a transaction, where the stock is not reissued or resold and the amount brought into the corporate treasury, but depletes or reduces the capital stock below the minimum amount required by our statute. The statute contemplates that this amount of capital shall be in the treasury for the protection of those doing business with such company at all times. And

this statutory requirement is tantamount to an express prohibition against paying out the funds constituting the capital stock to a shareholder for his shares of stock. In such case the corporation would have the surrendered certificate and the shareholder the money, and to the extent of the amount given him the corporate capital would be correspondingly reduced." Lefker v. Harner, 123 Ark. 575, L. R. A. 1916 F 281, 186 S. W. 75.

⁷⁰ Osage City Cemetery Ass'n v. Hanslip, 82 Kan. 20, 107 Pac. 785, where cemetery association transferred all its property to the holder

§ 1137. Agreement to repurchase stock sold. Even if a corporation cannot purchase its own stock, because of a statutory prohibition or otherwise, it may agree with a prospective purchaser of stock from it to refund his money and take back the stock on a certain future date at his option, or on the happening of a certain event,⁷¹ provided the rights of creditors are not affected thereby.⁷² Such an agreement is not contrary to public policy.⁷³

However, there are cases holding that, on selling its stock, a corporation cannot agree to repurchase it, where a statute forbids the corporation to take or acquire its own shares of stock.⁷⁴

In states where a corporation may purchase its own stock, it may sell shares of stock under an agreement to repurchase on the happen-

of all but one share of stock in the company.

71 United States. *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829, construing Colorado statute.

California. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582, distinguishing *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375, as a case based solely on a by-law.

Colorado. *Mulford v. Torrey Exploration Co.*, 45 Colo. 87, 100 Pac. 596.

Iowa. *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

Minnesota. *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N. W. 70.

New York. *Richards v. Ernst Wiener Co.*, 145 App. Div. 353, 129 N. Y. Supp. 951, aff'd 207 N. Y. 65, 100 N. E. 592; *Hyman v. New York Urban Real Estate Co.*, 79 Misc. 439, 140 N. Y. Supp. 138.

A sale of stock by a corporation under agreement that if the purchaser is dissatisfied after a specified time he may return the stock is known as a "sale or return" contract. Absolute

title does not pass thereby. "With the exercise of the option the contract of sale terminates and the right and title of the corporation is restored to its original status. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through this return of its unsold stock." *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829.

72 *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582.

73 *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

74 *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963.

In construing the New York statute making it a misdemeanor to purchase stock except out of surplus, a federal court has held that it applies, where stock is actually issued and delivered, to an agreement to repurchase made at the time of its original sale. In *re Tichenor-Grand Co.*, 203 Fed. 720. So in New Hampshire it is said that the "agreement to repurchase the plaintiff's stock was ultra vires." *Latulippe v. New England Inv. Co.*, 77 N. H. 31, 86 Atl. 361.

ing of a specified event,⁷⁵ as for instance if it sells its franchise,⁷⁶ where there is no fraud or secrecy, and the corporation is solvent, and there is no claim that the stock was worth less than the price fixed on for repurchase;⁷⁷ and it is wholly immaterial that all the stockholders are not given the same rights.⁷⁸

A corporation organized for the purpose of selling land which represents the capital of the corporation, and for which the stock of the corporation was issued, may provide in its charter that the holders of the stock may surrender it and accept land in lieu thereof upon such terms as may be determined by the corporation.⁷⁹

§ 1138. Express or implied charter or statutory authority. Statutes sometimes expressly or impliedly authorize corporations to purchase their own stock.⁸⁰ Thus, in New Jersey, under the Corporation Act of 1896, there is an implied grant of power to corporations to purchase shares of their own capital stock, provided such purchase is required for legitimate corporate purposes but not otherwise, by virtue of the statute making such shares personal property and giving corporations power to purchase such personal property as the purposes of the corporation shall require.⁸¹

⁷⁵ *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 373.

⁷⁶ *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

⁷⁷ *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

A secret agreement is void as to creditors. *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287.

⁷⁸ *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

⁷⁹ *Franco-Texas Land Co. v. Bousselet*, 70 Tex. 442, 7 S. W. 761; *Rowan v. Texas Orchard Development Co.*, — Tex. Civ. App. —, 181 S. W. 871.

⁸⁰ See statutes of the several states.

In Iowa, where the law authorizes

the formation of corporations for any purpose, and with any powers not in excess of those possessed by natural persons, it was held that a corporation, the articles of which provided that its general and principal business should be the manufacture of and dealing in lumber, etc., but also declared that it should have the power to acquire and transfer, purchase and hold, sell or exchange, any real estate "or other property" that might "be deemed desirable in the transaction of its business," could purchase shares of its own stock, if it acted in good faith, and without injury to creditors. *Iowa Lumber Co. v. Foster*, 49 Iowa 25, 31 Am. Rep. 140. See also *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

⁸¹ *Knickerbocker Importation Co. v. State Board of Assessors*, 73 N. J. L. 94, 9 L. R. A. (N. S.) 885, 65 Atl. 913; *Chapman v. Iron Clad Rheostat*

Statutes sometimes permit corporations to purchase their own stock for want of bidders at a sale for nonpayment of assessments on the stock.⁸²

But if an agreement to purchase its own stock is illegal when made, it cannot be validated by subsequent legislation.⁸³ Moreover, a statute providing that the stock of a corporation belonging to it shall not be voted directly or indirectly does not confer power on corporations to purchase their own stock,⁸⁴ nor does a statute providing that a corporation "at any meeting called for the purpose, may increase or reduce its capital stock and the number of shares therein."⁸⁵

A trust company authorized to "buy and sell all kinds of * * * stocks" is not thereby empowered to purchase its own stock.⁸⁶

Where a statute authorized corporations to buy their own stock from "surplus profits," it has been held that it is immaterial "whether the surplus is obtained from the stockholders or earnings, and so long as the surplus exceeds the amount the company is bound to retain as capital, together with a sum sufficient to cover its debts and liabilities, such surplus profits may properly be used for the retirement of its stock, the term 'surplus profits' implying the difference over and above the capital stock, debts and liabilities, no matter how created."⁸⁷

§ 1139. Express prohibition or restriction. The dangers incident to the recognition of the right of a corporation to purchase its own stock has led the legislatures in a number of the states to prohibit the right altogether.⁸⁸ Thus, the National Bank Act expressly prohibits a national bank from purchasing or holding shares of its own capital stock except when it is necessary to prevent loss on a debt previously contracted in good faith.⁸⁹ A like statute exists in

Co., 62 N. J. L. 497, 41 Atl. 690; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

⁸² *Lemoore Canal & Irrigation Co. v. McKenna*, 163 Cal. 736, 127 Pac. 345, and see § 662, *supra*, and the chapter on Stock and Stockholders, *infra*.

⁸³ *Schaun v. Brandt*, 116 Md. 560, 82 Atl. 551.

⁸⁴ *Schaun v. Brandt*, 116 Md. 560, 82 Atl. 551.

⁸⁵ In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock

as the amount of the proposed reduction bears to the whole amount of the capital stock. *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

⁸⁶ *Lefker v. Harner*, 123 Ark. 575, L. R. A. 1916 F 281, 186 S. W. 75.

⁸⁷ *Western & Southern Fire Ins. Co. v. Murphey*, — Okla. —, 156 Pac. 885.

⁸⁸ *In re Fëchheimer Fishel Co.*, 212 Fed. 357, 361.

⁸⁹ U. S. Rev. St. § 5201; see *First Nat. Bank of Xenia v. Stewart*, 107 U. S. 676, 27 L. Ed. 592; *First Nat. Bank of South Bend v. Lanier*, 11 Wall. (U. S.) 369, 20 L. Ed. 172; *Burrows v. Niblack*, 84 Fed. 111; *Buffalo*

some states in relation to the purchase and ownership of their own stock by state banks.⁹⁰

In some states it is made a misdemeanor for a corporation to apply corporate funds, except surplus profits, to the purchase of shares of its own stock;⁹¹ but in New York a purchase of stock for the purpose of preventing competition is not of itself necessarily illegal, where no monopoly is created.⁹² However, such a statute is not applicable to an agreement with stockholders who purchase on instalments to refund the money paid after a certain number of payments.⁹³

A statute forbidding a purchase of its own stock when it "would cause an impairment of the capital of the corporation" means that the funds of the company "shall not be so used for the purchase of shares of its own capital stock when the value of its assets is less than the aggregate amount of all the shares of its capital stock."⁹⁴

A statutory provision that no corporation shall purchase any of its own stock when insolvent or where it would buy such purchase render itself immediately insolvent, does not apply to the issuance of preferred stock to creditors of a firm taken over by the corporation, with the option to purchase goods from the corporation with such preferred stock, where the corporation had no debts of its own when formed to take over the business of the firm.⁹⁵

If a statute provides that at least one-half of the funds represented by the capital stock of a corporation shall consist of lawful money, a corporation cannot purchase half of its shares at a premium.⁹⁶

German Ins. Co. v. Third Nat. Bank, 162 N. Y. 163, 48 L. E. A. 107, 56 N. E. 521.

"The object and policy of the statute in prohibiting a bank from purchasing outright its stock is to prevent the reduction of its outstanding stock, and the withdrawal pro tanto of its capital." *Wallace v. Hood*, 89 Fed. 11, 13.

⁹⁰ *Kassler v. Kyle*, 28 Colo. 374, 65 Pac. 34, holding that action of stockholders in directing the officers to distribute assets among the stockholders equal to one-half the par value of the original stock, was, in effect, a sale of one-half of the capital stock of the bank to itself. *National Bank of Wheaton v. Myers*, 34 S. D. 231, 147 N. W. 991; *Green v. Ashe*, 130 Tenn. 615, 172 S. W. 293.

⁹¹ *In re Feehheimer Fishel Co.*, 212 Fed. 357, 362; *Richards v. Ernst Weiner Co.*, 207 N. Y. 59, 65, 100 N. E. 592, aff'g 145 N. Y. App. Div. 353, 129 N. Y. Supp. 951, holding, however, that it must appear that the purchase is to be made other than from the surplus.

⁹² *Attorney General v. Consolidated Gas Co.*, 124 N. Y. App. Div. 401, 108 N. Y. Supp. 823.

⁹³ *Hyman v. New York Urban Real Estate Co.*, 79 N. Y. Misc. 439, 140 N. Y. Supp. 138. *Contra*, *In re Tichenor-Grand Co.*, 203 Fed. 720.

⁹⁴ *In re International Radiator Co.*, — Del. —, 92 Atl. 255.

⁹⁵ *Butler v. Beach*, 82 Conn. 417, 74 Atl. 748.

⁹⁶ *Hunter v. Garanfio*, 246 Mo. 131, 151 S. W. 741.

Of course statutes forbidding the purchase of stock in other corporations do not apply to the purchase by a corporation of its own stock.⁹⁷

In California, a statute prohibiting corporations from dividing, withdrawing or paying to the stockholders, or any of them, any part of the "capital stock," except as provided for therein, bars corporations from purchasing their own stock, since the term "capital stock" is to be construed as meaning assets;⁹⁸ but it has been held by a federal court that a statutory provision that corporations shall not "divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such corporation, or reduce its capital stock, except as authorized by law," does not forbid the purchase by a corporation of its shares of stock.⁹⁹

A purchase of its stock is not a reduction of the capital stock, within a statute forbidding a reduction except in a certain way, where the stock is kept in existence ready to be resold and transferred to a third party.¹

§ 1140. Power to take by gift or bequest. A corporation may take its own shares of stock by gift² or bequest.³

§ 1141. Fraud upon or prejudice to creditors or stockholders. Even in those jurisdictions in which it is held that a corporation may purchase its own stock, the rule is subject to the condition that the purchase shall be made in good faith and without prejudice to the rights of other stockholders or creditors. It is unauthorized and invalid if made for the purpose of defrauding or injuring other stockholders or creditors of the corporation,⁴ or if it does in fact defraud or prejudice creditors, though made in the most perfect good faith.⁵

⁹⁷ Leonard v. Draper, 187 Mass. 536, 73 N. E. 644.

⁹⁸ Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 Pac. 444.

⁹⁹ In re Castle Braid Co., 145 Fed. 224, 232, construing New York statute.

¹ Leonard v. Draper, 187 Mass. 536, 73 N. E. 644.

² Lake Superior Iron Co. v. Drexel, 90 N. Y. 87.

³ Rivanna Nav. Co. v. Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

⁴ Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, modifying 40 Ill. App. 505; Clapp v. Peterson, 104 Ill. 26; Chicago, P. & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145, 643; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581, 12 S. E. 275; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680; In re Columbian Bank's Estate, 147 Pa. St. 422, 23 Atl. 625.

⁵ Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, modifying 40 Ill. App. 505;

"In the United States, I take it," said the court in a federal case, "the weight of authority upholds the right of a corporation, in the absence of statutory prohibition, to become the purchaser of shares of its own capital stock. * * * But the courts which have most distinctly announced and upheld this doctrine have most definitely held to and rigidly enforced the collateral principle that a corporation cannot become such purchaser when it results in a fraud upon the rights of or injury or loss to the creditors of the corporation. * * * The danger of fraud being perpetrated upon or of injury and loss resulting to creditors was one of the most potent reasons moving the courts of England to establish and adhere to the rule that a corporation cannot become the purchaser of its own shares of stock. * * * In view of the contrary doctrine obtaining in most of the courts of this country, the safety of the creditors of a corporation lies in the recognition and enforcement of the collateral principle above set forth. Were it not for the existence of this principle, creditors of corporations would occupy a most hazardous and perilous position."⁶ Thus, a purchase of its own stock by a corporation by exchange for its property of an equal value, although made in good faith, and without any element of fraud, or anything in the apparent condition of the corporation to interfere with the making of the exchange, will not be sustained if a creditor of the corporation is prejudiced thereby; and it can make no difference that the indebtedness was not at the time established or known to the stockholders.⁷ Also, in accordance with this rule, if the purchase renders the corporation insolvent,⁸ or if the purchase is by a corporation already insolvent,⁹ it is ultra vires.

Clapp v. Peterson, 104 Ill. 26; Adams & Westlake Co. v. Deyette, 5 S. D. 418, 49 Am. St. Rep. 887.

"It is possible that under certain circumstances a corporation may have legal power to buy shares of its own stock with its surplus or profits, such power being coupled with a legal duty on its part promptly to reissue such shares for value. However this may be, it is clear that no power exists in a corporation, as against its creditors, to impair the fund, represented by its capital stock, by expending any portion of it in purchasing shares of its own stock." Hamor v. Taylor-Rice Engineering Co., 84 Fed. 392, 399.

⁶ In re S. P. Smith Lumber Co., 132 Fed. 618.

⁷ Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, modifying 40 Ill. App. 505; Clapp v. Peterson, 104 Ill. 26.

⁸ Coleman v. Tepel, 230 Fed. 63; Menefee v. Phelan, 140 Fed. 988, aff'g In re S. P. Smith Lumber Co., 132 Fed. 618; Lefker v. Harner, 123 Ark. 575, L. R. A. 1916 F 281, 186 S. W. 75.

⁹ Coleman v. Tepel, 230 Fed. 63; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444; Fitzpatrick v. McGregor, 133 Ga. 332, 25 L. R. A. (N. S.) 50, 65 S. E. 859.

"I do not suppose that this decision

But creditors are not injured where the corporation has assets largely in excess of its indebtedness at the time of the purchase;¹⁰ and insolvency of the corporation at some later time is immaterial.¹¹

"If it were shown," said the Illinois court, "that the purchase was made to promote the interests of the officers of the company alone, and not the stockholders generally, or if for the benefit of a portion of the stockholders and not all, or for the injury of all or only a portion of them, or if it operated to the injury of creditors, or would defeat the end for which the body was created, or if it was done for any other fraudulent purpose, then chancery could interfere."¹²

A secret agreement between a corporation and certain stockholders to repurchase their stock at a certain advance at the end of two years is void as to creditors of the corporation.¹³ However, subsequent creditors who become such with knowledge of the purchase cannot complain.¹⁴

§ 1142. Taking stock as collateral. Certainly in those states in which it is held that a corporation may purchase shares of its own stock, and probably in all jurisdictions, in the absence of express restrictions, a corporation which has the power to make a loan may take and hold shares of its own stock as collateral. And there can be no doubt that in all the states, in order to prevent a loss, it may take its own shares as collateral for a debt previously contracted in good faith, unless there is an express charter or statutory restriction.¹⁵

The National Bank Act expressly prohibits a national bank from making any loan or discount on the security of the shares of its own capital stock, unless such security is necessary to prevent loss on a debt previously contracted in good faith;¹⁶ but the statute does not

goes the length of authorizing a corporation to purchase and pay for its own stock if such purchase and payment will disable it from paying its debt in full, or of authorizing a corporation to contract with one or more of its shareholders to buy shares and so convert them into creditors entitled to come in on an equality with other creditors, if the assets be at the time insufficient to pay all the creditors in full." *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

¹⁰ *Copper Belle Min. Co. v. Costello*, 12 Ariz. 105, 100 Pac. 807.

¹¹ *Copper Belle Min. Co. v. Costello*,

11 Ariz. 334, 95 Pac. 94; *Joseph v. Raff*, 82 N. Y. App. Div. 47, 81 N. Y. Supp. 546.

¹² *Chicago, P. & S. W. R. Co. v. Town of Marseilles*, 84 Ill. 643.

¹³ *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634, aff'g 92 Ill. App. 287.

¹⁴ *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333.

¹⁵ *German Sav. Bank v. Wulfe-kuhler*, 19 Kan. 65; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 452; *Dalzell v. Commercial Bank*, 82 Mo. App. 264.

¹⁶ U. S. Rev. St. § 5201; *First Nat.*

prohibit a national bank from accepting a pledge of its own capital stock, where such a measure is necessary to secure the payment of an unsecured pre-existing debt and so prevent loss to the bank.¹⁷

§ 1143. Taking stock in payment of debts. In the absence of express restrictions, even in those states in which power on the part of a corporation to purchase shares of its own stock is denied, a corporation has the power, in order to prevent loss, to take its own shares in payment of a debt previously contracted in good faith.¹⁸

The National Bank Act expressly gives such power to national banks, though it prohibits them from otherwise purchasing their own shares; but it requires them to sell shares so acquired, at public or private sale, within six months after taking them.¹⁹

After a corporation has become insolvent, however, it will not of course be permitted to discharge a debt due it by acceptance of shares of its stock.²⁰

In Missouri, it has been held that a manufacturing corporation cannot take its own shares in payment for goods sold at the time;²¹ but this rule does not apply in those states where it has held that

Bank of Xenia v. Stewart, 107 U. S. 676, 27 L. Ed. 592; *First Nat. Bank of South Bend v. Lanier*, 11 Wall. (U. S.) 369, 20 L. Ed. 172; *Feckheimer v. National Exch. Bank of Norfolk*, 79 Va. 80.

¹⁷ *First Nat. Bank of Lake Charles v. Lanz*, 202 Fed. 117.

¹⁸ *United States. Chillicothe Branch of Ohio State Bank v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683.

Alabama. Draper v. Blackwell, 138 Ala. 182, 35 So. 110; *Governor v. Baker*, 14 Ala. 652.

Maryland. Williams v. Savage Mfg. Co., 3 Md. Ch. 452.

Missouri. St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142.

New Hampshire. Currier v. Lebanon Slate Co., 56 N. H. 262.

New York. City Bank of Columbus v. Bruce, 17 N. Y. 507; *Barton v. Port Jackson & Union Falls Plank Road Co.*, 17 Barb. 407; *Ex parte Holmes*, 5 Cow. 426.

Ohio. Morgan v. Lewis, 46 Ohio St.

1, 17 N. E. 558; *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425; *Taylor v. Miami Exporting Co.*, 6 Ohio 80, 25 Am. Dec. 736.

Texas. Roach v. Burgess (Tex. Civ. App.), 62 S. W. 803.

Vermont. State v. Smith, 48 Vt. 266.

Washington. Barto v. Nix, 15 Wash. 563, 46 Pac. 1033; *Yeaton v. Eagle Oil & Refining Co.*, 4 Wash. 185, 29 Pac. 1051.

¹⁹ When a national bank takes its own stock in payment of a debt previously contracted, and sells the same within six months, it may sell on credit, provided it acts in good faith, and take the note of the purchaser secured by a pledge of the stock as collateral. *Union Nat. Bank v. Hunt*, 76 Mo. 440.

²⁰ *Roach v. Burgess* (Tex. Civ. App.), 62 S. W. 803.

²¹ *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338.

there is express or implied power in a corporation to purchase its own stock.

§ 1144. Taking stock to effect compromise. A corporation may also take shares of its own stock, in the absence of express restriction, even in those jurisdictions in which it is held that it cannot purchase its own stock, in order to effect a compromise of a disputed claim against the holder, whether the claim arises out of the latter's subscription to its capital stock, or out of some other contract or transaction.²² Thus, when a corporation is solvent, the directors may accept the resignation of the corporate president, where they deem it conducive to the best interests of the corporation, paying him for his stock and back salary, together with a certain further sum as liquidated damages as consideration for his resignation.²³

§ 1145. Effect of purchase. A corporation which has purchased shares of its own stock cannot vote the same at corporate meetings.²⁴

The purchase does not amount to a cancellation of the stock purchased,²⁵ and it may be kept alive and treated as assets.²⁶

The corporation, where solvent, may reissue the stock at any time.²⁷

Whether its shares of stock purchased by the corporation are taxable is the subject of conflicting decisions.²⁸

§ 1146. Who may attack. The corporation itself cannot have the purchase declared illegal, in states where such a purchase is allowable under some conditions, even if injured stockholders or creditors might have that right.²⁹ Nor can nonassenting stockholders who are not injured thereby complain.³⁰

The title passes even though the purchase is *ultra vires*,³¹ and the general rules as to the effect of *ultra vires* purchases are applicable, where the purchase is *ultra vires*.³²

²² *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258; *Berks & Dauphin Turnpike Road v. Meyers*, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402. To the same effect, see *Fulmer v. Tootle-Campbell Dry Goods Co.*, 189 Mo. App. 514, 176 S. W. 1091.

²³ *Joseph v. Raff*, 82 N. Y. App. Div. 47, 81 N. Y. Supp. 546.

²⁴ See chapter on Meetings and Elections, *infra*.

²⁵ *Pabst v. Goodrich*, 133 Wis. 43, 14 Ann. Cas. 824, 113 N. W. 398.

²⁶ *Pabst v. Goodrich*, 133 Wis. 43, 14 Ann. Cas. 824, 113 N. W. 398.

²⁷ *Costello v. Portsmouth Brewing Co.*, 69 N. H. 405, 43 Atl. 640.

²⁸ See chapter on Taxation, *infra*.

²⁹ *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94, rehearing denied 12 Ariz. 105, 95 Pac. 803.

³⁰ *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94, rehearing denied 12 Ariz. 105, 95 Pac. 803.

³¹ See Chap. 37, *infra*.

³² See Chap. 37, *infra*.

CHAPTER 31

POWERS AS TO FRANCHISES

I. IN GENERAL

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§ 1183. — Who may assert forfeiture; procedure.

§ 1184. Amendment or modification.

§ 1185. Rights and duties of grantee of franchise.

I. IN GENERAL

§ 1147. Scope of chapter. It is necessary, in construing the decisions and statutes, to understand what is meant by the term “franchise” or “franchises.” At the same time much of the law in regard thereto relates almost wholly to municipal corporations, which are not within the scope of this work. Without going into details or attempting an exhaustive citation of authorities, this chapter will be devoted to a general consideration of what constitutes a franchise, its nature, the kinds of franchise, the rules governing particular kinds, etc. Much of the law relating to the nature of franchises and the distinction between general and special franchises arises in connection with the taxation thereof, which is considered in a subsequent chapter.¹

The power of the legislature to grant exclusive franchises has already been noticed.² The power to transfer franchises is also discussed elsewhere.³

Whether the franchises of a corporation may be taken on attachment or execution is considered in a subsequent chapter,⁴ as is the question whether franchises are subject to the right of eminent domain.⁵

§ 1148. Definition and kinds. The word “franchise” is generally used to designate a right or privilege conferred by law. Many attempts have been made to define it, and there is not a little variation in the terms used. The truth is that the term has various significations both in legal and in popular parlance.⁶ No practical value is to be derived in this connection from considering at length the judicial definitions of the term. Without going into any extended research as to its origin, it may be said that a franchise is a special privilege conferred by governmental authority, and which does not belong to citizens of the country generally as a matter of common right.⁷

In common usage the term includes any special privilege or right conferred by legislative power on corporations or persons.⁸ It is also

¹ Chapter on Taxation, *infra*.

² See § 173, *supra*, and chapter on Monopolies and Trusts, *infra*.

³ See Chap. 32, *infra*.

⁴ Chapters on Attachment and on Executions, *infra*.

⁵ Chapter on Eminent Domain, *infra*.

⁶ 12 Ruling Case Law 173.

⁷ Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081.

⁸ People v. Union Gas & Electric

to be regarded as a generic term covering all rights granted to a corporation by legislative act or statute.⁹

A definition often quoted is that of Mr. Justice Bradley in the Supreme Court of the United States, as follows: "A franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."¹⁰ To illustrate: "No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority, which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."¹¹

Its meaning depends more or less upon the connection in which the word is employed¹² and "the property and corporation to which it is applied. It may have different significations."¹³

For practical purposes, franchises, so far as relating to corporations, are divisible into (1), corporate or general franchises and (2), special or secondary franchises. The former is the franchise to exist as a corporation,¹⁴ while the latter are certain rights and privileges conferred upon existing corporations, such as the right to use the streets of a municipality to lay pipes or tracks, erect poles or string wires.¹⁵

Co., 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768; *State v. Farmers' & Mechanics' Sav. Bank of Minneapolis*, 114 Minn. 95, 130 N. W. 445, 851.

⁹ *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.* (Del.), 46 Atl. 12; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 238, 91 N. W. 1081.

"It is quite too narrow a definition of the word 'franchise' * * * to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature." *Atlantic & G. R. Co. v. Georgia*, 8 Otto

(U. S.) 359, 25 L. Ed. 185, quoted in *State v. Berry*, 52 N. J. L. 308, 19 Atl. 665.

¹⁰ *California v. Central Pac. R. Co.*, 127 U. S. 1, 32 L. Ed. 150.

¹¹ *California v. Pacific R. Co.*, 127 U. S. 1, 32 L. Ed. 150.

¹² *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 238, 91 N. W. 1081; *Pierce v. Emery*, 32 N. H. 484.

¹³ *Attorney General v. Haverhill Gas Light Co.*, 215 Mass. 394, Ann. Cas. 1914 C 1266, 101 N. E. 1061.

¹⁴ See §§ 1152-1155, *infra*.

¹⁵ See §§ 1156-1185, *infra*.

While the distinction between the two is well defined,¹⁶ unfortunately the courts often have used the term without indicating which kind of franchise was meant, thus sometimes rendering it difficult to determine exactly what the court intended to decide.¹⁷

16 Kansas. *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337.

Maine. *Crawford Elec. Co. v. Knox County Power Co.*, 110 Me. 285, Ann. Cas. 1914 C 933, 86 Atl. 119.

New York. *New York v. Bryan*, 196 N. Y. 158, 89 N. E. 467, rev'g 130 App. Div. 658, 115 N. Y. Supp. 551; *Village of Fredonia v. Fredonia Natural Gas Light Co.*, 87 Misc. 592, 149 N. Y. Supp. 964.

Oregon. *State v. Portland General Elec. Co.*, 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

Utah. *Cooper v. Utah Light & Railroad Co.*, 35 Utah 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

Wisconsin. *LaCrosse v. LaCrosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530; *State v. Milwaukee, B. & L. G. R. Co.*, 92 Wis. 546, 92 N. W. 546.

"The secondary franchise, or right of making use of the purchased privilege, which the books denominate the 'franchise to do,' is entirely distinct and separate from the franchise to be or exist here as a corporation." *American Smelting & Refining Co. v. People*, 34 Colo. 240, 82 Pac. 531. Again it has been said: "The franchise of a corporation comprises its existence, its activity and its liability; the right to be, the power to do and the liability of being acted upon; and these are, sometimes called separate and independent franchises. The franchise to be is only one of its franchises. The franchise to do is a combination of independent franchises embracing all things which the corporation is given power to do, and may be denominated its active

powers—those powers which, when properly exercised, render it successful and valuable." *Rhode Island Hospital Trust Co. v. Tax Assessors of Providence*, 25 R. I. 355, 55 Atl. 877. Thus "a franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railroad." *Central Trust Co. of New York v. Western North Carolina R. Co.*, 89 Fed. 24.

¹⁷It has been said that "it is unfortunate that the same word is used with widely different meanings, for it leads to confusion unless qualified by an appropriate adjective, such as 'general' or 'special.'" *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443.

"Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation." *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

It has also been said that "much confusion has arisen from not distinguishing clearly between the franchise of a corporation, which can only be granted by the state, and the permission, by ordinance, of a municipality for the exercise of the corporate franchise within the municipality. The latter is not a franchise, although it is often so referred. It is a

Some courts, however, hold, it would seem, that the term "franchise," when applied to a corporation, technically speaking means only the franchise to be a corporation, and does not include those rights and privileges, subsidiary in their nature, acquired by the corporation, and to the existence of which corporate existence is not a prerequisite.¹⁸

§ 1149. Nature as property. A franchise, whether general or special, is generally considered as property.¹⁹

If it is property, it is generally held to be an incorporeal hereditament,²⁰ although, as stated by Chancellor Kent, "with some impropriety, as they have no inheritable quality."²¹

Whether franchises shall be considered property is usually important only in connection with the power to tax franchises; and this is also true in regard to the question whether a franchise is real or personal property.

§ 1150. Ownership. The franchise to exist as a corporation, generally referred to as the corporate or general franchise, belongs to the incorporators rather than the corporation; the special or secondary franchises belong to the corporation.²²

§ 1151. Franchise as contract. It is too well settled to admit of controversy that a franchise is a contract²³ within the protection of constitutional prohibitions against impairing the obligation of contracts.²⁴

II. CORPORATE OR GENERAL FRANCHISE

§ 1152. General rules. The franchise to exist as, or be, a corporation, ordinarily called the corporate franchise,²⁵ is a separate and

license." *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768.

¹⁸ See § 1158, *infra*.

¹⁹ See §§ 1153, 1163, *infra*.

²⁰ *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511, 83 Pac. 54; *Leonard v. Baylen St. Wharf Co.*, 59 Fla. 547, 31 L. R. A. (N. S.) 636, 52 So. 718; *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700; *State v. Portland General Elec. Co.*, 52 Ore. 502, 95 Pac. 722.

²¹ 3 Kent's Com. 459, quoted in *State v. Anderson*, 90 Wis. 550, 63 N. W. 746.

²² See § 1153, *infra*.

²³ *Russell v. Sebastian*, 233 U. S. 195, Ann. Cas. 1914 C 1282, 58 L. Ed. 912, *rev'g* 163 Cal. 668, Ann. Cas. 1914 A 152, 126 Pac. 875; *Boise Artesian Hot & Cold Water Co. v. Boise City*, 230 U. S. 84, 57 L. Ed. 1400.

²⁴ See § 1179, *infra*.

²⁵ See § 1148, *supra*.

distinct form of franchise. This franchise is also referred to as the "primary" franchise.²⁶ It is not the same as the charter of the corporation.²⁷

The right of a body of men to be and act as an artificial person, without, as a general rule, incurring individual liability, is declared by Blackstone to be "a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject."²⁸

"A corporate franchise is the right to exist as a corporation. It is the franchise invested in the individual stockholders before a corporation is organized, authorizing them to form such corporation by organization."²⁹

This "general franchise" of a corporation, as it is sometimes called, is its right to live and to do business by the exercise of the corporate powers granted by the state.³⁰

Whenever a corporation is legally formed, the right to be and exist as such, and, as a corporation, to do the business specified in its articles, whether it be a banking business, grocery business, or the operation of a railroad, or any other business in which individuals may engage without grant from the state, is a grant by the sovereign power—a valuable right which is generally known as the "corporate franchise."³¹ It includes the power to consolidate.³²

Such a franchise, however, gives the corporation no right to do any-

²⁶ American Smelting & Refining Co. v. People, 34 Colo. 240, 82 Pac. 531.

²⁷ Chicago Open Board of Trade v. Imperial Bldg. Co., 136 Ill. App. 606.

²⁸ Bl. Com. Bk. II, p. 37.

²⁹ Adams v. Yazoo & M. Val. R. Co., 77 Miss. 194, 60 L. R. A. 33, 28 So. 956, 24 So. 200.

³⁰ "Now, a franchise is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter." *Fietsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501.

³¹ "What is called 'the franchise of forming a corporation' is really but an exemption from the general rule of the common law prohibiting the formation of corporations." *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349.

³² *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443. See also *Georgia Railroad & Banking Co. v. Wright*, 132 Fed. 912; *Atlanta v. Grant, Alexander & Co.*, 57 Ga. 340; *In re Stevens*, 46 N. Y. Misc. 623, 95 N. Y. Supp. 297.

³³ *Bank of California v. City & County of San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

³⁴ "There is an exact analogy between this corporate franchise authorizing individuals to organize themselves into a corporation, and the franchise authorizing constituent corporations and artificial persons to organize themselves into a consolidated company." *Adams v. Yazoo & M. Val. R. Co.*, 77 Miss. 194, 60 L. R. A. 33, 28 So. 956, 24 So. 200.

thing in the public highways without special authority from the state, or some municipal officer or body acting under its authority.³³

The right to be a corporation, or the corporate right of life, is inseparable from the corporation itself. It is a part of it, and, unless otherwise provided, cannot be sold or assigned.³⁴ Such franchise is general and dies with the corporation, since it cannot survive dissolution or repeal.³⁵ It is not terminated by an attempted conveyance of all its tangible property, since it is not essential to the existence of a corporation that it should possess any property.³⁶

On the other hand, special franchises to do something in the public streets "are not a part of the corporation. They can be made to an individual with the same legal force or effect as to a corporation. Unless there is some legislative restriction, they can be mortgaged and sold. They are no part of corporate life if owned by a corporation, any more than they are a part of individual life if owned by a human being."³⁷

Forfeiture of the corporate franchise is treated of in another chapter.³⁸

Whether such a franchise is corporate property or not is the subject of some conflict in the decisions, the question generally arising in connection with an attempt to tax such franchise.

In Missouri,³⁹ Georgia⁴⁰ and Utah,⁴¹ it has been held that the fran-

³³ *People v. State Tax Com'rs*, 174 N. Y. 417, 435, 63 L. R. A. 884, 105 Am. St. Rep. 674, 67 N. E. 69.

³⁴ *Atlanta v. Grant Alexander & Co.*, 57 Ga. 340; *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768; *Fietsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501; and see § 1154, *infra*.

³⁵ *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443.

³⁶ *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349. See also *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

³⁷ *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443. See also *Potter v. Calumet Elec. St. R. Co.*, 158 Fed. 521; *People v. Union*

Gas & Electric Co., 254 Ill. 395, 98 N. E. 768; *Chicago v. Rothschild & Co.*, 212 Ill. 590, 72 N. E. 698.

³⁸ See chapter on Forfeiture, Dissolution, etc., *infra*.

³⁹ "It may be said that corporate existence is as much a franchise as the franchises of the corporation. The former is not property in the ordinary acceptance of the term, cannot be transferred by ordinary conveyance or by sale under execution unless the statutes of the state so provide; while corporate franchises are property" and may be transferred. *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 38 L. R. A. 218, 62 Am. St. Rep. 742, 41 S. W. 955.

⁴⁰ *Atlanta v. Grant*, 57 Ga. 340.

⁴¹ "When the law authorizes a given number of individuals to form a corporation, the mere right to exist as such is a franchise, and is usually

chise to exist as a corporation is not property, although there is authority to the contrary in California⁴² and in Kentucky.⁴³ So the Supreme Court of the United States has said that "the right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."⁴⁴

Whether a franchise is property, within tax laws, is further considered in a subsequent chapter.⁴⁵

§ 1153. Ownership. The general franchise belongs to the corporators rather than the corporation⁴⁶ and is held by the members

termed a corporate franchise. While the right thus conferred may be a valuable right, it cannot be said to partake of the incidents of property. The right thus conferred is one merely to transact the contemplated business as a corporate body." Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah 369, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850, 98 Pac. 180.

⁴² *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341; *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

Cal. Const. 1879, art. XIII, § 1, providing for the taxation of property, declares "property" shall include "moneys, credits, bonds, stocks, dues, franchises and all other matters, and things, real, personal, and mixed, capable of private ownership," was held to include the franchise to be a corporation. *Bank of California v. City & County of San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

⁴³ See *Cumberland Telephone & Telegraph Co. v. Hopkins*, 121 Ky. 850, 90 S. W. 594.

"The corporate franchise, the right to be a corporation where created by this state, and to conduct its corporate business in this state, whatever value might attach to such right and its exercise, are property of the corporation, frequently possessing great value." *Marion Nat. Bank of Lebanon v. Burton*, 121 Ky. 876, 10 L. R. A. (N. S.) 947, 90 S. W. 944.

⁴⁴ *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164.

⁴⁵ Chapter on Taxation, *infra*.

⁴⁶ See § 1148, *supra*, and *Southern Ry. Co. v. Greene*, 160 Ala. 396, 49 So. 404; *Fietsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501.

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation." *Memphis & L. R. R. Co. v. Berry*, 112 U. S. 619, 28 L. Ed. 841.

"When the voluntary society accepted the charter, it became a private civil corporation, and the corporators, then in being, acquired a property in the franchise, and every person who

of the corporation in their individual capacity, conferring upon them the right to do business as an artificial being and enabling them in their collective or corporate capacity to have and exercise rights and privileges and secondary franchises.⁴⁷ Moreover, it is well settled that a corporator in a private corporation has a property in the franchise of which he cannot be deprived without due process of law.⁴⁸

§ 1154. Special and general franchises as indivisible. While the general and special franchises may be regarded as indivisible for the purpose of a judicial proceeding to declare a dissolution of the corporation,⁴⁹ yet in many respects the two are clearly divisible. For instance, a special franchise may be transferred without transferring the general franchise.⁵⁰ So the termination of the life of the general franchise, either by lapse of time or judicial proceedings, does not necessarily terminate the special franchises;⁵¹ and, a fortiori, the forfeiture of a special franchise does not terminate the general franchise.

§ 1155. Special franchises as merged in general franchises. Special franchises are not merged in the franchise to exist as a corporation; and the "mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire public uses or franchises, does not carry with it the idea that such franchises, when acquired, be they many or few, are merged in" the general corporate franchise.⁵²

has since become a corporator has acquired a like property. The property which the corporator acquires is not visible, tangible property; but it is none the less property because it is invisible and intangible. It is not a corporeal hereditament; but it is incorporeal." *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

"A corporation is itself a franchise, belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation." *Pierce v. Emery*, 32 N. H. 484, 507, quoted in *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

⁴⁷ *Spring Valley Water Works v.*

Schattler, 62 Cal. 69, aff'd 110 U. S. 347, 28 L. Ed. 173; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 353.

⁴⁸ *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

⁴⁹ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518, explaining *People v. Bristol & R. Turnpike Road*, 23 Wend. (N. Y.) 222, 243, as so holding.

⁵⁰ See § 1163, *infra*. And see *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

⁵¹ *Knickerbocker Trust Co. v. Tarrytown, W. P. & M. Ry. Co.*, 139 N. Y. App. Div. 305, 123 N. Y. Supp. 954.

⁵² *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

III. SPECIAL OR SECONDARY FRANCHISE

§ 1156. General considerations. The questions relating to special or secondary franchises, as already defined,⁵³ are ordinarily more a part of the law relating to municipal corporations than that relating to private and quasi public corporations. However, inasmuch as the rights and powers of quasi public corporations, such as railroad, street railroad, gas, electric light and power, water, telegraph and telephone, etc., corporations, are, to some extent, dependent on the existence and extent of such franchises, it is deemed proper to include herein a brief review of the rules relating to such franchises, without any attempt to collect all the decisions or to state fully the law in regard thereto.

§ 1157. Definition and scope. All of the franchises possessed by a corporation, except the franchise to be a corporation which belongs to the incorporators, are included in what are known as special or secondary franchises. For instance, the decisions hold that the franchise of a railroad corporation to exist as a corporation is a general franchise, while its right, even when conferred by the same statute, to construct and maintain a railroad, is a special franchise.⁵⁴ So a right to collect tolls⁵⁵ or rates for water⁵⁶ is a franchise independent of the franchise to exist as a corporation. Likewise, the right granted to a corporation to use a public highway, or to do thereon some act which would be a trespass except for the grant, is a special franchise.⁵⁷

A "special franchise" is also defined as "the right, granted by the public, to use public property for a public use, but with private profit,

⁵³ See § 1148, *supra*.

⁵⁴ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

"There are various other franchises which may belong to corporations, such as the right to be and operate a railroad after the corporation is organized, receive tolls, etc.; but this belongs to the corporation as an artificial person." *Adams v. Yazoo & M. Val. R. Co.*, 77 Miss. 194, 60 L. R. A. 33, 28 So. 956, 24 So. 200.

⁵⁵ *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585.

⁵⁶ Rule applies to irrigation company. *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

⁵⁷ *People v. State Board of Tax Com'rs*, 174 N. Y. 417, 63 L. R. A. 884, 105 St. Am. Rep. 674, 67 N. E. 69.

When a right of way over, under, above, or along a public street or highway is granted to a corporation, with leave to lay pipes, rails, erect poles, dig ditches or the like the privilege is usually referred to a "special franchise," or the right to do something in the public highway, which, except for the grant, would be a trespass. *People v. State Board of Tax Com'rs*, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674, 67 N. E. 69, quoted in *City of New York v. Interborough Rapid Transit Co.*, 53 N. Y. Misc. 126, 104 N. Y. Supp. 157.

such as the right to build and operate a railroad in the streets of a city.”⁵⁸

These special franchises are granted only to public service or quasi public corporations as distinguished from strictly private corporations.

The franchise is to be distinguished from a contract between the municipality and the corporation for a supply of water, light, heat or the like.⁵⁹

A franchise does not include property gained by the exercise thereof.⁶⁰ It is distinct from the corporate property which the corporation uses in the enjoyment of the franchise.⁶¹

§ 1158. Distinguished from license. In some jurisdictions a grant of the right to a public service company to use the streets of a municipality for tracks, pipes, poles, wires, etc., is considered a license rather than a franchise.⁶² Thus, in Illinois, a municipal grant of the right to use a street is held to be a license rather than a franchise,⁶³ but it

⁵⁸ Lord v. Equitable Life Assur. Soc. of United States, 194 N. Y. 212, 22 J.L. R. A. (N. S.) 420, 87 N. E. 443.

⁵⁹ Montana Water Co. v. Billings, 214 Fed. 121; Des Moines, Iowa v. Welsbach Street Lighting Co. of Delaware, 188 Fed. 906; McPhee & McGinnity Co. v. Union Pac. R. Co., 158 Fed. 5.

⁶⁰ Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, 266, 4 Am. Rep. 63.

⁶¹ Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63; Wilmington, C. & A. R. Co. v. Brunswick County Com'rs, 72 N. C. 10. See also Smith v. New York, 68 N. Y. 552.

“But the franchise consists in the incorporeal right; the property acquired is not the franchise. A bank has a right to purchase a banking house: when purchased, is the house a franchise? Surely not, for it is corporeal, whereas a franchise is incorporeal.” Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374.

In the provision of Ky. Const. sec. 203, that no corporation “shall lease

or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise,” the word “franchise” is to be construed as “the corporate existence, or charter privileges, as distinguished from the corporeal property of the corporation.” Bailey v. Southern Ry. Co., 112 Ky. 424, 61 S. W. 31.

⁶² Dakota Central Tel. Co. v. Huron, 165 Fed. 226; Potter v. Calumet Elec. St. Ry. Co., 158 Fed. 521; McPhee & McGinnity Co. v. Union Pac. R. Co., 158 Fed. 5. See also Cumberland Telephone & Telegraph Co. v. Calhoun, 151 Ky. 241, 151 S. W. 659; East Tennessee Tel. Co. v. Frankfort, 141 Ky. 588, 133 S. W. 564.

⁶³ People v. Union Gas & Electric Co., 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768; Chicago v. Rothschild & Co., 212 Ill. 590, 72 N. E. 698; Belleville v. Citizens' Horse-Ry. Co., 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584; Chicago City R. Co. v. People, 73 Ill. 541.

is held even in that state that such a license becomes an irrevocable contract after acceptance and the expenditure of time and money thereunder.⁶⁴ However, the great weight of authority is that such a grant is a franchise.⁶⁵

However, as stated by Judge Sanborn, it is not every "privilege or permission granted by state or city to occupy or to use public rivers, highways, or streets that rises to the dignity of a franchise. A privilege granted by a city to a private party to occupy or use a portion of a public street temporarily for the construction of a building upon an abutting lot, for a cab stand, an apple stand, or for any similar commercial purpose is a license and not a franchise. The exact line of demarcation between franchises and licenses may not be clearly drawn, but their general characters and limits are so well known and so clearly established that it is not difficult to assign many rights granted to the class to which they belong. * * * A right or privilege not essential to the general function or purpose of the grantee, and of such a nature that a private party might grant a like right or privilege upon his property, such as a temporary or revocable permission to occupy or use a portion of some public ground, highway, or street, is a license and not a franchise."⁶⁶

A franchise to use the streets is to be distinguished from a mere permit. Thus, it has been said that "a permit or location is different in kind from a franchise, and is inferior and subsidiary to it. Sometimes the terms of a permit from or a contract with local authorities are incorporated in a franchise * * *; but the functions of a franchise cannot be performed by a permit. * * * A franchise involves a greater or less degree of comprehensiveness and generality,

⁶⁴ *Peoria R. Co. v. Peoria Ry. Terminal Co.*, 252 Ill. 73, 96 N. E. 689; *Chicago v. Rothschild & Co.*, 212 Ill. 590, 72 N. E. 698; *Harvey v. Aurora & G. R. Co.*, 186 Ill. 283, 293, 57 N. E. 857; *Belleville v. Citizens' Horse-Ry. Co.*, 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584, rev'g 47 Ill. App. 388; *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 130 Ill. 42, 42 N. E. 616, aff'g 27 Ill. App. 346.

⁶⁵ *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 57 L. Ed. 1389; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867, refusing to follow Illinois and Michigan decisions to the contrary;

Ghee v. Northern Union Gas Co., 158 N. Y. 510, 53 N. W. 692; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697; *Wright v. Milwaukee Elec. Railway & Light Co.*, 95 Wis. 29, 36 L. R. A. 47, 60 Am. St. Rep. 74; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *State v. Madison St. Ry. Co.*, 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487.

"The law in that regard is so firmly settled here that it is useless to go elsewhere for guidance." *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

⁶⁶ *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5.

and its exercise something of time and development. A permit, specification or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions.”⁶⁷

If the power to use streets is granted to a company by its charter or other statute, the consent of the city to the use of the streets is considered a license rather than a franchise;⁶⁸ and hence it is held that a grant by a city to a commercial railroad whose charter gives it the right to use streets, of the right to use a certain street or streets in the operation of its road, is a license and not a franchise.⁶⁹

It has been said that “franchise” is the grant from the state of authority to occupy the streets; “licenses” are the designation by the council of the streets to be occupied; and “contracts” are the stipulated arrangements between the companies and the city as to the manner of occupancy.⁷⁰

§ 1159. Distinguished from easements. There is a difference between special franchises and easements, which is well stated by the Court of Appeals of Maryland as follows: “The right to occupy the streets with gas mains is a franchise. The actual occupation of them in that way, pursuant to the franchise, is the acquisition of an easement. You must distinguish between the right to do the thing, and the interest acquired in the soil by the exercise of that right. The right of a railroad company to be and to build a road is a franchise from the state. The roadbed acquired by purchase or condemnation is an easement altogether distinct therefrom, though obtained as a result of the exercise of that pre-existing franchise.”⁷¹

⁶⁷ *Metropolitan Home Tel. Co. v. Emerson*, 202 Mass. 402, 88 N. E. 670.

⁶⁸ *Western U. Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023. See *People v. Consolidated Gas Co.*, 130 N. Y. App. Div. 626, 115 N. Y. Supp. 393; *Ghee v. Northern Union Gas Co.*, 34 N. Y. App. Div. 551, 56 N. Y. Supp. 450.

⁶⁹ *United States. McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, holding that a grant by the city of Denver to the Union Pacific Railroad Company of a revocable permit to operate certain spur tracks upon a certain street for the distance of eight blocks, to accommodate shippers, was a license rather than a franchise.

Colorado. See *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, where court calls permit a “license.”

Illinois. *Chicago City R. Co. v. Story*, 73 Ill. 541.

Nebraska. *Lincoln St. Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802.

West Virginia. *Belington & N. R. Co. v. Alston*, 54 W. Va. 597, 46 S. E. 612.

⁷⁰ *Govin v. Chicago*, 132 Fed. 848, quoted in *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

⁷¹ *Consolidated Gas Co. v. Baltimore*, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584, 61 Atl. 532.

§ 1160. As including "powers." The term "franchise" is sometimes loosely used as including the powers of the corporation.⁷² Strictly speaking, however, the corporate franchise is distinguishable from, and does not ordinarily include, the powers of the corporation.⁷³

Corporations possess many powers which are not franchises. Thus, the power of a bank to receive money on general or special deposit, to lend money on securities, to discount or purchase bills, notes, or other evidences of indebtedness, are not franchises, since no legislative authority is necessary to authorize a person or partnership to engage in such kinds of business.⁷⁴

⁷² "A corporation * * * is itself a franchise, and the different powers which may be exercised by the corporation are also franchises." Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 238, 91 N. W. 1081.

"The different powers of a private corporation, like the right to hold and dispose of property, are its franchises." Pierce v. Emery, 32 N. H. 484, 507.

"The franchise to do is a combination of independent franchises embracing all things which the corporation is given power to do, and may be denominated its active powers—those powers which, when properly exercised, render it successful and valuable." Rhode Island Hospital Trust Co. v. Tax Assessors of Providence, 25 R. I. 355, 55 Atl. 877.

"To speak of the powers of a corporation we are understood to refer to the privileges and franchises which are created in the charter, and which control and circumscribe the legal acts of the corporate body." Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co., 3 Ore. 527.

⁷³ "The distinction between franchises and powers should not be overlooked. * * * The right given this corporation to furnish electric light and power, aside from the right of eminent domain, authorized a business which was open to any individual,

without special legislative grant, and falls within the definition of powers." State v. Twin Village Water Co., 98 Me. 214, 230, 56 Atl. 763.

"Not infrequently, the courts have differed in their views of what a franchise, speaking discriminately, is, and have confused mere rights and powers, which belong to corporations and individuals alike, with franchises which inhere in and must emanate from sovereignty alone." Crawford Elec. Co. v. Knox County Power Co., 110 Me. 285, Ann. Cas. 1914 C 933, 86 Atl. 119.

"The corporate franchise is the right to exist as an entity for the purpose of doing things which are permitted under the law authorizing the incorporation. The things which the corporation is authorized to do are its powers as distinguishable from its franchise; that is, its right to exist as a corporation. If, therefore, the corporation engages in a business not authorized by the statute under which it is incorporated, it is only doing something in excess of its powers; unless unlawful or against the public welfare, it is not a usurpation of franchise ordinarily." State v. Business Men's Club, 178 Mo. App. 548, 163 S. W. 901.

⁷⁴ Per Justice Mitchell in International Trust Co. v. American Loan & Trust Co., 62 Minn. 501, 65 N. W. 78, 632, followed in Northwestern

On the other hand, the power of banks to issue notes for the purpose of circulating as money is a franchise, since it is a right not possessed by individuals.⁷⁵ So, in reference to railroads, it has been said that "a grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the powers of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise."⁷⁶ So the right to collect tolls upon logs put in a river is a franchise.⁷⁷

The power of eminent domain, delegated to railroad corporations, has been held not a franchise.⁷⁸ However, the better rule seems to be that the power of eminent domain, since it can only be conferred by the sovereign, is a franchise.⁷⁹

The supply of a public utility, since it may be engaged in by an individual as well as a corporation, is not a franchise.⁸⁰

§ 1161. As grant of "corporate powers or privileges." A franchise to use streets granted by a municipal ordinance is not a grant of "corporate powers or privileges" within a constitutional provision prohibiting such a grant by a special or private law.⁸¹

In a constitutional provision that the legislature shall have no power to grant corporate powers and privileges to private companies, the term "corporate powers and privileges" is to be construed as signifying "the corporate franchise, the aggregate powers and privileges

Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

⁷⁵ International Trust Co. v. American Loan & Trust Co., 62 Minn. 501, 65 N. W. 78, 632, quoted in Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

⁷⁶ Driscoll v. Norwich & W. R. Co., 65 Conn. 230, 32 Atl. 354.

⁷⁷ Sellers v. Union Lumbering Co., 39 Wis. 525.

⁷⁸ "The right to institute such a proceeding can, in no proper sense, be regarded as a franchise of the corporation. It is rather a means to secure the enjoyment of the franchise granted, a resort to which may become necessary." Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

⁷⁹ California v. Central Pac. R. Co.,

127 U. S. 1, 32 L. Ed. 150; Chicago & W. I. R. Co. v. Dunbar, 95 Ill. 571; Mayor v. Park Com'rs, 44 Mich. 602, 7 N. W. 180.

"The right to construct a road over the lands of private citizens, without their consent, is a sovereign right; it is the right, so called, of eminent domain. Whenever that right is delegated to a corporation or an individual, by an act of the general assembly, the corporation or individual has a franchise of eminent domain." Knoup v. Piqua Branch of State Bank, 1 Ohio St. 603, 615.

⁸⁰ Crawford Elec. Co. v. Knox County Power Co., 110 Me. 285, Ann. Cas. 1914 C 933, 86 Atl. 119.

⁸¹ Linden Land Co. v. Milwaukee Elec. Railway & Light Co., 107 Wis. 493, 83 N. W. 851.

which constitute a corporation, not every separate power and privilege which may be conferred upon a corporate body.”⁸²

§ 1162. As synonymous with “rights,” “privileges” or “immunities.” The term “franchise” is often used as synonymous with “rights,” “privileges” or “immunities,” of a personal and temporary character. But, while the latter may be franchises, they are not necessarily so. Thus, as stated by Justice Field of the Supreme Court of the United States, “the franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction.”⁸³

§ 1163. Nature as property. That a special franchise is property admits of no doubt,⁸⁴ although there is some conflict, mostly in regard to taxation, as to whether it is real or personal property.

In some states, it is held that the franchise does not involve an interest in land. It “is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy, or even the ownership, of land; but that circumstance does not make the franchise itself an interest in land.”⁸⁵ The special franchise may, according to the weight of

⁸² Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401.

⁸³ Morgan v. Louisiana, 93 U. S. 223, 23 L. Ed. 860, quoted in Chesapeake & O. R. Co. v. Miller, 114 U. S. 185, 29 L. Ed. 121; Wicomico County Com'rs v. Bancroft, 135 Fed. 977; Lake Drummond Canal & Water Co. v. Com., 103 Va. 337, 68 L. R. A. 892, 49 S. E. 506. Followed in East Tennessee, V. & G. R. Co. v. Hamblen County, 102 U. S. 273, 26 L. Ed. 152.

⁸⁴ San Joaquin & K. R. Canal & Irrigation Co. v. Merced County, 2 Cal.

App. 593, 84 Pac. 285; Frankfort v. Capital Gas & Electric Light Co. (Ky.), 96 S. W. 870; Knickerbocker Trust Co. v. Tarrytown, W. P. & M. R. Co., 139 N. Y. App. Div. 305, 123 N. Y. Supp. 954; Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah 369, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850, 98 Pac. 181.

⁸⁵ Consolidated Gas Co. v. Baltimore, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584, 61 Atl. 532; State v. Portland General Elec. Co., 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

authority, be sold or assigned,⁸⁶ and it may survive the corporation that received it and exercised it.⁸⁷

§ 1164. Necessity for municipal consent to use of streets. Ordinary private corporations require no special franchises to enable them to conduct their business. It is otherwise, however, as to public service corporations which must use public highways and streets, to a greater or less extent, in the course of their regular business, and in a way different from the ordinary use of a street. Sometimes, the right to use the streets is conferred by federal or state statutes, and sometimes by constitutional provisions. Generally, however, no such constitutional or statutory provisions exist, except in the case of commercial railroads. It follows that in such cases it is necessary to obtain a franchise to use the streets or highways from the county, town, city or village having jurisdiction over the highway or street, since "the rule must be considered settled that no person can acquire the right to make a special or exceptional use of the public highway, not common to all citizens of the state, except by grant from the sovereign power."⁸⁸

Thus, if a street railway desires to operate in more than one county, it must obtain "separate franchises from the local authorities of the

⁸⁶ See Chap. 32, *infra*.

⁸⁷ *Parker v. Elmira, C. & N. R. Co.*, 165 N. Y. 274, 59 N. E. 81; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Knickerbocker Trust Co. v. Tarrytown, W. P. & M. Ry. Co.*, 139 N. Y. App. Div. 305, 123 N. Y. Supp. 954. See also § 1154, *supra*.

⁸⁸ *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242. See *Russell v. Sebastian*, 233 U. S. 195, Ann. Cas. 1914 C 1282, 58 L. Ed. 912, rev'g 163 Cal. 668, Ann. Cas. 1914 A 152, 126 Pac. 875, and construing the 1911 amendment of the California Constitution as not authorizing the city of Los Angeles to require franchises in case of corporations already using streets of the city.

The general franchise to be a corporation does not confer any rights in public highways unless the statute otherwise provides. *People v. State Board of Tax Com'rs*, 174 N. Y. 417,

63 L. R. A. 884, 105 Am. St. Rep. 674, 67 N. E. 69.

The construction and operation of a railroad upon a street, without authority, is a public nuisance. *McEniry v. Tri-City R. Co.*, 254 Ill. 99, 98 N. E. 227.

A franchise to exist as a corporation does not authorize the corporation "to use privileges and franchises that may be conferred by the municipality to render the public service therein." *State v. Tampa Water Works Co.*, 56 Fla. 858, 19 L. R. A. (N. S.) 183, 47 So. 358.

A street railroad does not receive a franchise to use the streets of a municipality by becoming incorporated, as an ordinary railroad receives its franchise to operate its road between its termini, but obtains it afterwards by special grant from the municipality. *San Francisco & S. M. Elec. R. Co. v. Scott*, 142 Cal. 222, 75 Pac. 575.

respective counties, so located that the ends of the two roads coincide at the county line, so that the two can be in fact operated as a continuous line running from one county into another. But the franchises must remain separate and distinct, and local in origin, situation and character.”⁸⁹

Corporate authority “to exercise all the powers necessary and requisite to carry into effect the objects for which it was formed” does not include power to use the streets to lay pipes, etc.⁹⁰

It is sometimes difficult, however, to determine whether the charter of a company or a statute actually confers authority to use the streets without the consent of the municipality; but statutes granting a franchise to a public utility company, and including therein a general right to use the streets of a municipality or municipalities, should not be construed as an express grant of the right to use such streets without the consent of the municipality, unless it is clearly apparent that such was the intention of the legislature.⁹¹

If a municipality has the power to grant a franchise, and a public service company uses the streets with the knowledge of the municipality, the latter may be estopped to question the right to use the streets without a franchise, or the validity of the franchise granted where it does not violate statutory or charter requirements.⁹²

§ 1165. Exclusive franchises. The rules as to exclusive franchises may be summed up as follows: The legislature may grant exclusive franchises in streets unless forbidden by the constitution; a municipality cannot grant an exclusive franchise unless expressly or impliedly authorized so to do; a franchise will not be construed as exclusive, in the absence of express words or necessary implication; and an exclusive franchise must be strictly construed against the grantee.⁹³

At any event, even if a franchise is not exclusive, it confers privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred; and

⁸⁹ San Francisco & S. M. Elec. R. Co. v. Scott, 142 Cal. 222, 75 Pac. 575.

⁹⁰ Chicago Municipal Gas Light & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616.

⁹¹ 4 McQuillin, Municipal Corporations, §§ 1620, 1621.

⁹² 4 McQuillin, Municipal Corporations, § 1687.

⁹³ 4 McQuillin, Municipal Corporations, §§ 1633-1635.

The Wisconsin Public Utility Law provides for a permit which combines the elements of perpetuity and exclusiveness. Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131.

the holder of the franchise may prevent another person or company having no franchise from invading its franchise rights.⁹⁴

If the exclusive feature of a franchise is wholly unauthorized, it is generally held that the franchise is not invalid in toto but merely in so far as it is exclusive.⁹⁵

§ 1166. Application for and determination of—In general. In making application to a city, village, town or county for a franchise to use highways or streets, and in the granting thereof, it is important to follow strictly all the provisions of the governing statute or the charter, regulating the matter.⁹⁶ For instance, if franchises are required to be granted by ordinance, a mere resolution is insufficient.⁹⁷ So the consent of abutting owners is sometimes required.⁹⁸

Sometimes particular corporations cannot exercise any of their special franchises without first obtaining the approval of the public service commission.⁹⁹

§ 1167. — Before organization of corporation. While a franchise cannot take effect until the grantee corporation is organized,¹ the franchise may, nevertheless, be applied for before the company is fully organized.²

⁹⁴ *Milville Gas Light Co. v. Vine-land Light & Power Co.*, 72 N. J. Eq. 305, 65 Atl. 504; *Bartlesville Elec. Light & Power Co. v. Bartlesville Interurban R. Co.*, 26 Okla. 453, 29 L. R. A. (N. S.) 77, 109 Pac. 228.

⁹⁵ *Gadsden v. Mitchell*, 145 Ala. 137, 6 L. R. A. (N. S.) 781, 117 Am. St. Rep. 20, 40 So. 557; *State v. Tampa Water Works Co.*, 56 Fla. 858, 19 L. R. A. (N. S.) 183, 47 So. 358; *Quincy v. Bull*, 106 Ill. 337; *Zimmerer v. Stuart*, 88 Neb. 530, 130 N. W. 300. But see as contra, *Hartford Fire Ins. Co. v. Houston*, — Tex. Civ. App. —, 110 S. W. 973.

⁹⁶ 4 *McQuillin, Municipal Corporations*, § 1638.

⁹⁷ *Morristown v. East Tennessee Tel. Co.*, 115 Fed. 304; *State v. Cowgill & Hill Milling Co.*, 156 Mo. 620, 57 S. W. 1008.

⁹⁸ 4 *McQuillin, Municipal Corpora-*

tions, § 1640, where the question is considered at some length.

⁹⁹ *People v. Willcox*, 151 N. Y. App. Div. 832, 136 N. Y. Supp. 1031. See chapter on Public Utility Regulations, *infra*.

¹ *Aspen Water & Light Co. v. Aspen*, 5 Colo. App. 12, 37 Pac. 728.

² *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, aff'g 100 Ill. App. 57; *Domestic Telephone & Telegraph Co. v. Citizens' Telephone Co.*, 9 N. J. L. 210; *Woodbridge Tp. v. Middlesex Water Co.* (N. J. Ch.), 68 Atl. 464; *Clarksburg Elec. Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994.

In New Jersey, however, where the first and second reading of the ordinance occurred before the organization of the gas company which was to obtain the grant, the franchise was declared void. *Stevens v. Merchantville*, 62 N. J. L. 167, 40 Atl. 688.

A grant of a street franchise is valid although the corporation is not created until afterwards.³

§ 1168. — Submission to voters. In some states, statutes require that ordinances granting franchises, or certain franchises, shall be submitted to a vote of the people,⁴ and the referendum has been applied by statute to franchises in some states.⁵

§ 1169. — Sale to highest bidder. In some states, street franchises are required to be sold to the highest bidder, at least so far as certain classes of corporations, such as street railroads, are concerned.⁶

However, statutes sometimes override charter provisions requiring such a sale.⁷

§ 1170. — Right of municipality to refuse. Where the right to use the streets has been unconditionally granted by the legislature⁸

³ *Clarksburg Elec. Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994.

⁴ *Centerville v. Fidelity Trust & Guaranty Co.*, 118 Fed. 332; *Keokuk v. Ft. Wayne Elec. Co.*, 90 Iowa 67, 57 N. W. 689; *Hanson v. Hunter*, 86 Iowa 722, 53 N. W. 84, 48 N. W. 1005; *State v. Citizens' St. R. Co.*, 80 Neb. 357, 114 N. W. 422; *State v. Lincoln St. R. R.*, 80 Neb. 333, 14 L. R. A. (N. S.) 336, 114 N. W. 422; *State v. Bechel*, 22 Neb. 158, 34 N. W. 342; *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353.

In Washington, see *Benton v. Seattle Elec. Co.*, 50 Wash. 156, 96 Pac. 1033.

⁵ *Meyer v. Boonville*, 162 Ind. 165, 70 N. E. 146; *State v. Redding*, 84 Kan. 654, 114 Pac. 1094; *Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353; *State v. Portland Railway, Light & Power Co.*, 56 Ore. 32, 107 Pac. 958.

⁶ *United States. Pacific Elec. R. Co. v. Los Angeles*, 194 U. S. 112, 48 L. Ed. 896, construing California statute; *Tri-State Telephone & Telegraph Co. v. Thief River Falls*, 183 Fed. 854, construing Minnesota statute.

California. McGinnis v. San Jose, 153 Cal. 711, 96 Pac. 367.

Kentucky. Christian-Todd Tel. Co. v. Com., 156 Ky. 557, 161 S. W. 543; *Louisville Home Tel. Co. v. Louisville*, 130 Ky. 611, 659, 117 S. W. 315; *Hilliard v. George G. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115; *Moberly v. Richmond Tel. Co.*, 126 Ky. 369, 103 S. W. 714; *Louisville & N. R. Co. v. Bowling Green R. Co.*, 110 Ky. 788, 63 S. W. 4; *Stites v. Norton*, 31 Ky. L. Rep. 263, 101 S. W. 1189.

Louisiana. Johnson v. New Orleans, 105 La. 149, 29 So. 355; *New Orleans City & L. R. Co. v. Watkins*, 48 La. Ann. 1550, 21 So. 199.

New York. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277.

Ohio. Cincinnati v. Dexter, 55 Ohio St. 93, 44 N. E. 520; *Raynolds v. Cleveland*, 24 Ohio Cir. Ct. 215.

See further, *McQuillen, Municipal Corporations*, § 1642.

⁷ *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

⁸ *Kentucky. Louisville v. Louisville Water Co.*, 105 Ky. 754, 49 S. W. 766.

New Jersey. Summit v. New York

or by congress,⁹ a municipality cannot absolutely refuse to allow the use of its streets by a public service company. But if the federal government or the state does not grant the right to use streets, and it is provided that the consent of the municipality must be obtained before the streets can be used, the municipality may refuse to allow a public service company to use its streets.¹⁰

§ 1171. — Imposing conditions. If the consent of the municipality is necessary to the use of streets by a public service company, it may impose conditions, on granting the franchise, which will be binding on the company if it accepts the franchise, provided that such conditions are not forbidden by the constitution or statutes or inconsistent with conditions prescribed by the legislature. Thus, it may require compensation for use of the streets, or require the plant or road to be completed within a fixed time, or require a railroad company to have part of the street.¹¹

§ 1172. Acceptance. An ordinance granting a franchise confers no rights and imposes no obligations on the grantee until it is accepted.¹²

& N. J. Tel. Co., 57 N. J. Eq. 123, 41 Atl. 146.

New York. Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 50, 68 N. E. 117.

Ohio. Zanesville v. Zanesville Telegraph & Telephone Co., 63 Ohio St. 442, 59 N. E. 781, distinguishing In re Norwalk St. Ry. Co.'s Appeal, 69 Conn. 576, 39 L. R. A. 794, 38 Atl. 708, 37 Atl. 1080, as to validity of statute requiring application to probate court where the corporation and the municipality cannot agree as to the use of the streets.

Pennsylvania. Dorrance v. Bristol Borough, 224 Pa. 464, 73 Atl. 1015.

Wisconsin. State v. Sheboygan, 111 Wis. 23, 86 N. W. 657.

⁹ As in case of telegraph companies accepting the Post Roads Act of 1866. Western U. Tel. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557.

Statute not applicable to telephone

companies. Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761, 43 L. Ed. 1162, rev'g 85 Fed. 19.

Under the federal Post Roads Act of 1866 providing that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed, a municipality cannot arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and limitations. Essex v. New England Tel. Co., 239 U. S. 313, 60 L. Ed. 301.

¹⁰ Blair v. Chicago, 201 U. S. 400, 50 L. Ed. 801; State v. Spokane, 24 Wash. 53, 63 Pac. 1116.

¹¹ See 4 McQuillin, Municipal Corporations, §§ 1644-1649.

¹² Cumberland Telephone & Telegraph Co. v. Mt. Vernon, 176 Ind. 177, 94 N. E. 714.

Sometimes express acceptance of the franchise is required by the granting ordinance or otherwise.¹³ However, unless otherwise provided, an acceptance may be presumed under some circumstances;¹⁴ and the acceptance need not be formal or written but may be by acting thereunder.¹⁵

If the right to use streets is granted to a certain class of corporations, the use of some of the streets is such an acceptance of the grant as to prevent the impairment of the contract by subsequently requiring a further franchise as to streets not actually occupied.¹⁶

§ 1173. Construction. The rules relating to the construction of special franchises are practically the same as those applicable to the construction of corporate charters.¹⁷ Strictly speaking, the rules in regard thereto are ordinarily a part of the law relating to municipal corporations rather than private corporations, and reference should be made to standard textbooks on the former subject.¹⁸ However, the general rules will be stated herein, without any attempt to fully represent the decisions or the applications of the rules.

Special franchises are strictly construed, and in favor of the public, where susceptible of two or more constructions.¹⁹

¹³ See *Des Moines Water Co. v. Des Moines*, 206 Fed. 657; *Hook v. Bowden*, 144 Mo. App. 331, 128 S. W. 261.

But the requirement that the acceptance be in writing may be waived. *Postal Tel. Cable Co. v. Newport*, 25 Ky. L. Rep. 635, 76 S. W. 159.

¹⁴ *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114.

¹⁵ *Russell v. Sebastian*, 233 U. S. 195, Ann. Cas. 1914 C 1282, 58 L. Ed. 912, rev'g 163 Cal. 668, Ann. Cas. 1914 A 152, 126 Pac. 875; *Western U. Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557; *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023.

"Where no obligations are imposed on the grantee, the acceptance of the thing granted may be inferred from slight circumstances." *Cumberland Telephone & Telegraph Co. v. Mt. Vernon*, 176 Ind. 177, 94 N. E. 714.

¹⁶ *Russell v. Sebastian*, 233 U. S. 195, Ann. Cas. 1914 C 1282, 58 L. Ed. 912, rev'g 163 Cal. 668, Ann. Cas. 1914 A 152, 126 Pac. 875.

¹⁷ See Chap. 20, *supra*.

¹⁸ See 4 McQuillin, *Municipal Corporations*, § 1652.

¹⁹ *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385, 52 L. Ed. 257; *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262, 40 N. E. 89.

The reason for the rule is that "an intention on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55.

Nothing passes by the grant unless it is clearly stated or necessarily implied,²⁰ and if there is any doubt as to the extent of the grant, the doubt is resolved in favor of the public.²¹

They are to be interpreted according to the language used, in the light of all surrounding facts and circumstances.²²

On the other hand, a construction that would lead to false consequences, not contemplated or intended, should be avoided.²³ Moreover, a grant to use streets should not be frittered away by construction, but is to be held up by the four corners and examined, and given a fair construction,²⁴ that is, a reasonable construction consistent with common sense.²⁵ So, if the language is unambiguous it is not subject to interpretation but must be accepted and enforced as it is written.²⁶ And the rule relating to contracts in general that the practical construction thereof by the parties themselves is of great weight is applicable to such franchises.²⁷

A franchise will not be construed as exclusive, in the absence of express words or necessary implication.²⁸

§ 1174. Duration — In general. Where a special franchise is granted by a municipality, it may fix its duration, although a perpetual franchise cannot be granted unless the power to grant perpetual franchises has been delegated to the municipality.²⁹

²⁰ *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

“While we are to give public grants a fair and reasonable interpretation (citing cases), they are not to be extended by implication beyond their clear intent.” *Louisiana R. & Nav. Co. v. Behrman*, 235 U. S. 164, 59 L. Ed. 175.

²¹ *Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co.*, 81 Tex. 494, 17 S. W. 57.

²² *Blocki v. People*, 220 Ill. 444, 77 N. E. 172, rev'g 123 Ill. App. 369.

²³ *People v. Deehan*, 153 N. Y. 528, 47 N. E. 787.

²⁴ *Des Moines City Ry. Co. v. Des Moines*, 151 Fed. 854, 862; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

²⁵ *Forsythe v. Baltimore & O. Tel. Co.*, 12 Mo. App. 494.

“But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey.” Per Mr. Justice Hughes in *Russell v. Sebastian*, 233 U. S. 195, Ann. Cas. 1914 C 1282, 58 L. Ed. 912, rev'g 163 Cal. 668, Ann. Cas. 1914 A 152, 126 Pac. 875.

²⁶ *Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, Ann. Cas. 1914 A 1240, 148 S. W. 13.

²⁷ *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 230 L. Ed. 1410.

²⁸ *Bartholomew v. Austin*, 85 Fed. 359; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381; *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. 828.

²⁹ See 4 *McQuillin*, *Municipal Corporations*, § 1654.

If the franchise itself fixes its duration, then of course it expires at the end of such time.³⁰

Generally, where a statute forbids the grant of a franchise for more than a certain number of years, a grant for a longer period is not invalid in toto but only as to the time in excess of the statutory periods;³¹ but such a franchise has been held invalid in toto.³² In any event, if a franchise is indefinite in duration, it is effective for at least the statutory term for which franchises may be granted.³³

If the franchise itself contains no limitation on its life, it is nevertheless limited to the maximum period fixed by statute or the municipal charter as the limit of municipal franchises.³⁴

The special franchise may extend beyond the life of the corporation as limited by its charter.³⁵

On the termination of the corporate life of the corporation, its special franchises do not cease to exist, but pass to its officers as trustees.³⁶

If, after the granting of an alleged perpetual franchise, the corporation accepts a franchise limited in point of time, the latter of course operates as a surrender of the alleged perpetual franchise as far as the latter covers the limited franchise.³⁷

§ 1175. — Where franchise silent. Generally, a special franchise is expressly limited to a specified number of years; but "indeterminate" franchises are provided for in Wisconsin and a few other states. Independently of such statutes, if a franchise makes no pro-

³⁰ Des Moines Water Co. v. Des Moines, 206 Fed. 657.

³¹ Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081; Neosho City Water Co. v. Neosho, 136 Mo. 498, 38 S. W. 89.

³² Manhattan Trust Co. v. Dayton, 59 Fed. 327; Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303.

³³ "There is a substantial distinction between a contract which on its face shows a plain intent to grant and obtain more than is legal, and a contract for an indefinite term. In the latter case the parties may be assumed as intending to grant or acquire no longer term than the law provides. The statute in the one case is openly and purposely defied, and in the other, the term, being indefinite, is limited

by the statute." Per Mr. Justice Lurton in Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 84, 57 L. Ed. 1400.

³⁴ Denver v. New York Trust Co., 229 U. S. 123, 57 L. Ed. 1101.

³⁵ Blair v. Chicago, 201 U. S. 400, 50 L. Ed. 801; Keith v. Johnson, 109 Ky. 421, 22 Ky. L. Rep. 947, 59 S. W. 487.

³⁶ New York v. Bryan, 196 N. Y. 158, 89 N. E. 467, rev'g 130 N. Y. App. Div. 658, 115 N. Y. Supp. 551; People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

³⁷ Cleveland Elec. Ry. Co. v. Cleveland, 137 Fed. 111. But see Abbott v. Duluth, 104 Fed. 833.

vision as to its duration, there is more or less conflict in the decisions as to the length of time the franchise shall be considered in force.³⁸

Some decisions seem to hold that if no time is fixed for the duration of the franchise, it is revocable at pleasure;³⁹ others that the franchise is limited to the life of the corporation;⁴⁰ and still others that the grant is for a reasonable time.⁴¹ However, the better rule, and the one supported by the federal decisions, is that such a grant is a perpetual one.⁴² The rule is stated in a recent decision of the Supreme Court of the United States as follows: "The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant."⁴³

In the federal courts, the grant is not limited to the life of the corporation accepting it, at least where it is to a corporation, "its assigns and successors."⁴⁴

³⁸ See *Washburn v. Washburn Waterworks Co.*, 120 Wis. 575, 98 N. W. 539.

³⁹ *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332, 90 N. E. 40.

⁴⁰ *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829; *Wyandotte Elec. Light Co. v. Wyandotte*, 124 Mich. 43, 47, 82 N. W. 821.

⁴¹ *Barre v. Perry & Scribner*, 82 Vt. 301, 73 Atl. 574.

⁴² *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

⁴³ *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 57 L. Ed. 1389, citing a number of cases.

"If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This con-

clusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated." Per Mr. Justice Lurton in *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 57 L. Ed. 1389.

⁴⁴ *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 57 L. Ed. 1410; *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 57 L. Ed. 1389, distinguishing *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651, as a case where the grant was to a particular company by name and was not to its assigns or successors.

The constitutional provision that "no law making any irrevocable grant of special privileges or immunities shall be passed" does not apply to a franchise to use streets where the franchise is not exclusive. *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 57 L. Ed. 1410; *Plattsmouth v.*

§ 1176. — Rights on termination of franchise. After the expiration of the time limited for the duration of the franchise, the corporation must withdraw from the use and occupation of the streets and remove its property therefrom within a reasonable time.⁴⁵ But the company should be allowed a reasonable length of time to negotiate an extension or renewal of the franchise or close out its business;⁴⁶ and it has the right to enter upon the streets to remove its plant, without let or hindrance.⁴⁷

On the expiration of the franchise, the municipality cannot, unless the franchise so provides, take possession of the property of the corporation in the streets; and an ordinance granting such property to another company on payment to the owner of a sum to be decided on as its value is void, as depriving the owner of its property without due process of law.⁴⁸

If a company has the right to terminate the franchise and to withdraw from the field, the municipality has no right to prevent it from removing its property, nor can the municipality take possession of and make use of the property or grant the right to use it to another company, without due process of law.⁴⁹

§ 1177. Surrender. It has been stated, by a leading textbook writer on the law of municipal corporations, that "it is undoubtedly the law that a public service company may withdraw altogether from public employment, where its charter is not mandatory, and thereby surrender its franchise to use the streets, at its option."⁵⁰ This rule has been applied to the right of a gas company to surrender its right to exercise its privileges within the municipality.⁵¹ So it has been held that a street railroad company cannot be compelled to operate a portion of its line.⁵² In any event, the franchise may be surrendered with the consent of the municipality.⁵³

Nebraska Tel. Co., 80 Neb. 460, 14 L. R. A. (N. S.) 654, 114 N. W. 588.

⁴⁵ *Detroit v. Detroit United Ry.*, 172 Mich. 136, 137 N. W. 645.

⁴⁶ *Mutual U. Tel. Co. v. Chicago*, 16 Fed. 309; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081.

⁴⁷ *Laighton v. Carthage*, 175 Fed. 145.

⁴⁸ *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399.

⁴⁹ *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332, 90 N. E. 40.

⁵⁰ 4 McQuillin, *Municipal Corporations*, § 1660.

⁵¹ *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332, 90 N. E. 40.

⁵² *State v. Helena Power & Light Co.*, 22 Mont. 391, 44 L. R. A. 692, 56 Pac. 685; *San Antonio St. Ry. Co. v. State*, 90 Tex. 520, 35 L. R. A. 662, 59 Am. St. Rep. 834, 39 S. W. 926, rev'g 10 Tex. Civ. App. 12, 30 S. W. 266. See also § 1176, *supra*.

⁵³ *Asher v. Hutchinson Water, Light & Power Co.*, 66 Kan. 496, 500, 61 L. R. A. 52, 71 Pac. 813.

§ 1178. Forfeiture or revocation—In general. The forfeiture of the corporate franchise, that is, the franchise to exist as a corporation, is treated of in a subsequent chapter.⁵⁴

What is here considered is the forfeiture of secondary franchises. Grounds for forfeiting the charter of the corporation are not necessarily grounds for forfeiting secondary franchises.⁵⁵ So statutory grounds for forfeiting the charter or corporate franchises of a company are not necessarily grounds for forfeiting the secondary franchise to use the streets.⁵⁶

§ 1179. —As breach of contract. It is too well settled to require an extensive citation of authorities that a secondary or special franchise cannot be revoked, after acceptance, without the consent of the corporation, unless the power to revoke is reserved in the grant or conferred by constitution or statute,⁵⁷ especially where the corporation has expended money in reliance on such grant.⁵⁸ However, revocation of a franchise for cause is not an impairment of a contractual obligation.⁵⁹ Thus, where a special franchise has not been exercised within a reasonable time, its revocation upon such ground cannot be regarded as an impairment of a contractual obligation.⁶⁰

⁵⁴ Chapter on Forfeitures, Dissolution and Winding Up, *infra*.

⁵⁵ *Phillipsburg Electric Lighting, Heating & Power Co. v. Phillipsburg*, 66 N. J. L. 505, 49 Atl. 445.

Violation of the charter or the laws of the state is not ground for forfeiting special franchises, although in such case the charter may be forfeited in a proceeding brought for that purpose. *Phillipsburg Elec. Lighting, Heating & Power Co. v. Phillipsburg*, 66 N. J. L. 505, 49 Atl. 445.

⁵⁶ *Fredonia v. Fredonia Natural Gas Light Co.*, 84 N. Y. Misc. 150, 145 N. Y. Supp. 820.

⁵⁷ *Grand Trunk Western R. Co. v. South Bend*, 227 U. S. 544, 554, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405; *Pomona v. Sunset Tel. Co.*, 224 U. S. 330, 56 L. Ed. 788; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762.

See further 4 McQuillin, *Municipal Corporations*, § 1661.

⁵⁸ *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *Rio Grande Ry. Co. v. Brownsville*, 45 Tex. 88.

⁵⁹ *New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915 A 906, *aff'g* 201 N. Y. 321, 94 N. E. 1056.

⁶⁰ "In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent, or that the grantee is duly proceeding to perform. And when it is said that there is vested an indefeasible interest, easement, or contract right it is plainly meant to refer to a franchise not only granted but exercised in conformity with the grant." Per Mr. Justice Hughes in *New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915 A 906, *aff'g* 201 N. Y. 321, 94 N. E. 1056.

Reserved power to repeal the charter does not include power to repeal or revoke special franchises.⁶¹ Moreover, it has recently been held by the Supreme Court of the United States that a franchise to use the streets is not revocable, after being acted on, although the charter of the city gives it power to make, publish "and repeal" ordinances regulating the streets, and the granting ordinance provides that it "may be altered or amended as the necessities of the city may demand."⁶² In Missouri, however, it is held that the right to amend or repeal exists, although not specifically reserved in the ordinance granting the franchise, where the right so to do is contained in the municipal charter or general ordinances.⁶³ This question as to impairment of contracts in general is fully treated of in a subsequent chapter, and what is there said applies equally well to franchises to use a street or other special or secondary franchises.⁶⁴

§ 1180. — Grounds for forfeiture. While forfeitures are not favored,⁶⁵ and secondary franchises will not be declared forfeited by a court because of a mere technicality, or ordinarily where there are other remedies,⁶⁶ they may be revoked, either by a court or by the state or municipality itself, for cause, such as nonuser,⁶⁷ misuser including neglect properly to perform public duties,⁶⁸ or breach of material conditions contained in the franchise.⁶⁹

Alleged insolvency is not a ground where the company is nevertheless able to perform its public duties, and is continuing to do so.⁷⁰

⁶¹ *Lawrence v. Rutland R. Co.*, 80 Vt. 1091, 67 Atl. 1091.

⁶² *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 57 L. Ed. 1389. But see dissenting opinion (p. 76) of Mr. Justice Day, which was concurred in by Justices McKenna, Hughes and Pitney.

⁶³ *State v. West End Light & Power Co.*, 246 Mo. 653, 152 S. W. 76.

⁶⁴ Chapter on Governmental Regulations and Control, *infra*.

⁶⁵ *Village of Fredonia v. Fredonia Natural Gas Light Co.*, 84 N. Y. Misc. 150, 145 N. Y. Supp. 820.

⁶⁶ *Olathe v. Missouri & K. Interurban R. Co.*, 78 Kan. 193, 96 Pac. 42.

⁶⁷ *People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961; *New York Elec. Lines Co. v. Gaynor*, 167 N. Y. App. Div. 314, 153 N. Y. Supp. 244

(failure to take any steps for twenty years).

The right to forfeiture for nonuser does not cease when the corporation becomes able and willing to resume the use, and in fact attempts to do so. *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

⁶⁸ Only in a clear case will a court forfeit the franchise for failure to fulfil duties to the public. *Gainesville Water Co. v. Gainesville*, 103 Tex. 394, 128 S. W. 370 (quality of water).

⁶⁹ *Town of Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. 676; *Edwards v. Pittsburg Junct. R. Co.*, 215 Pa. 597, 64 Atl. 798; *Wheeling & E. G. R. Co. v. Town of Triadelphia*, 58 W. Va. 487, 4 L. R. A. (N. S.) 321, 52 S. E. 499.

⁷⁰ *State v. East Fifth St. Ry. Co.*,

What constitutes nonuser is largely dependent on the circumstances of the particular case;⁷¹ but mere indefinite intention of resuming the use at some uncertain future day is immaterial where there has been a long continued nonuser.⁷²

While wilful neglect to do a certain act may not of itself be ground for forfeiture, "all wilful breaches of clear duty may in combination be properly considered upon the question of wilful and persistent abuse of the franchise; and may, if sufficient in number and gravity, justify a forfeiture."⁷³

§ 1181. — Waiver of forfeiture or estoppel to assert. Subject to the rules hereinafter laid down in this section, the general rule is that a municipality may waive the performance of conditions imposed by them and the right to enforce a forfeiture for failure to comply with such conditions,⁷⁴ as by laches in taking steps to annul the franchise.⁷⁵ However, it is held in one jurisdiction that the right of forfeiture by the state cannot always be waived by acts of municipal officers. The rule has been stated as follows: "So far as the city grants the mere right to use the streets, it is exercising, by delegation, a power which resides in the state, and which is by its nature governmental. It is in legal effect a grant by the state. Consequently, if grounds for forfeiture arise, the state alone may enforce it and regain its grant, and the state alone may waive the forfeiture. In addition to the power delegated by the state to the city to exercise this governmental function, the city is also empowered to impose conditions upon the grant for its own benefit. It may determine the manner of the use, service to be rendered, compensation to be paid, etc. Regarding these matters, outside the mere right to use the streets,

140 Mo. 539, 38 L. R. A. 218, 62 Am. St. Rep. 742; 41 S. W. 955; Gainesville Water Co. v. Gainesville, 103 Tex. 394, 128 S. W. 370.

⁷¹ Village of Fredonia v. Fredonia Natural Gas Light Co., 84 N. Y. Misc. 150, 145 N. Y. Supp. 820.

⁷² State v. Light & Development Co. of St. Louis, 246 Mo. 618, 152 S. W. 67.

⁷³ State v. Birmingham Waterworks Co., 185 Ala. 388, 64 So. 23.

Neglects or acts in regard to supplying water as ground for forfeiture, see State v. Birmingham Waterworks Co., 64 Ala. 388, 64 So. 23.

⁷⁴ Dern v. Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556, and see 4 McQuillin Municipal Corporations, § 1667. Contra, see People v. Sutter St. Ry. Co., 117 Cal. 604, 49 Pac. 736.

⁷⁵ Daly v. Carthage, 143 Mo. App. 564, 128 S. W. 265; State v. Janesville Water Power Co., 92 Wis. 496, 32 L. R. A. 391, 66 N. W. 512.

Short delay not prejudicial to the corporation is not fatal. Borough of Minersville v. Schuylkill Elec. R. Co., 205 Pa. 394, 54 Atl. 1050.

the city acts in its proprietary capacity, and herein waiver and estoppel may be invoked against the city, based upon acts of the city officials done within the scope of their official duty.”⁷⁶ But in a companion case, where the subject is discussed at some length, the court held that “the correct rule of law is that a waiver of the forfeiture may arise from the action of the legislative body clothed with authority to grant the franchise,” but that administrative officers of the municipality cannot waive a forfeiture.⁷⁷

Submitting to the voters the question of city ownership of waterworks, which proposition is defeated, does not, it has been held, estop the municipality to assert its right to a forfeiture of the franchise of the waterworks company.⁷⁸

On the other hand, the act of a municipality in assessing a company for the value of its special franchise in the streets, for several years, estops it to attack such franchise on the ground of nonuser during such years.⁷⁹ So a municipality is estopped to declare a forfeiture of a franchise granted by it to a gas company, because of its consolidation with another company, where such consolidation was expressly authorized by the franchise granted by it to the latter corporation.⁸⁰ So where a municipality had power, under certain conditions, to grant a franchise for the use of the streets, it cannot urge as ground for ouster that the conditions necessary (petition of abutting owners) to its granting such franchise did not exist, where, on reliance on the franchise, great expenditures have been made.⁸¹

§ 1182. — Necessity for declaration of forfeiture or resort to courts. Forfeiture under certain conditions may be provided for in the franchise itself, in which case a resort to the courts to enforce the forfeiture is sometimes not necessary.⁸²

Whether a breach of conditions, by the grantee of a franchise works a forfeiture ipso facto, depends upon the language of the grant or the governing statute.⁸³ For instance, if the statute provides that failure

⁷⁶ *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

⁷⁷ *State v. West End Light & Power Co.*, 246 Mo. 653, 152 S. W. 76.

⁷⁸ *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.

⁷⁹ *Village of Fredonia v. Fredonia Natural Gas Light Co.*, 84 N. Y. Misc. 150, 145 N. Y. Supp. 820.

⁸⁰ *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477, 95 Pac. 1074.

⁸¹ *People v. Union Gas & Electric Co.*, 260 Ill. 392, 103 N. E. 245.

⁸² *Tower v. Tower & S. St. R. Co.*, 68 Minn. 500, 38 L. R. A. 541, 64 Am. St. Rep. 493, 71 N. W. 691.

⁸³ *Union St. Ry. Co. v. Snow*, 113 Mich. 694, 71 N. W. 1073; *In re Brooklyn, Q. C. & S. R. Co.*, 185 N. Y. 171, 77 N. W. 994; *Millcreek Tp. v. Erie*

to complete the work within the time specified by the municipality "works a forfeiture," the statute is self-executing, and failure to complete the work within the time specified by the municipality ipso facto forfeits its franchise, at least as to the uncompleted portion.⁸⁴ And if the condition is that the franchise shall "be terminated," or shall cease, on a certain occurrence, no judicial declaration is necessary to constitute a forfeiture.⁸⁵

On the other hand, if the statute or grant does not expressly declare that the breach of conditions or other cause shall work a forfeiture, the municipality must declare the forfeiture,⁸⁶ and generally even that is insufficient and it must resort to the courts to obtain a judicial determination of the forfeiture.⁸⁷ However, if ground for forfeiture is deemed to exist, the statutes in some jurisdictions authorize the municipality to revoke the franchise, leaving the question whether there are sufficient grounds for forfeiture for judicial consideration.⁸⁸

§ 1183. — Who may assert forfeiture; procedure. The state may sue to forfeit a franchise although the franchise was granted by a municipality,⁸⁹ and it has been held that the remedy by the state is

Rapid Transit St. R. Co., 209 Pa. 300, 58 Atl. 613.

⁸⁴ Los Angeles R. Co. v. Los Angeles, 152 Cal. 242, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54, 92 Pac. 490.

⁸⁵ Oakland Ry. Co. v. Oakland, B. & F. V. R. Co., 45 Cal. 365, 13 Am. Rep. 181; Atchison St. Ry. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; Street Ry. of Grand Rapids v. West Side Ry., 48 Mich. 433, 12 N. W. 643; In re Brooklyn, W. & N. R. Co., 72 N. Y. 245.

⁸⁶ In re Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18.

⁸⁷ United States Knickerbocker Trust Co. v. Kalamazoo, 182 Fed. 865.

Alabama. State v. Birmingham Waterworks Co., 185 Ala. 388, 64 So. 23.

Nebraska. Nebraska Tel. Co. v. Fremont, 72 Neb. 25, 99 N. W. 811.

New York. In re Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474.

Texas. Spencer v. Palestine, 54 Tex. Civ. App. 392, 116 S. W. 857.

If there has been misuser, it seems that the corporation must be given notice and an opportunity to be heard, and the municipality must take action, quasi judicial in character, declaring the forfeiture. Passaic v. Public Service Corp. of New Jersey, 75 N. J. Eq. 379, 73 Atl. 122.

Failure to perform the duties imposed by a special franchise, as ground of forfeiture, seems to be available only by legal proceedings in the courts. Montana Power Co. v. Billings, 214 Fed. 121.

⁸⁸ See New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915 A 906, aff'g 201 N. Y. 321, 94 N. E. 1056.

⁸⁹ State v. Birmingham Waterworks Co., 185 Ala. 388, Ann. Cas. 1916 B 166, 64 So. 23; State v. East Fifth St. Ry. Co., 140 Mo. 539, 38 L. R. A. 218, 62 Am. St. Rep. 742, 41 S. W. 955.

Municipality may be relator. State v. Light & Development Co. of St. Louis, 246 Mo. 618, 152 S. W. 67.

exclusive.⁹⁰ In some jurisdictions, however, the municipality itself may sue.⁹¹ The ground of forfeiture cannot be set up by a private citizen,⁹² competitor,⁹³ or abutting owner.⁹⁴

Quo warranto is a proper remedy, whether its purpose is to dissolve the corporation or merely to annul and forfeit a particular franchise.⁹⁵

A proceeding in equity is generally not the proper remedy to enforce a forfeiture;⁹⁶ but sometimes statutes provide for a cumulative remedy by a bill in equity in behalf of the municipality.⁹⁷ Furthermore, a municipality may sue in equity, at least in some jurisdictions, to annul the franchise and cancel the contract with the public service company, where it has refused to comply with material provisions of the franchise and contract.⁹⁸

An attempt by a municipality summarily to oust a company from the use of streets in which it has an irrevocable franchise is an attempt to deprive the company of its property without due process of law, in violation of the United States Constitution, so as to give a federal court jurisdiction to enjoin such action.⁹⁹

§ 1184. Amendment or modification. Unless the power to do so is reserved, the municipality cannot modify or amend a street franchise after it is granted and accepted, where thereby it lessens the rights and privileges of the company or imposes additional burdens on it.¹

⁹⁰ *New York v. Montague*, 145 N. Y. App. Div. 172, 129 N. Y. Supp. 1084; *Milwaukee Elec. Railway & Light Co. v. Milwaukee*, 95 Wis. 39, 36 L. R. A. 45, 60 Am. St. Rep. 81, 69 N. W. 794.

⁹¹ *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329, 92 N. W. 1112; *Gainesville Water Co. v. Gainesville*, 57 Tex. Civ. App. 257, 122 S. W. 959, rev'd on other grounds, 103 Tex. 394, 128 S. W. 370.

⁹² *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

⁹³ *New Orleans City & L. R. Co. v. New Orleans*, 44 La. Ann. 748, 11 So. 77; *Newport News & O. P. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co.*, 102 Va. 795, 47 S. E. 839.

⁹⁴ *French v. Robb*, 67 N. J. L. 260, 57 L. R. A. 956, 91 Am. St. Rep. 433, 61 Atl. 509.

⁹⁵ *State v. Birmingham Waterworks*

Co., 185 Ala. 388, Ann. Cas. 1916 B 166, 64 So. 23; *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245.

⁹⁶ *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 38 L. R. A. 218, 62 Am. St. Rep. 742, 41 S. W. 955; *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57. See also *Kavanaugh v. St. Louis*, 220 Mo. 496, 517, 119 S. W. 552.

⁹⁷ *State v. Birmingham Waterworks Co.*, 185 Ala. 388, Ann. Cas. 1916 B 166, 64 So. 23.

⁹⁸ *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 33 L. Ed. 573; *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329, 92 N. W. 1112; *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.

⁹⁹ *Ashland Elec. Power & Light Co. v. Ashland*, 217 Fed. 158.

¹ *Minneapolis St. Ry. Co. v. Minneapolis*, 155 Fed. 989, aff'd 215 U. S.

§ 1185. Rights and duties of grantee of franchise. The effect of granting a franchise to use streets to a public service company may be briefly summarized as follows:

1. The proper use of the streets is not of itself a nuisance,² but the franchise does not confer power to create a nuisance.³

2. The granting of the franchise does not defeat a recovery of damages by abutting owners if the use of the street constitutes an additional servitude.⁴

3. The franchise is a contract, within the constitutional provision prohibiting the impairment of contracts,⁵ but this does not prevent a proper exercise of the police power on the part of the municipality.⁶

4. The grantee, being given extraordinary privileges, is correspondingly burdened with certain duties to the public, such as the duty to furnish service or a supply to all willing to pay and abide by the reasonable regulations of the company, without discrimination, and at reasonable rates.⁷

417, 54 L. Ed. 259; *Burlington v. Burlington St. R. Co.*, 49 Iowa 144, 31 Am. Rep. 145.

² *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100, 95 Pac. 343; *Lambert v. Westchester Elec. R. Co.*, 191 N. Y. 248, 83 N. E. 977.

³ *Lambert v. Westchester Elec. R. Co.*, 115 N. Y. App. Div. 78, 100 N. Y. Supp. 665, aff'd 191 N. Y. 248, 83 N. E. 977.

⁴ *McQuillin, Municipal Corporations*, §§ 1700-1710.

⁵ See § 1179, *supra*.

⁶ *Union Pac. R. Co. v. Lincoln*, 97 Neb. 198, 149 N. W. 419. See generally, chapter on Governmental Regulations and Control, *infra*.

⁷ See 4 *McQuillin, Municipal Corporations*, §§ 1689-1699, 1725-1762, where these matters are fully considered.

CHAPTER 32

ALIENATION OF PROPERTY AND FRANCHISES

I. GENERAL CONSIDERATIONS

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I. GENERAL CONSIDERATIONS

§ 1186. **Scope of chapter.** Subsequent chapters contain the law relating to leases¹ and mortgages² of corporate property, and also questions relating to the power of an insolvent corporation to transfer property.³ This chapter includes merely the rules relating to the power to transfer real or personal property in general by way of deed, sale, gift or the like, including all or a part of the property of the corporation.

§ 1187. **Implied power.** Nothing is better settled in the law of corporations than the doctrine that a corporation has, as an incident to its ownership of property, real or personal, the same capacity and power as a natural person to dispose of and convey it,⁴ provided it does

¹ See Chap. 33, *infra*.

² See Chap. 34, *infra*.

³ See chapter on Insolvency, *infra*.

⁴ **United States.** *Post v. Beacon Vacuum Pump & Electrical Co.*, 84 Fed. 371.

California. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

Georgia. *Plant v. Macon Oil & Ice Co.*, 103 Ga. 666, 30 Atl. 567.

Illinois. *Aurora Agricultural & Horticultural Soc. of Aurora v. Pad-dock*, 80 Ill. 263.

Indiana. *Levering v. Bimel*, 146 Ind. 545, 45 N. E. 775.

Iowa. *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

Kansas. *State v. Western Irrigat-*

ing Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349.

Maine. *Fitch v. Lewiston Steam-Mill Co.*, 80 Me. 34, 12 Atl. 732.

Massachusetts. *Com. v. Smith*, 10 Allen 448, 87 Am. Dec. 672; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray 393, 66 Am. Dec. 490; *Sargent v. Webster*, 13 Mete. 497, 46 Am. Dec. 743.

Michigan. *Detroit v. Mutual Gas-light Co.*, 43 Mich. 594, 5 N. W. 1039; *University of Michigan v. Detroit Young Men's Society*, 12 Mich. 138.

New Jersey. *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68, 40 Atl. 218; *Kean v. Johnson*, 9 N. J. Eq. 401; *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

not do so for a purpose which is inconsistent with or foreign to the objects for which it was created,⁵ and provided, further, it violates no charter or statutory restriction,⁶ or rule of law based upon public policy.⁷

"As a general rule," said Judge Christiancy in a Michigan case, "corporations may be said to have an incidental power to dispose of their property, real and personal, either by sale absolute, or by mortgage or other mode of security, for any debt which they may rightfully contract, to the same extent as natural persons, except so far as that power may be restrained by their charter, by considerations connected with the purposes of their creation, or limited by express provision or just implication of some statute, or by the general policy of the state to be deduced from its legislation."⁸

This power need not be expressly conferred upon a corporation by its charter. It is implied as an incident to its ownership of property, unless there is some clear restriction in its charter or in some statute.⁹

New York. *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; *Yates v. Van De Bogert*, 56 N. Y. 526; *De Groff v. American Linen Thread Co.*, 21 N. Y. 124.

North Carolina. *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

Ohio. *Reynolds v. Stark County Com'rs*, 5 Ohio 204.

Pennsylvania. *In re Burton's Appeal*, 57 Pa. St. 213; *Ardesco Oil Co. v. North American Oil & Mining Co.*, 66 Pa. St. 375.

Utah. *Hearst v. Putnam Min. Co.*, 28 Utah 184, 66 L. R. A. 784, 107 Am. St. Rep. 698, 77 Pac. 753.

Wisconsin. *Uncas Nat. Bank of Norwich v. Rith*, 23 Wis. 339.

England. *In re Patent File Co.*, 6 Ch. App. 83.

A trading or manufacturing corporation has the same power as an individual manufacturer or trader to sell its goods, and to sell to some persons to the exclusion of others. Such a corporation has the same right and

power as a natural person engaged in the same business to consign its goods to selling agents, and to impose conditions as to whom they shall sell to, and the terms upon which they shall sell. *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971, aff'd sub nom. *Miller v. American Tobacco Co.*, 56 N. J. Eq. 847, 42 Atl. 1117.

An irrigation company has incidental power to convey to an individual a perpetual right to a certain number of inches of water. *Old Mill Ditch & Irrigation Co. v. Breeding*, 65 Ore. 581, 133 Pac. 89. Shares of stock lawfully held by a corporation may be sold by it. *Pennsylvania R. Co. v. Minis*, 120 Md. 461, 496, 87 Atl. 1062. A trading company may sell lumber and take the purchaser's note in payment therefor. *Dillard v. A. G. McAdams Lumber Co.*, — Tex. Civ. App. —, 141 S. W. 1023.

⁵ See §§ 1192, 1193, *infra*.

⁶ See § 1196, *infra*.

⁷ See § 1216, *infra*.

⁸ *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 164.

⁹ See cases cited in note 4, *supra*, and in the notes following.

Thus, the right to own real property carries with it the right to sell it.¹⁰ A fortiori, a corporation created to hold and sell real property may sell real estate owned and held by it.¹¹

Of course, a manufacturing company may make contracts to sell, and may sell, its manufactured product.¹²

Whenever a corporation has the power to dispose of its real or personal property, it has the power to bind itself by a contract to sell. And in making such a contract it may agree to any terms or conditions with respect to the price, the time of payment, delivery, etc., that are not forbidden by law. In other words, it has the same power in this respect as a natural person, except in so far as it may be restrained by its charter.¹³

Powers of a corporation to do a general commission and mercantile business, and to own, lease and operate turpentine farms, and buy and hold real estate, authorize it to make a contract for the sale of land, even though it is not seized and possessed thereof and has no interest in the land.¹⁴

Statutory authority to sell all the property and franchises of a corporation has been held, in Illinois, not to authorize a sale of only a part of the corporate property.¹⁵

§ 1188. Sale of surplus or of property taken as security. The sale by a corporation of property for which it has no use is not objectionable as engaging in business outside the scope of its charter.¹⁶ If a corporation has taken property as security it may sell such property, although it has no power primarily to buy or sell such property.¹⁷

A national bank may sell grain of which it is the owner, on credit, and acquire a seed-grain lien for the price, as provided for by the state statute.¹⁸ Furthermore, a savings bank owning a summer hotel, which

¹⁰ Knowles v. Northern Texas Traction Co. (Tex. Civ. App.), 121 S. W. 232.

¹¹ Deepwater Council v. Renick, 59 W. Va. 343, 53 S. E. 552.

¹² Pierpont Mfg. Co. v. Goodman Produce Co. (Tex. Civ. App.), 60 S. W. 347.

¹³ Sistare v. Best, 88 N. Y. 527; De Groff v. American Linen Thread Co., 21 N. Y. 124.

¹⁴ McQuaig v. Gulf Naval Stores Co., 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2, which was an action against

the corporation for commissions for obtaining a purchaser for the land.

¹⁵ Snell v. Chicago, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532, writ of error dismissed 152 U. S. 191, 38 L. Ed. 408.

¹⁶ Delaware, L. & W. R. Co. v. Welser, 233 Pa. 154, 81 Atl. 994.

¹⁷ McBoyle v. Union Nat. Bank, 162 Cal. 277, 122 Pac. 458.

¹⁸ First Nat. Bank of Parker v. Peavy Elevator Co., 10 S. D. 167, 72 N. W. 402.

it desires to sell, has power to expend reasonable sums to put it in condition to sell well, and may agree with an intending purchaser to advance money to get the hotel opened and in running order.¹⁹

Not only may a corporation sell its surplus property but ordinarily it has no power to hold such property and must sell it.²⁰

§ 1189. Transfer of choses in action. A corporation which has received bills, notes, bonds or other choses in action in the course of its business has the same power as a natural person to negotiate or assign the same, provided it does so for a legitimate corporate purpose, and violates no express restrictions in its charter.²¹ And it may assign or transfer them as collateral security for any debt lawfully contracted.²²

¹⁹ *Batchelder & Snyder Co. v. Saco Sav. Bank*, 108 Me. 89, 79 Atl. 13.

²⁰ See §§ 1076, 1077, *supra*.

Thus where a railroad company, by reason of the abandonment of a station, found itself the owner of a valuable tract of land in the heart of the city of Boston, and the property was no longer available for railroad purposes, and an adequate price for the land could not be obtained, it was held that it was nevertheless its duty to turn the real estate into money within a reasonable time; and it was also held that while the company should not be held too strictly to sales to be made at once and without expenditure for changes and improvements that would increase its marketable qualities, yet the company could not deed such land in trust to managing agents appointed irrevocably to conduct a business relating to the improvement and sale of the property for a term that might last nearly a century, and with power to acquire and manage other real estate in the vicinity, and to borrow large sums and issue additional shares of stock to new subscribers. *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90.

²¹ *United States. Planters' Bank v. Sharp*, 6 How. 301, 12 L. Ed. 447.

Illinois. Goodrich v. Reynolds, Wilder & Co., 31 Ill. 490, 83 Am. Dec. 240; *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321.

Massachusetts. Hallowell & A. Bank v. Hamline, 14 Mass. 178; *Northampton Bank v. Pepoon*, 11 Mass. 288.

Mississippi. Contra, McIntire v. Ingraham, 35 Miss. 25; *Payne v. Baldwin*, 3 Smedes & M. 661.

Missouri. Alexander v. Rollins, 84 Mo. 657.

New York. Wood v. Wellington, 30 N. Y. 218; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, 13 N. Y. 309; *Gillett v. Campbell*, 1 Den. 520.

Wisconsin. Uncas Nat. Bank of Norwich v. Rith, 23 Wis. 339.

Power to incur liability of indorser, see Chap. 26, *supra*.

²² *United States. Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759.

Illinois. Ward v. Johnson, 95 Ill. 215, *aff'g* 5 Ill. App. 30.

Maine. Androscoggin R. Co. v. Auburn Bank, 48 Me. 335.

New Jersey. Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; *Uncas Nat. Bank v. Rith*, 23 Wis. 339.

New York. Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190; *Brook-*

It may assign a mortgage held by it, for the purpose of securing a debt lawfully contracted, or to raise funds, or for any other legitimate purpose.²³ Subject to some qualifications, it may sell, mortgage or pledge unpaid subscriptions to its capital stock.²⁴

§ 1190. Grant of easement. A corporation may grant an easement, such as a right of way over its property, provided the grant is not inconsistent with its charter, but not otherwise. Thus, it has been held that an incorporated Odd Fellows association, which is authorized by its charter to buy and hold real estate for the use and occupation of the lodges, and which has erected a building for such purposes, and rented the lower floor for stores, may grant to another person the right to use an alley across the premises in consideration of benefits received.²⁵ A corporation also has authority to grant a traction company a right of way over its lands.²⁶ Likewise, a company organized to erect buildings and purchase real estate has implied power to grant a right of way over its land to a street railway company.²⁷ And a railroad company may let another company into the joint use and occupancy of its bridge, tracks, depots and other terminal facilities.²⁸

It can make no difference with respect to the validity of a corporation's grant of an easement in or over its land that the grantee is to use the land for a purpose which is not within the powers of the corporation. Thus it has been held that a railroad company, owning the fee in land, may grant to an oil transportation company the right to use the land for laying its pipes, if such use does not interfere with the performance of its duties to the public; and that it can make no difference that the railroad company itself would have no power to lay pipes for the transportation of oil.²⁹

But a railroad company cannot grant to a private business cor-

man v. Metcalf, 32 N. Y. 591; Nelson v. Eaton, 26 N. Y. 410.

Wisconsin. Uncas Nat. Bank v. Rith, 23 Wis. 339.

England. In re Regent's Canal Iron Works Co., 3 Ch. Div. 43.

²³ Detweiler v. Breckenkamp, 83 Mo. 45; Gillett v. Campbell, 1 Den. (N. Y.) 520; Uncas Nat. Bank v. Rith, 23 Wis. 339.

²⁴ See § 688, *supra*.

²⁵ Odd Fellows' Hall of Portland Ass'n v. Hegele, 24 Ore. 16, 32 Pac. 679.

²⁶ Knowles v. Northern Texas Traction Co. (Tex. Civ. App.), 121 S. W. 232.

²⁷ Knowles v. Northern Texas Traction Co. (Tex. Civ. App.), 121 S. W. 232.

²⁸ Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co. 51 Fed. 309, *aff'd* 47 Fed. 15.

²⁹ Benton v. Elizabeth, 61 N. J. L. 411, 693, 39 Atl. 683, 906.

poration the right to use its road to an extent which might exclude its use by the former.³⁰ And it has been held that a railroad company cannot grant an easement of a footway, for persons to walk along, not across, its roadbed or tracks.³¹

§ 1191. Transfer to pay debts. There can be no doubt that a corporation has the power to convey or transfer any part or all of its property when necessary to pay debts lawfully contracted by it.³² And for this purpose it has the same power as a natural person to make an assignment in trust for the benefit of its creditors, provided there is no charter or statutory restriction in the way.³³ The power to make an assignment, including the effect of statutory provisions on the subject, and the right to prefer creditors, will be more fully discussed in subsequent chapters dealing with the relations existing between a corporation and its creditors.³⁴

§ 1192. Transfer for unauthorized purpose or one outside of scope of business—In general. A corporation has no power to transfer or pledge its real or personal property for a purpose which is inconsistent with or foreign to the objects for which it was created.³⁵ Thus, a corporation cannot sell, mortgage or lease property for the individual benefit of an officer or shareholder.³⁶

³⁰ *American Lumber Co. v. Tombigbee Valley R. Co.*, 154 Ala. 385, 45 So. 911.

³¹ *Sapp v. Northern Cent. Ry. Co.*, 51 Md. 115. And see *Ohio & M. R. Co. v. Indianapolis & C. R. Co.*, 5 Am. L. Reg. (N. S.) 733.

³² *United States v. Hancock v. Holbrook*, 4 Woods 52, 9 Fed. 353.

Massachusetts. Sargent v. Webster 13 Metc. 497, 46 Am. Dec. 743.

Missouri. Manufacturers' Sav. Bank v. Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865.

New York. DeRuyter v. St. Peter's Church, 3 N. Y. 238; *Everson v. Eddy*, 36 N. Y. St. Rep. 763, 12 N. Y. Supp. 872.

North Carolina. National Union Bank of Maryland v. Hollingsworth, 143 N. C. 520, 55 S. E. 809.

Ohio. Stetson v. City Bank of New Orleans, 12 Ohio St. 577.

Washington. Klosterman v. Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136.

³³ *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *McCallie v. Walton*, 37 Ga. 611, 95 Am. Dec. 369; *Chew v. Ellingwood*, 86 Mo. 260, 56 Am. Rep. 429; *Warner v. Mower*, 11 Vt. 385.

³⁴ Chapter on Insolvency, *infra*.

³⁵ *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959; *Kean v. Johnson*, 9 N. J. Eq. 401; *Smith v. St. Louis Mutual Life Ins. Co.*, 2 Tenn. Ch. 727; *Stevens v. Rutland & Burlington R. Co.*, 29 Vt. 545; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775.

³⁶ *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017.

§ 1193. — Sale for future delivery. A sale of goods for future delivery may or may not be within the powers of a corporation, according to the circumstances of the particular case. Thus, it seems that a corporation created to conduct a mercantile business cannot contract to sell a large quantity of corn in the future.³⁷

On the other hand, it is held that a corporation empowered to buy or sell personal property has the power to sell cotton for future delivery.³⁸ And it has been held that a mining company may contract for future delivery of ore at the rate of a certain number of tons weekly, for a specified number of years, although not expressly limited to such ore as the company might produce from its own mines, where it is not affirmatively shown that the company cannot itself produce such amount of ore.³⁹

§ 1194. Property subject to limitations or specified trust. If a corporation holds property, not absolutely, but subject to limitations as to its use, or on a specified trust, it cannot so dispose of it as to divert it from such use or trust.⁴⁰ Thus, it has been held that a railroad company which has taken land under the power of eminent domain for the location of its road cannot sell or lease the same to private manufacturers or traders for their private use.⁴¹ And corporations created for the purpose of establishing and maintaining a hospital, college, seminary, or other similar institution, and to which real or personal property has been donated for such purpose, cannot dispose of the same in violation of the trust upon which it was received.⁴² The same is true of corporations created for religious purposes, and of any other corporation to which property has been conveyed, devised or bequeathed in trust for a specified purpose.⁴³

³⁷ Kelly Weber & Co. v. Vordenbaumen Lumber Co., 133 La. 290, 62 So. 910.

³⁸ Marengo Abstract Co. v. C. W. Hooper & Co., 174 Ala. 497, 56 So. 580.

³⁹ Young v. United Zinc Companies, 198 Fed. 593, aff'g 194 Fed. 461 (holding, however, that "notice that a corporation chartered for mining or manufacturing had no present or prospective means of producing the article for future delivery, but intended from the outset to go into the market to purchase the commodity, might make applicable the doctrine of *ultra vires*").

⁴⁰ Binney's Case, 2 Bland (Md.) 142.

⁴¹ Proprietors of Locks & Canals on Merrimack River v. Nashua & L. R. Co., 104 Mass. 1, 6 Am. Rep. 181. See also Western U. Tel. Co. v. American U. Tel. Co., 65 Ga. 160, 38 Am. Rep. 781.

⁴² Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927. And see McBride v. Porter, 17 Iowa 203; Hillsdale College v. Rideout, 82 Mich. 94, 46 N. W. 373.

⁴³ See McBride v. Porter, 17 Iowa 203; Proprietors of Staffordshire & W. Canal Nav. v. Proprietors of Birmingham Canal Nav., L. R. 1 H. L. 254;

Where a minority dissent, neither the majority of the members of a religious corporation nor the corporate officers have power to divert corporate property from the purposes for which the corporation was formed.⁴⁴

A farmer's union, in the nature of a mutual benefit society, which runs or controls co-operative stores, cannot sell the patronage intrusted to it by its members, since the trust is a personal one.⁴⁵

§ 1195. To whom sale may be made. A transfer of property from one corporation to another is allowable,⁴⁶ and a corporation may sell property to a corporation which is made up of part of the stockholders of the selling company.⁴⁷ Or it may sell, where authorized to sell, to a stockholder as well as any one else.⁴⁸

§ 1196. Statutory prohibitions or restrictions—General rules. A corporation, of course, cannot lawfully transfer its property in violation of an express prohibition or restriction in its charter or in a statute.⁴⁹

But restrictions upon a corporation's power of alienation are not to be extended, unless by necessary implication, beyond the language of the statute. Nor are they to be implied from doubtful language. Thus, a prohibition against alienation of property received for a particular purpose does not prohibit alienation of property received for some other purpose.⁵⁰ Nor does a grant of power to mortgage its property

Proprietors of Rochdale Canal Co. v. Radcliffe, 18 Q. B. 287.

⁴⁴ Cape v. Plymouth Congregational Church (Wis.), 109 N. W. 928.

⁴⁵ Farmers' & Laborers' Union of Kentucky National Union Co., 19 Ky. L. Rep. 1235, 42 S. W. 1096.

⁴⁶ Atkinson v. Western Development Syndicate, 170 Cal. 503, 150 Pac. 360.

⁴⁷ Goodwin v. Bodecaw Lumber Co., 109 La. 1050, 34 So. 74.

There is nothing in the organism of a corporation which prevents the stockholders of one corporation from organizing a second corporation, nor which prevents the first corporation from selling a portion of its property to the second corporation or to those stockholders who are planning the formation of the second corporation prior

to the actual incorporation thereof. No complaint for such action will be heard by parties who have no interest, either as members or creditors, in either of said corporations or the property thereof. Goodwin v. Bodecaw Lumber Co., 109 La. 1050, 34 So. 74.

⁴⁸ Werle v. Northwestern Flint & Sandpaper Co., 125 Wis. 534, 104 N. W. 743; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226.

⁴⁹ See Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Lord v. Yonkers, Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909; Rochester Sav. Bank v. Averell, 96 N. Y. 467; Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43.

⁵⁰ Douglass v. Union Mut. Ins. Co., 127 Ill. 101, 20 N. E. 51, holding that

and franchise impliedly take away its power to pledge such property.⁵¹

When a charter or statute prohibits the alienation of its property by a corporation, or a particular kind of corporation, except with the consent of a court, a valid conveyance cannot be made without such consent.⁵²

A sale of all its property by a corporation, although it may terminate its business, does not dissolve the corporation;⁵³ and therefore, when the sale is necessary for the interests of the stockholders, it is not prohibited by a statute providing that no corporation can be dissolved prior to the period fixed in the articles of incorporation except by unanimous consent, unless a different rule has been adopted in the articles.⁵⁴

§ 1197. — Consent of stockholders. In some states it is held that where the charter of a corporation or a statute prohibits a conveyance or pledge of its property without the consent of the stockholders, or of a certain proportion of them, such consent is essential to the validity of a conveyance or pledge.⁵⁵

In other states it is held that the prohibition is intended merely for the benefit of the stockholders, that it does not render a conveyance without their consent void, but merely makes it voidable, and that another cannot attack a conveyance or pledge for want of their consent.⁵⁶

In some states, by statute, mining corporations cannot dispose of any of their mining ground without a two-thirds vote of the stock-

a clause in the charter of a university, that "no gifts, grants, or devises made to the university for a particular purpose" should "be applied to any other purpose," had reference only to donations in aid of the accomplishment of a special object, as to endow a chair, as distinguished from aid to the university generally, and that it did not prohibit the alienation of land conveyed to it for no particular purpose.

⁵¹ *Uncas Nat. Bank v. Rith*, 23 Wis. 339.

⁵² *Dudley v. Congregation Third Order of St. Francis*, 138 N. Y. 451, 34 N. E. 281; *Madison Ave. Bapt. Church v. Oliver St. Bapt. Church*, 73 N. Y. 82; *Congregation Beth Elohim v. Cen-*

tral Presb. Church, 10 Abb. Pr. N. S. (N. Y.) 484.

⁵³ See § 1214, *infra*.

⁵⁴ *Price v. Holcomb*, 89 Iowa 123, 56 N. W. 407; *Warfield v. Marshall County Canning Co.*, 72 Iowa 666, 2 Am. St. Rep. 263, 34 N. W. 467.

⁵⁵ *Pekin Mining & Milling Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679; *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178.

⁵⁶ *G. V. B. Min. Co. v. First Nat. Bank of Halley*, 95 Fed. 23, modifying 89 Fed. 439; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 20 So. 84; *Barrett v. Polak Co.*, 108 Ala. 390, 54 Am. St. Rep. 172; *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Beecher v. Marquette & P.*

holders.⁵⁷ A statute providing that mining corporations shall have no power to sell the mining grounds, in whole or in part, without the transfer being approved by two-thirds of the stockholders, does not authorize two-thirds of the stockholders of a prosperous corporation to sell all of its property against the protest of any other stockholder.⁵⁸

Where a statute requires a certain proportion of the stockholders to consent to the conveyance of real property and the filing of such consent, a deed is not invalid because the written consents were not filed, since it is the consents and not the filing that is the essential thing;⁵⁹ and furthermore only stockholders can take advantage of a failure to comply with the statute.⁶⁰

A statute requiring a consent of two-thirds of the stockholders to a sale of all the property does not apply to an option for the sale of land.⁶¹

§ 1198. Presumptions as to power. Whenever the circumstances may have been such as to authorize a transfer of its property by a corporation, that it was authorized will be presumed until the contrary is affirmatively shown.⁶²

II. SUBSCRIPTIONS, GIFTS AND DONATIONS

§ 1199. Implied power—In general. There is a clear distinction between a mere gift, such as a gift to charity, and a subscription made with a view of receiving pecuniary benefit therefrom. In the former

Rolling Mill Co., 45 Mich. 103, 7 N. W. 695; Bishop v. Kent & Stanley Co., 20 R. I. 680.

⁵⁷ Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30; Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552 (holding, however, that stockholders cannot ratify a mining mortgage invalid because not previously authorized and executed by the board of directors); Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395 (holding adjustment of boundary lines not an alienation); Anaconda Copper Min. Co. v. Heinze, 27 Mont. 161, 69 Pac. 909; Forrester v. Butte & M. Consol. Copper & Silver Min. Co., 21 Mont. 544, 55 Pac. 229.

⁵⁸ Forrester v. Butte & M. Consol. Copper & Silver Min. Co., 21 Mont. 544, 55 Pac. 229.

⁵⁹ Buxton v. Pennsylvania Lumber Co., 221 Fed. 718, construing New York statute and following Rochester Sav. Bank v. Averell, 96 N. Y. 467.

⁶⁰ Buxton v. Pennsylvania Lumber Co., 221 Fed. 718.

⁶¹ Bradford v. Sunset Land & Water Co., 30 Cal. App. 87, 157 Pac. 20.

⁶² McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321; University of Michigan v. Detroit Young Men's Society, 12 Mich. 138; Wood v. Wellington, 30 N. Y. 218; Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466.

case, there is no question but that an ordinary business corporation is without power to give away part of its property.⁶³

In the latter case, the decisions relating to the power of corporations to donate part of its property or funds, with the idea of receiving benefits from such donation, are more or less conflicting. However, the tendency of the later decisions is to uphold such donations.⁶⁴

The test seems to be whether the corporation will receive a direct and proximate benefit; but it may well be said that "it may be difficult to define accurately the point at which the benefit to be derived from a proposed work would cease to be direct and proximate, and would become so remote as not to fall within the rule. But it is impossible to lay down an inflexible rule to govern such cases, and each case must be determined on its own circumstances."⁶⁵ The nature of the donating corporation is also of considerable importance. Thus the courts are much more liberal in upholding donations by such corporations as land companies than in case of donations by such corporations as banks.

§ 1200. — Donations held beyond corporate power. In support of the theory that a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders and is *ultra vires*, however worthy of encouragement or aid the object of the gift may be,⁶⁶ it has been held that it is *ultra vires* for a national bank to make a donation for the purpose of inducing a manufacturing company not to remove its plant from the city,⁶⁷ or to aid in the erec-

⁶³ While this is true, it does not apply to religious societies, concerning which it has been held that "there can be no question that it is within the power of any religious society to devote its general funds to the aid of other churches or religious societies or to home or foreign missions." *Enos v. Church of St. John the Baptist*, 187 Mass. 40, 72 N. E. 253.

⁶⁴ See *Derr v. Fisher*, 22 Okla. 126, 98 Pac. 978, reviewing at length many of the decisions.

Power of municipal corporations to give free water to secure location of state institution, see *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, and see, in general, 1 *McQuillin, Municipal Corporations*, §§ 363-365, 394, 395.

⁶⁵ *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83.

⁶⁶ *Illinois. McCrory v. Chambers*, 48 Ill. App. 445.

Louisiana. Polar Star Lodge No. 1 v. Polar Star Lodge No. 1, 16 La. Ann. 53.

Massachusetts. Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

Montana. McConnell v. Combination Mining & Milling Co., 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, *aff'd* 31 Mont. 563, 79 Pac. 248.

New York. Beers v. New York Life Ins. Co., 66 Hun 75, 20 N. Y. Supp. 788.

⁶⁷ *McCrory v. Chambers*, 48 Ill. App. 445. See also *Holt v. Winfield Bank*, 25 Fed. 812.

tion of a mill in the city,⁶⁸ and that a bank cannot subscribe money to secure the construction and operation of a railroad;⁶⁹ that a railroad company cannot subscribe for the erection of an institute on the line of its road;⁷⁰ and that an insurance company has no power voluntarily to pay an ex-president a large sum of money for past services, which it is under no legal duty to pay, and which would not constitute a legal consideration for a promise to pay.⁷¹

It has been held that a railroad company cannot subscribe for stock in a "Military Interstate Association" created to give an annual celebration, the object being to attract people to and advertise a certain city on the line of the railway.⁷² Nor can a railroad company donate funds for the erection of a public school, or for the purpose of building up or promoting the town in which the school is situated, even though the school or town is located on the line of the company's railway and its transportation business might thereby be increased.⁷³

It would seem self-evident that a mining company cannot donate its funds for political purposes.⁷⁴

A cemetery corporation may be enjoined from making a gift to a church where by the certificate of incorporation the company was formed exclusively for cemetery purposes, especially where the cemetery is not being kept up in proper condition.⁷⁵

§ 1201. — Donations held within corporate power. There may be circumstances under which a gift of property by a corporation would be a legitimate means of increasing or carrying on its business, and in such a case it would not be ultra vires. It has been held, for example, that an insurance company, for the purpose of increasing its business, may properly pay a customer a loss not covered by his policy, and for which it could not be held liable,⁷⁶ that a manufacturing company may give away some of its goods for the purpose of advertis-

⁶⁸ *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235, 58 N. W. 715.

⁶⁹ *Arkansas Valley & W. R. Co. v. Farmers' & Merchants' Bank*, 21 Okla. 322, 129 Am. St. Rep. 782, 96 Pac. 765.

⁷⁰ *Tomkinson v. Southeastern Ry. Co.*, 35 Ch. Div. 677.

⁷¹ *Beers v. New York Life Ins. Co.*, 66 Hun (N. Y.) 75, 20 N. Y. Supp. 788.

⁷² *Military Interstate Ass'n of Savannah v. Savannah, T & I. of H. Ry.*, 105 Ga. 420, 31 S. E. 200.

⁷³ *Brinson R. Co. v. Exchange Bank of Springfield*, 16 Ga. App. 425, 85 S. E. 634.

⁷⁴ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, aff'd 31 Mont. 563, 79 Pac. 248.

⁷⁵ *Clark v. Rahway Cemetery Co.*, 69 N. J. Eq. 636, 61 Atl. 261.

⁷⁶ *Taunton v. Royal Ins. Co.*, 2 Hem. & M. 135.

ing;⁷⁷ that a corporation may pay extra wages to its workmen or other employees out of its undivided profits, for the purpose of advancing its interests;⁷⁸ or may pay a pension for several years to the family of a deceased officer;⁷⁹ and that a railroad company may pay for the services of a physician and nurse for an employee injured in the course of his employment.⁸⁰ In Indiana, however, it is held that corporations have no power to furnish medical attendance to employees, if the business of the corporation is stationary as distinguished from a business such as that of a railroad company.⁸¹

It has also been held that a literary society, having authority to buy and sell land for the purpose of sustaining and carrying on its institution of learning, may make a donation to a railroad company to aid in the construction of its road, where the road will benefit the society by giving a means of access for persons and supplies, and for shipping the produce of its land;⁸² and that a land company may make a donation for the purpose of procuring the erection of a college,⁸³ or the construction of a railroad⁸⁴ or bridge,⁸⁵ or to induce the location upon its land of a bank, hotel, restaurant, factory or other business which will enhance the value of its property and aid in its settlement.⁸⁶ And it has been said that where a corporation is formed "to buy, improve, lease, sell, and otherwise dispose of real estate," the

⁷⁷ *Steinway v. Steinway & Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718.

⁷⁸ *Hampson v. Price's Patent Candle Co.*, 45 L. J. Ch. 437. And see *Hutton v. West Cork Ry. Co.*, 23 Ch. Div. 654.

⁷⁹ *Henderson v. Bank of Australasia*, 40 Ch. Div. 170.

⁸⁰ *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484. See also § 886, *supra*.

⁸¹ *Sourwine v. McRöy Clay Works*, 42 Ind. App. 358, 85 N. E. 782, following *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759.

⁸² *Louisville & N. R. Co. v. Literary Soc. of St. Rose*, 91 Ky. 395, 15 S. W. 1065.

⁸³ *Sherman Center Town Co. v. Russell*, 46 Kan. 382, 26 Pac. 715; *Whetstone v. Ottawa University*, 13 Kan. 320.

"Where the direct and proximate tendency of certain improvements sought to be obtained by the donation is the building up of the town and the enhanced value of the remaining property of the corporation, the donation is within the powers of the corporation; and this though the improvements are to be made outside of the town site." *Whetstone v. Ottawa University*, 13 Kan. 320, where company donated ninety-seven lots to the Ottawa University.

⁸⁴ *McGeorge v. Big Stone Gap Improvement Co.*, 57 Fed. 262; *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83.

⁸⁵ *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 38 L. Ed. 167.

⁸⁶ *Sherman Center Town Co. v. Russell*, 46 Kan. 382, 26 Pac. 715.

term "improve" includes the performance of any act, whether on or off the land, the direct and proximate tendency of which is to benefit the property or enhance its value.⁸⁷

It has been held that a brewing company may subscribe to a fund to bring new factories and industrial plants to the city where it is located, on the theory that its business would be increased thereby,⁸⁸ and that a manufacturing and trading company may subscribe money to procure the location of a postoffice near its building.⁸⁹ Likewise, a corporation created to improve an office building in Chicago, where it was doing business, has power to subscribe to secure the location of the Chicago Stock Exchange in a building near its own;⁹⁰ and a corporation organized "to render aid in the formation and maintenance of organizations in the city of Chicago for the transaction of public business in public exchanges" has power to accept a subscription payable to it on condition that the Chicago Stock Exchange locate in a building owned by the corporation.⁹¹

A chamber of commerce incorporated to foster and promote the educational, commercial, industrial, physical and moral development of a city or cities and vicinity has power to grant a subsidy for the construction of boats and the navigation of a river between such city or cities and another large city, without regard to whether the river

⁸⁷ *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83.

⁸⁸ *Huntington Brewing Co. v. McGrew*, — Ind. App. —, 112 N. E. 535.

⁸⁹ *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 59 Am. St. Rep. 146, 42 N. E. 176, aff'g 55 Ill. App. 556.

"The location of the post office adjoining the place of business of the company would be of direct financial and business advantage and benefit to it. Many persons, indeed, the people generally, residing in the city and the vicinity, would thereby be caused to pass and repass the company's place of business frequently, and would naturally have their attention attracted to the articles it kept for sale, and to the fact that it was an applicant for the patronage of all who desired or might have need of the goods it made and sold. The effect

would be to bring its business and line of trade prominently before the public, to increase the number of its customers and the amount of its sales, and consequently to add to its gains and profits. * * * Much greater sums than that agreed to be paid by the subscription in the case in hand are often appropriated by judicious business managers to the matter of advertising." Per Mr. Justice Boggs in *B. S. Green Co. v. Blodgett*, 55 Ill. App. 556, aff'd 159 Ill. 169, 59 Am. St. Rep. 146, 42 N. E. 176, and adopted on appeal.

⁹⁰ *Merchants' Bldg. Improvement Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 102 Am. St. Rep. 145, 71 N. E. 22, aff'g 106 Ill. App. 17.

⁹¹ *Merchants' Bldg. Improvement Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 102 Am. St. Rep. 145, 71 N. E. 22, aff'g 106 Ill. App. 17.

can be successfully navigated thereby.⁹² A street railway company may donate money to obtain a change of a baseball park to a location on the line of the railway.⁹³

But a corporation organized as a police department relief association has no power to divert a gift from the specific purpose designated by the donor, without his consent.⁹⁴

According to the better opinion, although there is a decision in Massachusetts to the contrary,⁹⁵ hotel or trading companies, street railroad companies and other corporations whose business will be increased by the holding of a convention, fair, festival, or the like, in the place in which they are located, may donate money or property towards the payment of the expenses of the same.⁹⁶

§ 1202. Dedication to public use. A corporation also has power to dedicate part of its land to public use, for a public highway, for example, unless it is restrained by its charter. This is true, not only of railroad companies,⁹⁷ but also of land, canal, bridge and cemetery companies, agricultural societies and other corporations owning real property.⁹⁸ Thus, a land company may subdivide its property and dedicate land for streets and parks.⁹⁹

However, where the platting and selling of lots was not within the authority of a corporation created to build and operate a summer hotel and develop mineral springs, there is no power to dedicate certain

⁹² *Gregg v. Little Rock Chamber of Commerce*, 120 Ark. 426, 179 S. W. 658.

⁹³ *Temple St. Cable Ry. v. Hailman*, 103 Cal. 634, 37 Pac. 530.

⁹⁴ *Cone v. Wold*, 85 Minn. 302, 88 N. W. 977.

⁹⁵ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

⁹⁶ *Temple St. Cable Ry. v. Hellman*, 103 Cal. 634, 37 Pac. 530; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702.

⁹⁷ *People v. El River & E. R. Co.*, 98 Cal. 665, 33 Pac. 728; *Williams v. New York & N. H. R. Co.*, 39 Conn. 519; *Green v. Town of Canaan*, 29 Conn. 157; *Skjeggerud v. Minneapolis*

& St. L. Ry. Co., 38 Minn. 56; *Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 496, 35 S. W. 572.

⁹⁸ *California*. *Los Angeles Cemetery Ass'n v. Los Angeles*, 95 Cal. 420, 30 Pac. 523; *Logan v. Rose*, 88 Cal. 263, 26 Pac. 106.

Kansas. *Hammerslough v. Kansas City*, 46 Kan. 37, 26 Pac. 496.

Massachusetts. *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 296, 11 Am. Dec. 170.

Rhode Island. *Union Co. v. Peckham*, 16 R. I. 64, 12 Atl. 130.

England. *Proprietors of Grand Surrey Canal v. Hall*, 1 M. & G. 392.

⁹⁹ *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866, aff'g 17 Ill. App. 253; *Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547.

portions of its land to the public in connection with subdividing its property into lots.¹

Where the corporate property is subject to a trust deed, it may not of course be dedicated to the public use where the holder of the trust deed does not consent thereto.²

III. TRANSFER OF ALL OF PROPERTY

§ 1203. General rule. The general rule is that as long as a corporation is solvent, and remains in control of its property and assets, it may dispose thereof the same as an individual, subject only to charter limitations upon its powers,³ provided the corporation is not a quasi public corporation,⁴ at least whenever it is necessary or proper to do so for the best interests of its stockholders and creditors,⁵ and where all the stockholders consent,⁶ and there are no creditors.⁷

The rule that corporations have power to sell and dispose of their property does not apply, however, to a company which has no property to sell or lease, but which is attempting to merge itself with another fraternal benefit society.⁸

§ 1204. Power as against state. That the state cannot raise objections to a transfer of all its property by a purely private, as distinguished from a quasi public corporation seems to admit of no doubt. Thus, in an early case in California the court said: "The only interest the public has in the continuance of the business is the remote, general interest, which it has in the proper development of the resources of the country. * * * If it is found from experience that the interest of the corporators and creditors require that the business should not

¹ *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 8 L. R. A. (N. S.) 966, 79 N. E. 133.

² *Newport News & O. P. Ry. & Elec. Co. v. Lake*, 101 Va. 334, 43 S. E. 566.

³ *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *Tash v. Ludden*, 88 Neb. 292, 129 N. W. 417; *Cooper v. Utah Light & Railroad Co.*, 35 Utah 570, 136 Am. St. Rep. 1075, 102 Pac. 202. To same effect, see *Kalamazoo v. Kalamazoo Heat, Light & Power Co.*, 124 Mich. 74, 7 Det. L. N. 115, 82 N. W. 811.

"If a corporation could convey a

part, it could convey the whole." *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

⁴ See §§ 1216-1220, *infra*.

⁵ *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

⁶ *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829; *People v. Whalen*, 119 N. Y. App. Div. 749, 104 N. Y. Supp. 555, *aff'd* without opinion in 189 N. Y. 560, 82 N. E. 1131.

⁷ *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829.

⁸ *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 118 S. W. 390.

be carried on upon so large a scale, or that it should cease entirely, and the disposal and conveyance of a part or the whole of the property is necessary to a reduction or cessation of the business, and the stockholders consent, or do not object, we know of nothing in the statute, or in sound public policy, to prevent the sale or conveyance for such purpose. * * * The interests of business men, and of the public, must necessarily coincide; for the prosperity of the state is but the aggregate of the prosperity of its citizens."⁹

But a transfer of all the property of a corporation for stock in another company organized by it in another state, to obtain the advantages of the corporation law of such state, can, it seems, be attacked by the state.¹⁰

§ 1205. Power as against creditors. A going concern may dispose of its assets in good faith, since the trust fund doctrine applies only to insolvent corporations, according to the better rule.¹¹ In any event, as against a general creditor a corporation may dispose of its property essential to its continuance in business where it receives the full consideration therefor and has the same available in its treasury for the payment of corporate debts.¹² The question as to the rights of creditors arises only where the sale is for stock of the purchasing company.

Creditors cannot object to transfers by a corporation of all its property where there is no fraud or intent to defraud,¹³ nor where the corporation remains solvent after the sale and transfer of its assets, and has sufficient property to pay all of its then existing debts.¹⁴ This is on the principle that a creditor cannot attack a corporate transaction on the ground that it is ultra vires merely, where no fraud is charged.¹⁵

But it has been held that where a creditor objects, a corporation cannot sell all of its property in consideration of stock issued by the purchasing company to an individual stockholder who does not agree to pay the corporate debts of the seller.¹⁶

⁹ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

¹⁰ *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54.

¹¹ *Cooper v. Utah Light & Railroad Co.*, 35 Utah 570, 136 Am. St. Rep. 1075, 102 Pac. 202; *Harle-Haas Drug Co. v. Rogers Drug Co.*, 19 Wyo. 35, Ann. Cas. 1913 E 181, 113 Pac. 791.

¹² *Ronsh v. Vanceburg, S. L., T. & M. Turnpike Co.*, 120 Ky. 165, 85 S. W. 735.

¹³ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756; *Warren v. Mayer Fertilizer & Junk Co.* (Mo. App.), 122 S. W. 1087.

¹⁴ *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829.

¹⁵ *Force v. Age-Herald Co.*, 136 Ala. 271, 33 So. 866.

¹⁶ *Hurd v. New York & Commercial Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327, rev'g 52 N. Y. App. Div. 467, 65 N. Y. Supp. 125 (following

The rights of creditors to attack transfers of all the corporate property as fraudulent is treated of in a subsequent chapter.¹⁷

§ 1206. Power as against minority stockholders—In general. This question generally arises where a minority stockholder seeks to enjoin or set aside a sale of all the corporate property by the board of directors or by a majority vote of the stockholders. As far as the question involves merely the powers of the directors as distinguished from the stockholders it will be considered in a subsequent chapter relating to directors,¹⁸ while as far as it involves the power of a majority of stockholders to bind or control the minority it will be treated of in a subsequent chapter relating to stockholders.¹⁹

Of course, a sale of all of the property of a corporation cannot be attacked by stockholders who have assented thereto.²⁰

§ 1207. — Where required by exigencies of business. A purely private business corporation, like a manufacturing or trading company, which is not given the right of eminent domain, and which owes no special duties to the public, may certainly sell and convey absolutely the whole of its property, when the exigencies of its business require it to do so, or when the circumstances are such that it can no longer profitably continue its business, without regard to whether minority stockholders consent or object,²¹ provided the trans-

Cole v. Millerton Iron Co., 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847).

¹⁷ Chapter on Consolidation and Merger, *infra*.

¹⁸ See chapter on Directors, *infra*.

¹⁹ See chapter on Stock and Stockholders, *infra*.

²⁰ *Wentworth v. Braun*, 78 N. Y. App. Div. 634, 79 N. Y. Supp. 489, *aff'd* 175 N. Y. 515, 67 N. E. 1091.

²¹ *United States. Post v. Beacon Vacuum Pump & Electrical Co.*, 84 Fed. 371.

California. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Connecticut. Bartholomew v. Derby Rubber Co., 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45.

Iowa. Price v. Holcomb, 89 Iowa 123, 56 N. W. 407; *Warfield v. Mar-*

shall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263, 34 N. W. 467.

Kansas. State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349.

Massachusetts. Dupee v. Boston Water Power Co., 114 Mass. 37; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray 393, 66 Am. Dec. 490; *Sargent v. Webster*, 13 Mete. 497, 46 Am. Dec. 743.

New Jersey. Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130.

New York. Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

England. Wilson v. Miers, 10 C. B. (N. S.) 348; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq 318.

action is not in fraud of the rights of creditors,²² or in violation of charter or statutory restrictions.²³ And, by the weight of authority, this may be done by a majority of the stockholders against the dissent of the minority.²⁴

As was said of such a transfer by a ditch company in a leading California case: "The very idea of private property, in which the public has no rights, involves the idea of the right to sell and convey when the exigencies of the corporation require it. If a corporation could convey a part, it would convey the whole. The enterprise of the Miners' Ditch Company may have proved unprofitable, and rendered it necessary to dispose of its assets and wind up the concern, as the only means of avoiding insolvency. It might be necessary to sell and convey a part or the whole of its property, in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property, with these objects in view, would be a lawful purpose of the corporation. Although the object for which it was formed was to construct a ditch, and convey water for sale to miners and for mechanical purposes, there was no obligation resting on the corporation to pursue this object after it became evident that the enterprise would be unprofitable and result in insolvency or loss. When such a result appears to be unavoidable, obviously the only mode by which the interests of the parties and of the public could be subserved would be to dispose of its assets in the most advantageous way, and pay off its debts, with a view to winding up the affairs of the corporation with the least possible loss." ²⁵

Where the de jure existence of a corporation is at an end and the company cannot procure working capital, a sale of all its property is warranted by the conditions. *Hoag v. Edwards*, 69 N. Y. Misc. 237, 124 N. Y. Supp. 1035.

²² *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809; *Blair v. St. Louis, H. & K. R. Co.*, 22 Fed. 36; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Hancock v. Holbrook*, 40 La. Ann. 53, 3 So. 351.

²³ See § 1210, *infra*.

²⁴ Chapter on Stock and Stockholders, *infra*.

²⁵ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

A mining company whose business has been unprofitable for a long period may sell its property, and cannot be compelled to borrow money to resume operations and to further explore for ore. *Geddes v. Anaconda Copper Min. Co.*, 222 Fed. 129.

Where a corporation is not insolvent, but is doing a losing business, and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations. *Raymond v. Security Trust & Life Ins. Co.*, 111 N. Y. App. Div. 191, 97 N. Y. Supp. 557.

§ 1208. — **Where not required by exigencies of business.** On the other hand, the general rule is that a corporation has no power to sell and convey the entire property of the corporation, and discontinue its business, against the dissent of minority stockholders, if the sale is not required by the exigencies of its business.²⁶ Moreover, the fact that the transfer of the property is to a new corporation organized by the majority stockholders, the effect of the transfer being to prejudice the interests of the minority, does not alter the rule.²⁷

The tendency of the courts, however, is to break away from this rule. In other words, while there is no question but that minority stockholders cannot object where the corporation is insolvent or is doing a losing business or can no longer make a reasonable profit, there is no

26 United States. *Eason v. Buckeye Brewing Co.*, 51 Fed. 156.

Alabama. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513; *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981.

Iowa. *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290.

Kansas. *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349.

Kentucky. *Louisville & N. R. Co. v. Jarvis*, 27 Ky. L. Rep. 986, 87 S. W. 759.

Minnesota. *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264, 47 N. W. 797.

Montana. *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229.

Missouri. *Feld v. Roanoke Inv. Co.*, 123 Mo. 603, 27 S. W. 635 (dicta).

New Jersey. *Kean v. Johnson*, 9 N. J. Eq. 401.

New York. *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Taylor v. Earle*, 8 Hun 1; *Frothingham v. Barney*, 6 Hun 366; *Copeland v. Citizens' Gas Light Co.*, 61 Barb. 60; *Abbot v. American Hard Rubber Co.*, 33 Barb. 578 (leading case in the United States).

Pennsylvania. *Balliet v. Brown*, 103 Pa. St. 546; *McCurdy v. Myers*, 44 Pa. St. 535.

Rhode Island. *Boston & P. R. Corporation v. New York & N. E. R. Co.*, 13 R. I. 260.

England. *Bird v. Bird's Patent Deodorizing & Utilizing Sewage Co.*, 9 Ch. App. 358; *Simpson v. Directors of Westminster Palace Hotel Co.*, 8 H. L. Cas. 712; *Ernest v. Nicholls*, 6 H. L. Cas. 401.

"All the authorities in this state," said the New York Court of Appeals, "are uniform in holding that the trustees of a corporation cannot so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated." *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54.

27 McLeod v. Lincoln Medical College of Cotner University, 69 Neb. 550, 98 N. W. 672, 96 N. W. 265, where the court held that the fact that the action of the majority was in good faith and for the best interest of the college, and that their action might have been for the benefit of the complaining minority, did not alter the case, since no man will be compelled to dispose of his stock or other property in a corporation simply because persons having control thereof deem that it is to his advantage that he be compelled so to do.

objection to a corporation's selling out at any time for any good reason provided there is no fraud or misconduct on the part of the officers or majority stockholders. Thus, it has been said that "if the majority may sell to prevent greater losses, why may they not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case the sale is made because it is of advantage to the stockholders. Whether the profit to be made is a reasonable one must be a relative matter. Three per cent. when others make two might be reasonable; but three per cent. when a sale could be made which would yield the stockholder ten could hardly be thought an investment a reasonable person would retain. The loss to the stockholder by a failure to sell out on a basis which would yield him ten per cent. instead of the three he is receiving is in fact much greater than it would be if a concern went on neither making nor losing when the investment would earn four per cent. elsewhere. It does not seem reasonable that the majority should have power to make a sale in the latter case, and not in the former. In neither case would the sale prevent positive loss, but in each it would result in positive gain. And the question is one of future prospects."²⁸

The rule is thus stated by Mr. Morawetz in his treatise on corporations: "Ordinarily trading corporations are formed solely for the pecuniary benefit of their shareholders. It is therefore no more than reasonable that the majority of an association of this description should have a discretionary power to give up the joint speculation, and wind up the company's business, whenever they deem this step to be in the interest of the whole association. The law is settled accordingly [as to this statement the decisions do not support the rule]; and it may be stated as a rule, that it is an implied condition in the charter of every corporation formed solely for the pecuniary profit of its shareholders, such as an ordinary trading or manufacturing corporation, that its business may be wound up whenever the majority deem this to be expedient. Under these circumstances the majority may, without the consent of the minority, sell the whole of the company's property, close up the business, distribute the assets and surrender the charter to the state. But the majority of a corporation have no right to sell property which is necessary to enable the company to carry on its business under the charter, unless this be done in good faith, for the purpose of distributing the proceeds after paying off creditors,

²⁸ Per Justice Peaslee in *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. 82 Atl. 1014, A. 1917 A 1174, Ann. Cas. 1913 A 366.

and finally winding up the company's affairs. The majority would have no implied authority to sell out the company's property as a speculation, with the intention of starting the company's business anew at a subsequent time."²⁹

The mere fact that all of the stockholders have not consented to the sale, does not necessarily require the sale to be enjoined or set aside, even where the corporation is doing a good business.³⁰ Thus it has been held that power to sell all the property of a corporation is not limited to cases of insolvency or financial distress, but such power may be exercised where any just cause exists therefor.³¹ And an insurance company, for the best interests of all concerned, may sell out all its assets to another insurance company, even though not insolvent or financially distressed.³²

It has been held that a corporation, such as an irrigation company, cannot make a contract by which its officers divest themselves of the possession and control of the property of the company and transfer it to individuals.³³ And that a corporation cannot sell its property to a foreign corporation organized through its procurement, with a majority of nonresident trustees, for the express purpose of stepping into its shoes, taking all its assets and carrying on its business.³⁴

This proposition is further considered in a subsequent chapter in connection with the question as to the power of a majority of the stockholders to bind or control the minority.³⁵

§ 1209. — Corporations created to own and sell lands. A corporation empowered to buy and sell real estate has authority to sell its real estate as a whole;³⁶ and a corporation created to hold real estate and distribute the proceeds has implied power to itself sell the prop-

²⁹ Morawetz, *Priv. Corp.* § 413.

³⁰ *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

³¹ *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 434, 142 N. W. 434.

³² *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434, criticising leading case of *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578.

³³ *Arno Co-operative Irrigation Co. v. Pugh*, — Tex. Civ. App. —, 177 S. W. 991.

³⁴ *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54, in which case the only object of the transaction was without a dissolution, to reorganize a company under the laws of another state in order to obtain some real or supposed advantage afforded thereby. To same effect, *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004.

³⁵ Chapter on Stock and Stockholders, *infra*.

³⁶ *Peters v. Waverly Water-Front Improvement & Development Co.*, 113 Va. 318, 74 S. E. 168.

erty.³⁷ So a corporation created to buy and sell mines or mining lands may sell all of the mineral lands owned by it without regard to the objections of minority stockholders.³⁸

§ 1210. — Statutory provisions. The necessity for the assent of stockholders, as required by the charter or general laws, to validate certain acts by the directors or trustees, is generally considered in a subsequent chapter.³⁹ It is sufficient to state in this connection that the statutes often require a certain per cent., generally two-thirds, of the stock as held by shareholders, to consent to a transfer by a corporation of all its property.⁴⁰

Of course, "all" the stockholders must consent to the sale if a statute so provides.⁴¹

A statute authorizing a sale of the property, rights and franchises of a corporation, "or any interest therein, or any part thereof," providing two-thirds of the stock consent, requires such consent where a sale is made of an independent and important branch of a business, including the good-will and right to exercise the corporate franchise in such branch of business.⁴² But a statute authorizing corporations to dispose of their property to other corporations, on approval by a vote of the majority "in amount of the stock" of the selling corporation, does not apply to fraternal beneficiary associations which have

³⁷ *Sargent Land Co. v. Von Baumbach*, 207 Fed. 423.

³⁸ *Maben v. Golf Coke & Coal Co.*, 173 Ala. 259, 35 L. R. A. (N. S.) 396, 55 So. 607; *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290; *Lange v. Reservation Mining & Smelting Co.*, 48 Wash. 167, 93 Pac. 208; *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047.

Under corporate articles which read: "The purposes for which this corporation is formed are to work, operate, buy, sell, lease, locate, acquire, procure, hold and deal in mines," it is not ultra vires for the corporation to sell its mines composing practically its entire property. *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047.

³⁹ Chapter on Stock and Stockholders, *infra*.

⁴⁰ *Guardian Trust & Deposit Co. v.*

Greensboro Water Supply Co., 115 Fed. 184; *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290; *Coler v. Tacoma Railroad & Power Co.*, 64 N. J. Eq. 117, 53 Atl. 680; *Germer v. Triple-State Natural Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509; *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

Where a statute requires that no sale shall be made "except at a general or special meeting of the stockholders, called in the manner provided by law," it is sufficient that all the stockholders informally but plainly authorize the sale, although there is no formally called meeting. *Kennedy v. Merchants' & Miners' Bank*, 67 W. Va. 475, 68 S. E. 32.

⁴¹ *Kean v. Johnson*, 9 N. J. Eq. 401.

⁴² *In re Timmis*, 200 N. Y. 177, 93 N. E. 522, *aff'd* 139 N. Y. App. Div. 936, 124 N. Y. Supp. 1132.

neither capital stock, stockholders nor property to be used in business for individual profit.⁴³ And a statute forbidding a sale of "the business, franchise and property," as a whole, without the consent of two-thirds of the stock, does not prevent a sale, without such consent, of all the tangible property of a company engaged in the business of conducting a race track and holding fairs, where the sale does not include the "business"; and it is immaterial that the seller does not purchase other property to continue the business.⁴⁴

§ 1211. Stock of purchasing corporation as consideration. In determining whether a sale of all the corporate property can be made for stock in the purchasing corporation, it is necessary to first consider whether the selling corporation has power to purchase the stock of another company,⁴⁵ and then, secondly, if such power exists, whether stockholders may object to such a sale as distinguished from a sale for cash. Of course, if a corporation has no power to acquire stock of another corporation, it cannot accept such stock in payment,⁴⁶ although if all the stockholders agree, and the rights of creditors are not affected thereby, such a sale cannot be attacked.⁴⁷

Moreover, a corporation cannot, unless all its stockholders consent, exchange all its property for stock in another corporation except where the disposition of its property is urgent and immediately necessary and no cash purchaser is available, or where a substantially larger sum can be obtained by trading for such stock.⁴⁸ And even when all the stockholders consent, a corporation has no power, unless it is expressly conferred by the legislature, to sell and transfer, all of its property to another corporation for stock in the latter, where the purpose is, not to wind up its business and distribute the stock among its shareholders, but to continue its existence as a corporation and hold

⁴³ *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 118 S. W. 390.

⁴⁴ *Shaw v. Hollister Land & Improvement Co.*, 166 Cal. 257, 135 Pac. 965.

⁴⁵ Power to purchase stock of another corporation, see Chap. 30.

⁴⁶ *Coler v. Tacoma Railway & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

A sale of all the property and secondary franchises of a corporation for

stock in a company of a foreign corporation is invalid where the statutes of the state of the foreign corporation forbids a "fictitious increase of stock" which includes an issue of new stock known to be issued for less than its face value. *Coler v. Tacoma Railway & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

⁴⁷ *Read v. Citizens' St. R. Co.*, 110 Tenn. 316, 75 S. W. 1056.

⁴⁸ *Geddes v. Anaconda Copper Min. Co.*, 222 Fed. 129.

the stock itself, or, in other words, where the object is to continue corporate life and activity through the instrumentality of the other corporation.⁴⁹

It was said by Judge Lurton in such a case in the federal Circuit Court of Appeals: "There was to be a corporation within a corporation. Individual activity was to cease, but corporate energy was to be exercised through a living corporation, whose life and functions were to be controlled through the shares held by its corporate creator and master. Forbidden to exercise the very functions for which the breath of corporate life had been breathed into it by the state, there would remain standing only the shell of a corporation, retaining corporate existence only for the purpose of controlling and directing the new corporation in which was vested its corporate capital, and to receive and distribute its aliquot proportion of those earnings as dividends among its own shareholders. The effect of this action of the appellee was to divest itself of the power to exercise the essential and vital elements of its franchise, by a renunciation of the right to engage directly and individually in the very business which it was organized to carry on, and is a disregard of the conditions upon which corporate existence was conferred. The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions or maims or cripples their separate activity, by taking away the right freely and independently to exercise the function of their franchise, is contrary to a sound public policy."⁵⁰

The better rule is that even if a corporation has power to acquire stock in other corporations, it cannot accept stock of the purchasing corporation in payment as against the objection of minority stockholders,⁵¹ although in many cases the right of a corporation to take

⁴⁹ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 31 L. R. A. 415; *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54. And see *Easun v. Buckeye Brewing Co.*, 51 Fed. 156; *Taylor v. Earle*, 8 Hun (N. Y.) 1; *Frothingham v. Barney*, 6 Hun (N. Y.) 366.

⁵⁰ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 31 L. R. A. 415.

⁵¹ **Alabama.** *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513.

Illinois. *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349.

Maryland. *Glymont Improvement & Excursion Co. v. Toller*, 80 Md. 278, 30 Atl. 651.

Missouri. *Feld v. Roanoke Inv. Co.*, 123 Mo. 603, 27 S. W. 635.

stock in payment is stated unqualifiedly, where the power to acquire and sell shares of stock is recognized.⁵²

Even if a corporation may exchange its property for stock of another corporation doing the same character of business, and thereby become a holding corporation only, such status cannot, it seems, exist for an indefinite time,⁵³ at least as against the objections of minority stockholders.⁵⁴

A corporation cannot transfer all its assets to another corporation in consideration of stock in the latter company to be distributed to

New York. Frothingham v. Barney, 6 Hun 366, 372.

Under a statute which made the directors trustees for the settlement of corporate affairs and authorized them to "prescribe the terms and conditions of the sale of such property, and sell all or any part for cash, or partly on credit or take mortgages and bonds for part of the purchase price for all or any part of said property," the court held that the portion of the statute referring to the granting of credit did not embrace the power to dispose of the corporate property in exchange for shares in a company created to take over such property, the purpose of the trustees being to then distribute the shares of the new company among the stockholders of the original company. The conclusion was reached, therefore, that unless he wished so to do, a stockholder in the original company could not be compelled to part with his interest therein in exchange for such new shares. *Coler v. Tacoma Railroad & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

⁵² **United States.** Metcalf v. American School Furniture Co., 122 Fed. 115.

Delaware. Butler v. New Keystone Copper Co. (Del.), 93 Atl. 380.

Illinois. Hiles v. C. A. Hiles & Co., 120 Ill. App. 617.

Iowa. Traer v. Lucas Prospecting Co., 124 Iowa 107, 99 N. W. 290.

New York. Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

And see *Leathers v. Janney*, 41 La. Ann. 1120, 6 L. R. A. 661, 6 So. 884; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *Buford v. Keokuk Northern Line Packet Co.*, 3 Mo. App. 159.

Where the charter expressly authorizes a corporation to consolidate, or the powers expressly conferred thereby will lead naturally and inevitably to such result, and where, by its charter, the corporation also possesses the power to deal in stock of other corporations, a subscriber to its stock will not be permitted to assert that the corporation may not sell its entire property for stock of another corporation, since if it be true that the transaction virtually compels the dissenting stockholder to enter into another corporation with different powers, and renders him subject to certain liabilities which he did not have by his holdings of stock in the original corporation, it must be presumed that in subscribing to stock of the original corporation he contracted with reference thereto. *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290.

⁵³ *Riley v. Callahan Min. Co.*, 28 Idaho 525, 155 Pac. 665.

⁵⁴ Chapter on Stock and Stockholders, *infra*.

the several stockholders of the former company, where the statute forbids the distribution of capital to stockholders.⁵⁵

A statutory provision barring a corporation from purchasing stocks, bonds or securities, except where necessary to secure payment of a debt or as collateral, may be construed as applying simply to a going concern and not to a transaction whereby a corporation disposes of its corporate property with a view to terminating its existence.⁵⁶

There is not a purchase of stock of another company where a corporation sells all its property and those of its stockholders who so desire receive payment in stock of the purchasing company, and those who do not so wish are to be paid in cash.⁵⁷

The power of a majority of the stockholders to bind the minority, on disposing of its property, to accept shares of stock of the purchasing corporation as payment is further treated in another chapter.⁵⁸

§ 1212. Mode of sale and conditions. The sale may be a private one and need not be at public auction.⁵⁹

On selling the property of a corporation, including its good-will, particular stockholders who really control the good-will may bind themselves to refrain from becoming competitors.⁶⁰

Where all the property of a corporation is sold, and part of the price is to be paid on delivery of the contract and the rest in instalments, the purchaser is not entitled to the property until payment in full.⁶¹

§ 1213. Statutory authorization. Private corporations are often authorized by statute to sell all of their property.⁶²

Where a benevolent society was granted power to sell its property, provided that the proceeds be devoted to benevolent purposes, it had no power to convey its property to its members.⁶³

Some of the statutes authorizing such a disposal are construed to embrace only quasi public corporations and not merely private corporations.⁶⁴

⁵⁵ *Dalsheimer v. Graphic Arts Co.* (N. J. Ch.), 97 Atl. 497.

⁵⁶ *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

⁵⁷ *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

⁵⁸ Chapter on Stock and Stockholders, *infra*.

⁵⁹ *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

⁶⁰ *Public Opinion Pub. Co. v. Ransom*, 34 S. D. 381, Ann. Cas. 1917 A 1010, 148 N. W. 838.

⁶¹ *Eppley v. Kennedy*, 131 N. Y. App. Div. 1, 115 N. Y. Supp. 360.

⁶² *Metcalf v. American School Furniture Co.*, 122 Fed. 115 (West Virginia statute).

⁶³ *German Corp. of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343.

⁶⁴ *Coal Creek Min. & Mfg. Co. v.*

A sale of all the property of a corporation is not necessarily authorized by the use of the words "successors or assigns" in a statute making specific grants to such corporation.⁶⁵

§ 1214. Effect of transfer of all of property. A transfer of all the property and franchises of a corporation does not necessarily dissolve the corporation,⁶⁶ and the purchaser does not become a corporation merely by virtue of the purchase and transfer, unless a statute expressly so provides.⁶⁷

Generally a sale of all the property of a quasi public corporation passes the special franchises connected with the property.⁶⁸ Furthermore, the purchasing corporation ordinarily is not liable for the general debts or on the general contracts of the selling corporation.⁶⁹ So a mere sale of its property by one railroad company to another does not alone make the purchaser liable for damages previously caused by the vendor.⁷⁰

A sale of all the property of one corporation to another is not a merger or consolidation,⁷¹ and the purchaser does not assume the liabilities of the selling company, although it takes the property subject to such liabilities.⁷²

A provision in a statute authorizing the purchase of other railroads that the purchasing company "shall be subject to all the duties, obligations and restrictions of said company," referring to the selling company, relates only to the duties, etc., of a public nature, and does not embrace obligations created by contract which could have no binding

Tennessee Coal, Iron & Railroad Co., 106 Tenn. 651, 62 S. W. 162, followed in *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 118 S. W. 390.

⁶⁵ *Oregon Ry. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 2, 32 L. Ed. 837.

⁶⁶ Chapter on Dissolution of Corporations, *infra*.

⁶⁷ Chapter on Consolidation and Merger, *infra*.

⁶⁸ Chapter on Consolidation and Merger, *infra*.

⁶⁹ *Spear Min. Co. v. Shinn*, 93 Ark. 346, 124 S. W. 1045; *Warren v. Mayer Fertilizer & Junk Co.* (Mo. App.), 122 S. W. 1087. See also Chapter on Consolidation and Merger, *infra*.

⁷⁰ *De Loach v. Georgia Coast & P. R. Co.*, 137 Ga. 633, 73 S. E. 1072.

⁷¹ *Hiles v. C. A. Hiles & Co.*, 120 Ill. App. 617; *Ft. Wayne & W. V. Traction Co. v. Kendlesparker*, 46 Ind. App. 299, 92 N. E. 228; *Overstreet v. Citizens' Bank*, 12 Okla. 383, 72 Pac. 379; *Gulf, C. & S. F. Ry. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788, 11 S. W. 342.

⁷² *Boyd v. Northern Pac. Ry. Co.*, 170 Fed. 779; *Swing v. Empire Lumber Co.*, 105 Minn. 356, 117 N. W. 467.

"It stood in all respects as the purchaser of real estate who takes it subject to a mortgage thereon, but does not assume and agree to pay the same." *Ft. Wayne & W. V. Traction Co. v. Kendlesparker*, 46 Ind. App. 299, 92 N. E. 228.

force upon the purchasing company, unless a special provision was made for their continuance in the contract for the purchase of the road.⁷³

A company acquiring the property and franchises of another company is vested with the title to land conveyed to the latter company.⁷⁴

§ 1215. Ratification of transfer by legislature. Since the legislature may expressly authorize a transfer of its franchises and property by a corporation, it may ratify a transfer made without authority, and thereby render it binding *ab initio*.⁷⁵

IV. TRANSFER OF PROPERTY BY QUASI PUBLIC CORPORATIONS

§ 1216. General rules. The doctrine that a corporation has the power to alienate or encumber its property does not apply to the full extent to quasi public corporations, like railroad companies, for example, which are given the power of eminent domain, and which owe special duties to the public. Unless expressly authorized by its charter, such a corporation cannot convey or transfer property which it has acquired by the exercise of the power of eminent domain, or which is necessary to enable it to properly perform its duties to the public. Such a conveyance violates its contract with the state, and is contrary to public policy and void.⁷⁶ Stated in another way, unless granted

⁷³ *Rice v. Norfolk & W. Ry. Co.*, 153 Fed. 497.

⁷⁴ *Smith v. Frankfort & C. R. Co.*, 24 Ky. L. Rep. 2040, 72 S. W. 1088.

⁷⁵ *Chaffee v. Ludeling*, 27 La. Ann. 607; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 23; *Shipley v. Atlantic & St. Lawrence R. Co.*, 55 Me. 395; *Richards v. Merrimack & Connecticut River R. Co.*, 44 N. H. 127.

As to ratification of lease, see Chap. 33.

⁷⁶ *United States. St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Atlantic & Pacific Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary 188, 1 Fed. 745.

Alabama. Memphis & C. R. Co. v.

Grayson, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

Illinois. Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, rev'g 20 Ill. App. 473.

Maine. Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Maryland. State v. Consolidation Coal Co., 46 Md. 1.

Massachusetts. Weld v. Board Gas & Electric Light Com'rs, 197 Mass. 556, 84 N. E. 101; *Richardson v. Sibley*, 11 Allen 65, 87 Am. Dec. 700; *Com. v. Smith*, 10 Allen 448, 87 Am. Dec. 672.

New Hampshire. Dow v. Northern R. R., 67 N. H. 1, 36 Atl. 510.

New Jersey. Black v. Delaware & R. Canal Co., 22 N. J. Eq. 399.

New York. Abbott v. Johnstown,

special authority by the legislature or unless so authorized by its charter, a quasi public corporation, owing duties to the public, is without authority to so transfer its entire corporate assets as to render it incapable of accomplishing the purposes for which it was formed.⁷⁷

"Corporations possessing and exercising the right of eminent domain," said the Maine court in this regard, "owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally executed mortgage. And they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or quasi public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority."⁷⁸

This principle applies to all corporations which are given the power of eminent domain or other special privileges, and which, in return therefor, are under a special duty to serve the public. Such are ordinary railroad companies transporting freight and passengers,⁷⁹ street

G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

Pennsylvania. Susquehanna Canal Co. v. Bonham, 9 Watts & S. 27, 42 Am. Dec. 315.

England. East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Shrewsbury & B. Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113.

A public service corporation which sells all of its property and its franchises, except the franchise of being a corporation, is in effect dissolved, and the arrangement can be legally carried out only by such proceedings as the statute prescribes for dissolution. *Coler v. Tacoma Railway & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep.

786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

Property as subject to execution, see chapter on Executions, etc., infra.

⁷⁷ *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362; *Cumberland Telephone & Telegraph Co. v. Evansville*, 127 Fed. 187, aff'd 143 Fed. 238; *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776.

⁷⁸ *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

⁷⁹ *United States. St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

Alabama. Memphis & C. R. Co. v.

railroad companies,⁸⁰ sleeping car companies,⁸¹ canal companies,⁸² water companies,⁸³ gas and electric light companies,⁸⁴ telephone companies, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

Colorado. Pueblo & A. Val. R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Georgia. Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574.

Massachusetts. Middlesex R. Co. v. Boston & C. R. Co., 115 Mass. 347; Richardson v. Sibley, 11 Allen 65, 87 Am. Dec. 700; Com. v. Smith, 10 Allen 448, 87 Am. Dec. 672.

Minnesota. Freeman v. Minneapolis & St. L. Ry. Co., 28 Minn. 443, 10 N. W. 594.

New Jersey. Stockton v. Central R. Co. of New Jersey, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

New York. Abbott v. Johnstown, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

Ohio. Coe v. Columbus, P. & T. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Oregon. Lakin v. Willamette Valley & C. R. Co., 13 Ore. 436, 57 Am. Rep. 25, 11 Pac. 68.

Pennsylvania. Plymouth R. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

South Carolina. Harmon v. Columbia & G. R. Co., 28 S. C. 401, 13 Am. St. Rep. 686, 5 S. E. 835.

Tennessee. Frazier v. East Tennessee, V. & G. Ry. Co., 88 Tenn. 138, 12 S. W. 537.

Texas. Gulf, C. & S. F. Ry. Co. v. Morris, 67 Tex. 692, 4 S. W. 156.

West Virginia. Fisher v. West Virginia & P. R. Co., 39 W. Va. 366, 23 L. R. A. 758, 19 S. E. 578.

England. East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Shrewsbury & B. Ry. Co. v. North-western Ry. Co., 6 H. L. Cas. 113.

⁸⁰ Doane v. Chicago City Ry. Co., 51 Ill. App. 353, aff'd 160 Ill. 22, 35 L. R. A. 588, 45 N. E. 507; Middlesex R. Co. v. Boston & C. R. Co., 115 Mass. 347; Richardson v. Sibley, 11 Allen

(Mass.) 65, 87 Am. Dec. 700; Abbott v. Johnstown, G. & K. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

⁸¹ Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55.

⁸² Black v. Delaware & R. Canal Co., 22 N. J. Eq. 399; Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315.

Compare, however, State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349, where it was held that a corporation having power under its charter to construct and operate a canal for irrigation, waterworks and manufacturing purposes might, with the assent of its stockholders, lawfully sell and convey to another corporation its right of way, canal and other real and personal property, provided the transfer was in good faith, and not with intent to hinder, delay or defraud creditors.

⁸³ South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490; Foster v. Fowler, 60 Pa. St. 27.

⁸⁴ United States. Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979.

California. Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

Illinois. Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, aff'g 20 Ill. App. 473.

Maine. Brunswick Gas Light Co. v. United States, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Massachusetts. Weld v. Edison Elec. Illuminating Co., 197 Mass. 556, 84 N. E. 101. See also Evans v. Boston Heating Co., 157 Mass. 37, 31 N. E. 698; Com. v. Lowell Gas Light Co., 12 Allen 75.

panies,⁸⁵ toll bridge companies,⁸⁶ cemetery companies⁸⁷ and the like.

On the other hand, however, it does not apply to purely private corporations which are not vested with the power of eminent domain or other special privileges, and which owe no special duties to the public, although their business may in a sense be public. Thus, it does not apply to a gaslight company which is not given the power of eminent domain or other special or exclusive privileges,⁸⁸ nor to a corporation engaged in a general storage and elevator business, with the power to issue warehouse receipts, advance money, etc.⁸⁹

This rule applies also to the grant of an easement. A railroad company, for example, cannot grant a right of way or other easement in the land necessary for the operation of its road, if the easement will interfere with the performance of its duties to the public.⁹⁰

But the rule does not apply to a contract by which such a corporation permits another corporation to use its property, as a railroad, bridge, or canal, jointly with it, as such use does not interfere with the performance of its duties to the public.⁹¹

The rule that a quasi public corporation cannot alienate property which is necessary to enable it to perform its duty to the public does not prevent such a corporation, which is given an exclusive privilege, from surrendering its right to exclude others from exercising such a privilege, provided it does not bind itself not to continue its business, for the exclusiveness of the privilege is not for the benefit of the public, but for the benefit of the corporation.⁹²

§ 1217. Property not necessary for public service. As to property which a quasi public corporation has not acquired by the exercise of

Michigan. See *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039.

New York. *Bath Gaslight Co. v. Claffy*, 74 Hun 638, 26 N. Y. Supp. 287.

⁸⁵ *Cumberland Telephone & Telegraph Co. v. Evansville*, 127 Fed. 187, aff'd 143 Fed. 238.

⁸⁶ *In re People State of New York*, 70 N. Y. Misc. 72, 128 N. Y. Supp. 29.

⁸⁷ *Wolford v. Crystal Lake Cemetery Ass'n*, 54 Minn. 440, 56 N. W. 56.

⁸⁸ *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006.

⁸⁹ *Girard Point Storage Co. v. Southwork Foundry Co.*, 105 Pa. St. 248.

⁹⁰ *In re Canada Southern Ry. Co.* (Ontario, 1884), 20 Am. & Eng. R. Cas. 196. And see *Pacific Postal Tel. Cable Co. v. Western U. Tel. Co.*, 50 Fed. 493.

See also § 1190, *supra*.

⁹¹ *Union Pac. Ry. Co. v. Chicago, R. I. & P. R. Co.*, 51 Fed. 309, aff'g 47 Fed. 15. And see *Prospect Park & C. I. R. Co. v. Brooklyn, B. & W. E. R. Co.*, 84 Hun (N. Y.) 516, 32 N. Y. Supp. 857.

⁹² *St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 117.

the power of eminent domain, and which is not necessary to enable it to perform its duties to the public, it is in the same position as any other corporation, and may dispose of or incumber the same for any legitimate purpose.⁹³ Thus a railroad company may sell to the owner of the land a terminal switch.⁹⁴

If a public service corporation transfers property not needed in its business, the lessee or vendee does not assume any obligation or incur any of the personal disabilities of the transferor. For instance, if the transferee is a warehouse corporation, it may use the property for such purpose although the transferor railroad company could not have so used it.⁹⁵

§ 1218. Consent of public service commission. In some states, a transfer of all the property of a public service company cannot be made except with the consent of the public service commission.⁹⁶

§ 1219. Statutory authority. A quasi public corporation may sell all of property to another company where authorized by statute.⁹⁷

By statute, in some states, a quasi public corporation may transfer all its property on consent of two-thirds of its stockholders.⁹⁸

But where a statute authorizes a railroad company to sell any of its lands "not necessary for its use," it cannot sell land on which a part of its right of way in actual use is located.⁹⁹

§ 1220. Statutory prohibition. A statute forbidding street railroads to sell their roads unless authorized so to do by the legislature prohibits not only a transfer of the franchise, but also a transfer of

⁹³ *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Yates v. Van De Bogert*, 56 N. Y. 526; *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526.

⁹⁴ *Oman v. Bedford Bowling Green Stone Co.*, 134 Fed. 64.

⁹⁵ *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81.

⁹⁶ *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656 (holding, however, that purchaser cannot resort to the commission for relief and it will not compel the corporation to perform its contract to sell). *Grafton County Elec. Light & Power Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

In New Hampshire, the commission may authorize the transfer if it is for the public good. A transfer is for the public good where reasonable and not contrary to law. *Grafton County Elec. Light & Power Co. v. State*, 77 N. H. 539, 94 Atl. 193. See chapter on Public Utility Regulations, *infra*.

⁹⁷ *South & N. A. R. Co. v. Gray* (Fla.), 49 So. 347.

⁹⁸ *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490, holding statute relating to "any" corporation to be applicable to water company.

⁹⁹ *Seaboard Air Line Ry. v. McRaine*, 69 Fla. 462, 68 So. 753.

the property necessary to enable the railroad to perform its duties as a public carrier.¹

§ 1221. Transfer to municipality. The rule that a public service company cannot transfer all its property without the consent of the legislature does not apply to a transfer to the city of the plant to be run as a municipal plant.² On the other hand, it has been held that a quasi public corporation has no power to give a city an option to purchase all its property.³

§ 1222. Rights of creditors. So far as creditors are concerned, they cannot object to the transfer of all the property of a quasi public corporation, if they are not injured thereby.⁴

V. TRANSFER OF FRANCHISES

§ 1223. General considerations. In determining the power to transfer franchises, it is necessary to keep in mind the difference between a franchise to be a corporation and corporate franchises as heretofore noticed.⁵

§ 1224. Franchise to be a corporation. It is clear that a corporation cannot, without express authority from the legislature, transfer its franchise to be a corporation, since this would result in the creation of a corporation without the consent of the legislature,⁶ and hence the charter as such cannot be the subject of barter or sale in the absence of express authority.⁷

However, it is well settled that a corporation, when authorized by

¹ *Clemons Electrical Mfg. Co. v. Walton*, 206 Mass. 215, 92 N. E. 459.

² *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640.

³ *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362.

⁴ *Fourth Nat. Bank of Fayetteville, North Carolina v. Consolidated Steamboat Co.*, 12 Ga. App. 864, 76 S. E. 1057.

⁵ See Chap. 31.

⁶ *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, 28 L. Ed. 837; *Snell v. Chicago*, 133 Ill. 413, L. R. A. 858, 24 N. E. 532, writ of error dis-

missed, 152 U. S. 191, 38 L. Ed. 408; *Attorney General v. Haverhill Gas Light Co.*, 215 Mass. 394, Ann. Cas. 1914 C 1266, 101 N. E. 1061.

"The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will." *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

⁷ *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, 28 L. Ed. 837; *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

statute to do so, may transfer, sell or convey its charter or franchise to be a corporation, and thus vest it in others.⁸

§ 1225. Corporate franchises. According to the better opinion and the weight of authority, both in England and in this country, a quasi public corporation cannot transfer the franchises or special privileges other than the franchise to be a corporation, conferred upon it by its charter or other statutes or ordinances, such as the franchise or privilege of constructing and maintaining a railroad or canal, or water or gas works, or a turnpike or plank road, or a bank, etc., unless such a transfer is expressly authorized by the legislature or ratified by it.⁹

⁸ *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829.

"The real transaction in all such cases of transfer, sale, or conveyance, in legal effect, is nothing more or less, and nothing other than a surrender or abandonment of the old charter by the corporators, and a grant de novo of a similar charter to the so-called transferees or purchasers." *State v. Sherman*, 22 Ohio St. 411.

⁹ *United States*. *Oregon Ry. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837; *Pennsylvania R. R. Co. v. St. Louis, A. & T. R. R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, 28 L. Ed. 837; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Atlantic & Pacific Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary 188, 1 Fed. 745.

Alabama. *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

Illinois. *Snell v. Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532, writ of error dismissed, 152 U. S. 191, 38 L. Ed. 408; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, rev'g 20 Ill. App. 473.

Maine. *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Massachusetts. *Weld v. Board Gas & Electric Light Com'rs*, 197 Mass. 556, 84 N. E. 101, followed in *Attorney General v. Haverhill Gaslight Co.*, 215 Mass. 394, Ann. Cas. 1914 C 1266, 101 N. E. 1061; *Com. v. Smith*, 10 Allen 448, 87 Am. Dec. 672.

Missouri. *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552.

New Jersey. *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 400.

New York. *Abbott v. Johnstown, G. & K. Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *People v. New York City R. Co.*, 57 Misc. 114, 107 N. Y. Supp. 247.

Ohio. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

Oregon. *State v. Portland General Elec. Co.*, 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

Pennsylvania. *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81 Pa. St. 104; *Susquehanna Land Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315.

Tennessee. *Ragan v. Aiken*, 9 Lea 609, 42 Am. Rep. 684.

Virginia. *Roper v. McWhorter*, 77 Va. 214.

England. *Shrewsbury & B. R. Co.*

This principle not only applies to an absolute conveyance, but it also applies to a lease¹⁰ or mortgage.¹¹ And it applies to an assignment for the benefit of creditors.¹²

In holding void a lease of its franchises by a corporation created for the purpose of constructing and maintaining a railroad and canal, it was said by Chancellor Zabriskie in a New Jersey case: "This rule is founded on reason and principle. The franchises granted by the state are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants the state is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroad across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, are with others a material part of the property leased; these cannot be leased or aliened without consent of the state."¹³

Another reason why corporations cannot sell their franchises to others is because it would tend to the creation of monopolies. By the exercise of such a power, "a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint."¹⁴

In most jurisdictions this doctrine is too well settled to admit of question, but in some it has been criticised and even disregarded.¹⁵

v. Northwestern R. Co., 6 H. L. Cas. 113.

Canada. *Hinckley v. Gildersleeve*, 19 Grant Ch. (U. C.) 212.

As to banking corporations, see *Fietsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501.

¹⁰ See Chap. 33.

¹¹ See Chap. 34.

¹² *Fietsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501.

¹³ *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 399.

¹⁴ *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

¹⁵ See the following decisions:

Kansas. *State v. Western Irrigation Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349.

Kentucky. *Bardstown & L. R. Co. v. Metcalf*, 4 Metc. 199, 206, 81 Am. Dec. 541.

Michigan. *Detroit v. Mutual Gas-light Co.*, 43 Mich. 594, 5 N. W. 1039; *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155.

Texas. *Threadgill v. Pumphrey*, 37 Tex. 573, 30 S. W. 356, 9 Tex. Civ. App. 184, 28 S. W. 450.

Virginia. *Enders v. Board Public Works*, 1 Gratt. 364.

Thus, the view has been announced that a franchise is property

In a Michigan case it was held that a telephone company having a franchise from a city to use its streets can alienate or mortgage the same without the consent of the city, under a statute authorizing corporations to alienate their property. *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 47 L. R. A. 87, 80 Am. St. Rep. 520, 80 N. W. 383. And in a Kansas case it was held that a corporation organized for the purpose of supplying a city and its inhabitants with water, and given the power generally to mortgage its property, may mortgage the franchise conferred upon it by the city. *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337.

In neither of these cases, however, are any authorities referred to which can be said to support the decision, while numerous decisions directly to the contrary are apparently ignored. The overwhelming weight of authority is to the effect that a corporation created or organized for the purpose of constructing and operating a railroad, turnpike, or toll road, telegraph or telephone line, water or gas works, or other public enterprise, and which are given the power of eminent domain, and other special franchises or privileges, either by the state or by a municipality under express or implied authority, from the state, in consideration of the benefits to be derived by the public, cannot alienate or mortgage such franchises any more than it can alienate or mortgage its franchise to be a corporation, without legislative authority. See the following:

California. *Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

Maine. *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Massachusetts. *Middlesex R. Co. v. Boston & C. R. Co.*, 115 Mass. 347; *Richardson v. Sibley*, 11 Allen 65, 87 Am. Dec. 700.

New York. *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390, 74 Hun 638, 26 N. Y. Supp. 287; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307.

Wisconsin. *State v. Anderson*, 97 Wis. 114, 72 N. W. 386; *Wright v. Milwaukee Elec. Railway & Light Co.*, 95 Wis. 29, 36 L. R. A. 47, 60 Am. St. Rep. 74, 69 N. W. 791; *State v. Anderson*, 90 Wis. 550, 63 N. W. 746.

And see other cases cited in note 9, *supra*, and in notes 10-14, *supra*. An examination of some of the cases which are cited in support of the power of such corporations to alienate their franchises will show that they were decided under an express grant of such power by the legislature, either in the charter of the particular corporation or in a general law. See § 1227, *infra*, and the following decisions:

United States. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. Ed. 244; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296.

Missouri. *Hovelman v. Kansas-City Horse R. Co.*, 79 Mo. 632.

New York. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

Texas. *Threadgill v. Pumphrey*, 87 Tex. 573, 30 S. W. 356.

Wisconsin. *Wright v. Milwaukee Elec. Railway & Light Co.*, 95 Wis. 29, 36 L. R. A. 47, 60 Am. St. Rep. 74, 69 N. W. 791.

Other cases were cases in which the corporation was not quasi public. See *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698.

A toll road franchise may be transferred by assignment or any other authorized mode of transferring real

and assignable as such,¹⁶ unless it is otherwise provided by statute.¹⁷

The question as to the power to assign the franchise right to use streets of a municipality has been the subject of conflicting opinions.¹⁸

The rule that a special or secondary franchise is inalienable without express legislative assent is of little importance at the present time because the statutes almost universally permit such transfer.¹⁹

A statute providing that "no gas company shall transfer its franchise * * * without authority of the legislature" means the franchise "to manufacture and supply gas for a particular locality and to exercise the special rights and privileges in the streets and elsewhere which are essential to the proper performance of its public duty and the gain of its private emoluments and without which it could not exist successfully." ²⁰

§ 1226. Transfer to municipality. While it is true that the franchise and property of a public service corporation cannot be aliened except upon consent of the legislature, as such public service corporation would thereby lose its power to perform the public duties for which it was organized, such transfer by a public service corporation may be made to the public itself. It is not, therefore, ultra vires for a public service corporation, in the acceptance of its franchise from a municipality, to contract that its property may be bought later at its appraised value by such municipality.²¹

property, where its transfer is not prohibited by statute. *People v. Lawley*, 17 Cal. App. 331, 119 Pac. 1089.

"The consent of the electors to the occupation of the streets of the city, if a mere license, was a license coupled with an interest, and such licenses, it is well settled, are assignable." *State v. Citizens' St. R. Co.*, 80 Neb. 357, 114 N. W. 429.

¹⁶ *In re Long Acre Elec. Light & Power Co.*, 51 N. Y. Misc. 407, 101 N. Y. Supp. 460.

¹⁷ *In re Long Acre Elec. Light & Power Co.*, 51 N. Y. Misc. 407, 101 N. Y. Supp. 460.

¹⁸ See 4 McQuillin, *Municipal Corporations*, § 1653.

¹⁹ As to the regulations in regard to transfers by public service corporations, see the chapter on Public Utility Regulations, *infra*.

"The relaxation of the general rule is undoubtedly due to the freedom with which corporate charters are now given, and to the universal recognition of the property, nature and value of special franchises." *In re Long Acre Elec. Light & Power Co.*, 117 N. Y. App. Div. 80, 102 N. Y. Supp. 242.

²⁰ *Attorney General v. Haverhill Gas Light Co.*, 215 Mass. 394, Ann. Cas. 1914 C 1266, 101 N. E. 1061.

²¹ *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124.

California. *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

Illinois. *Snell v. Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532, writ

§ 1227. **Legislative authority.** Unless prevented by some constitutional limitation, it is within the power of the legislature to expressly authorize a corporation or particular kinds of corporations to transfer their franchises or special privileges, and part or all of their property, even though they may be quasi public corporations, and though the transfer or mortgage may disable them from performing their duties to the public. And in many states such authority has been conferred to a greater or less extent.²²

Since a transfer by a quasi public corporation of its franchises, or of property necessary to enable it to perform the duties which it owes to the public, is contrary to public policy in the absence of express legislative authority, it follows that such power is not to be implied from ambiguous or doubtful language in a charter or statute.²³ Thus it has been held that a corporation cannot transfer its franchises under a grant of power to transfer its property merely,²⁴ and that charter authority to sell "the whole property of this corporation" does not authorize a transfer of the secondary franchise;²⁵ but it has been held in California that a franchise is "property" within a statute authorizing a sale of property.²⁶

A statute authorizing a transfer of franchises of any corporation formed in the state does not authorize the transfer of a franchise of a foreign corporation.²⁷

of error dismissed 152 U. S. 191, 38 L. Ed. 408.

Massachusetts. *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen 422.

New York. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, 45 Hun 519; *Brock v. Poor*, 167 App. Div. 784, 153 N. Y. Supp. 332, rev'd on other grounds in 216 N. Y. 387, 111 N. E. 229.

Pennsylvania. *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763, 23 Atl. 884; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685.

Wisconsin. *In re Southern Wisconsin Power Co.*, 140 Wis. 245, 122 N. W. 801; *State v. Anderson*, 97 Wis. 114, 72 N. W. 386.

²² **United States.** *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279.

²³ *Archer v. Terre Haute & I. R. Co.*,

102 Ill. 493; *State v. Chicago, B. & K. C. Ry. Co.*, 89 Mo. 523, 14 S. W. 522. See *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453.

²⁴ *Pullman v. Cincinnati & C. Air Line R. Co.*, 4 Biss. (U. S.) 35, Fed. Cas. No. 11,461; *Butler v. Rahm*, 46 Md. 541; *Philadelphia v. Western U. Tel. Co.*, 11 Phila. (Pa.) 327. And see *Joy v. Jackson & Michigan Plank Road Co.*, 11 Mich. 155; *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211; *Randolph v. Wilmington & R. R. Co.*, 11 Phila. (Pa.) 502.

²⁵ *Coler v. Tacoma Railway & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413, rev'g 64 N. J. Eq. 117, 53 Atl. 680.

²⁶ *People v. Lawley*, 17 Cal. App. 331, 119 Pac. 1089.

²⁷ *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 13 Det. L. N. 1, 107 N. W. 79.

A grant of power to mortgage or pledge does not give the power to sell and convey absolutely.²⁸

When one corporation is authorized to purchase the franchises and property of another, the other is impliedly authorized to sell.²⁹

A grant of power to a railroad company to sell its property and to incorporate its stock with that of another company gives it the power to sell its property and special privileges to the latter.³⁰

The franchise of a quasi public corporation may be transferred as authorized by statute, notwithstanding a constitutional prohibition against the alienation of any franchise "so as to release the franchise or property held thereunder from the liabilities * * * contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."³¹

When the legislature has conferred upon such a corporation the power to transfer its franchises and property for a particular purpose, it cannot do so for any other purpose.³²

When a statute requires the transfer to be made in a particular mode or on certain terms, the requirements of the statute must be complied with.³³ Thus, in alienating a secondary franchise, constitutional limitations requiring the assent of the municipality are to be observed.³⁴ Unless otherwise provided by statute, a franchise may be transferred without the formal or express consent of the state.³⁵

If a corporation is authorized to transfer its franchises or property to a particular person or corporation only, it cannot sell or lease to another person or corporation, and, if authorized to sell or lease to

²⁸ *State v. Chicago, B. & K. C. Ry. Co.*, 89 Mo. 523, 14 S. W. 522; *Southern Pac. Ry. Co. v. Esquibel*, 4 N. M. 337, 20 Pac. 109.

²⁹ *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 52 Conn. 275. Compare *State v. Consolidation Coal Co.*, 46 Md. 1.

³⁰ *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279.

³¹ *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

"The section does not forbid the transfer of a franchise so as to relieve the previous owner thereof, or the grantee or lessee, personally, from liability incurred in the operation of the franchise, if such a thing were

possible. It merely forbids the transfer of a franchise 'so as to relieve the franchise, or property held thereunder,' from liabilities so incurred or contracted." *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

³² *Frazier v. East Tennessee, V. & G. Ry. Co.*, 88 Tenn. 138, 12 S. W. 537.

³³ *Snell v. Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532, writ of error dismissed 152 U. S. 191, 38 L. Ed. 408; *Brownell v. Old Colony R. Co.*, 164 Mass. 29, 29 L. R. A. 169, 49 Am. St. Rep. 442, 41 N. E. 107.

³⁴ *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552.

³⁵ *O'Sullivan v. Griffith*, 153 Cal. 502, 96 Pac. 323, 95 Pac. 873.

other corporations only, it cannot sell or lease to a person who is about to form a corporation.³⁶

A transfer by a quasi public corporation under a power conferred by its charter or a statute must be within the power with respect to the property or right transferred. Thus, a railroad company, authorized by its charter to sell or lease its completed road, cannot transfer its right to construct a road.³⁷

§ 1228. Ratification. The authority conferring a franchise may ratify and confirm the alienation thereof when attempted to be effected without precedent authority.³⁸

§ 1229. Effect of transfer. If the grant of a franchise confers no power to transfer it, a transfer is void so far as burdens imposed on the original holder are concerned.³⁹

Where the franchises and rights are sold to a natural person who in turn transfers them to another corporation, the latter is vested with all the rights of the original corporation, where the sale is within the powers of the corporation.⁴⁰ The purchaser takes subject to the restrictions and conditions contained in the franchise, even though the purchaser did not expressly assume them.⁴¹

A constitutional provision forbidding the alienation of "any franchise" so as to relieve the franchise or property from the liabilities of the transferor, includes the secondary franchises as well as the franchise to be a corporation.⁴²

³⁶ *Bird v. Bird's Patent Deodorizing & Utilizing Sewage Co.*, 9 Ch. App. 358.

³⁷ *Clarke v. Omaha & Southwestern R. Co.*, 4 Neb. 458; *Wood v. Bedford & B. R. Co.*, 8 Phila. (Pa.) 94.

³⁸ *In re Long Acre Elec. Light & Power Co.*, 117 N. Y. App. Div. 80, 102 N. Y. Supp. 242.

³⁹ *State v. Portland General Elec. Co.*, 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

⁴⁰ *Fifth Ave. Coach Co. v. New York*, 58 N. Y. Misc. 401, 111 N. Y. Supp. 759.

⁴¹ *Asbury Park & S. G. R. Co. v. Neptune Tp.*, 73 N. J. Eq. 323, 67 Atl. 790.

⁴² *Cooper v. Utah Light & Railroad Co.*, 35 Utah 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

CHAPTER 33

POWERS AS TO LEASES OF PROPERTY

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I. GENERAL CONSIDERATIONS

§ 1230. Introductory. Leases may be classified as those in which the corporation is lessor and those in which the corporation is lessee. Usually, however, both parties to a lease of corporate property are corporations. But it is sometimes necessary to distinguish between the power to make a lease and the power to take a lease. In this connection, much that has been said in prior chapters as to the power to acquire and hold¹ or alienate² property, is applicable and furnishes the governing rule as to leases.

Leases are also divisible into those made by strictly private corporations and those made by quasi public corporations, such as railroad, street railway, water, light, telegraph or telephone, etc., companies. The power to lease their property is much more restricted as to the latter class of corporations.

II. POWER TO TAKE OR MAKE LEASE

§ 1231. In general. The following rules are too settled to admit of controversy, viz.:

1. A corporation may lease part of its property, where not interfering with any public duties, provided it has the ordinary power to dispose of its property and the property to be leased is not subject to any trust.³

2. A corporation may take a lease of property, provided it has power to acquire property, as already considered,⁴ and provided further that the property is leased for a purpose within the scope of the corporate powers.⁵

3. A quasi public, or public service company cannot lease a part or all of its property, unless authorized by statute, if it will prevent the fulfilling of its duties to the public.⁶

§ 1232. Power to lease part of corporate property—In general. A corporation may not only convey or transfer its property abso-

¹ See Chap. 29.

² See Chap. 32, *supra*.

³ See § 1232, *infra*.

⁴ See Chap. 29, *supra*.

⁵ See § 1234, *infra*.

⁶ See § 1236, *infra*.

lutely, subject to the qualifications stated in a preceding chapter,⁷ but, since the power to lease is an incident of the ownership of property,⁸ it may also, subject to such qualifications, lease the same.⁹

The power to sell includes the power to lease;¹⁰ and charter power to hold, purchase, sell, mortgage or "otherwise convey" property, includes power to lease property belonging to the corporation.¹¹ Thus, a religious, educational, literary, or scientific corporation, or any other kind of corporation, which owns lands and buildings for use in conducting its business, may lease the same or any portion thereof when it is not necessary for the purposes of its business.¹² And a hotel company or other corporation which has constructed a building which is too large for its present need may lease the part which is not needed.¹³

⁷ See Chap. 32.

⁸ *Nantasket Beach Steamboat Co. v. Preston*, 182 Mass. 147, 65 N. E. 57; *Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & Railroad Co.*, 106 Tenn. 651, 62 S. W. 162.

⁹ *Indiana. Phillip v. Aurora Lodge No. 104*, I. O. G. T., 87 Ind. 505.

Massachusetts. Nye v. Storer, 168 Mass. 53, 46 N. E. 402.

New Jersey. Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130.

New York. Temple Grove Seminary v. Cramer, 98 N. Y. 121.

Pennsylvania. Ardesco Oil Co. v. North American Oil & Mining Co., 66 Pa. St. 375.

England. Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1. Eq. 318.

A corporation for the purpose of carrying on a large department store may let space therein to other persons or corporations for the sale of particular articles, receiving as compensation a certain percentage on all sales made by the others. *Standard Fashion Co. v. Siegel-Cooper Co.*, 44 N. Y. App. Div. 121, 60 N. Y. Supp. 739.

¹⁰ *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81.

¹¹ *Starke v. J. M. Guffey Petroleum Co.*, 98 Tex. 542, 4 Ann. Cas. 1057,

86 S. W. 1, aff'g (Tex. Civ. App.), 80 S. W. 1080.

¹² *Temple Grove Seminary v. Cramer*, 98 N. Y. 121; *Laford v. Deems*, 81 N. Y. 507; *Catholic Institute v. Gibbons*, 3 Cinc. L. Bul. (Ohio) 581; *Simpson v. Directors of Westminster Palace Hotel Co.*, 8 H. L. Cas. 712.

¹³ *Dauchy Iron Works v. Gunfler*, 150 Ill. App. 604; *Simpson v. Directors of Westminster Palace Hotel Co.*, 8 H. L. Cas. 712.

A corporation chartered to manufacture railway cars, and authorized to purchase and hold such real estate as may be necessary for the prosecution of its business, and whose business is large and increasing, may purchase land and erect a large office building, in anticipation of its future needs, and may rent such portions of the same as are not presently needed. *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

An opera house company, which owns its opera house, may rent two small rooms under the balcony, where not needed in its regular business, as against the objection that it thereby engages in the business of owning and renting real estate. *People v. Walker Opera House Co.*, 249 Ill. 106, 94 N. E. 159.

Furthermore, a corporation which has the power to sell property may make a lease giving the lessee an option to purchase.¹⁴

The lease may be to another corporation engaged in an entirely different kind of business.¹⁵ And the fact that the lessor corporation was to receive as additional rent a certain percentage upon the gross receipts in excess of a certain sum does not constitute it a partner or give it such an interest that it can be said to be engaged in the business of the lessee corporation.¹⁶ But a corporation has no power to lease its property when the lease is inconsistent with its charter and the object for which it was created.¹⁷

In order to constitute a valid lease, the lessee must have authority to take as well as the lessor to execute the lease.¹⁸

§ 1233. — Surplus property of quasi public corporation. A quasi public or public utility corporation, although having no power to lease all of its property, may lease property not needed for the time being and the parting from which temporarily will not affect the power properly to fulfil its duties to the public.¹⁹ Thus, a railroad company may lease part of its right of way if it does not thereby affect its ability to discharge its public duties.²⁰ So a railroad company, owning land which is not at the time necessary for the operation of its road, may lease the same to individuals for the purpose of

¹⁴ *In re Female Orphan Asylum*, 17 L. T. R. (N. S.) 59.

¹⁵ *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81.

"The most that can be said is that the property was leased for hotel purposes. But that fact did not constitute an engaging in or carrying on the hotel business by it, any more than the fact that one lets his premises to tenants engaged in various occupations or for certain business purposes constitutes an engaging in those occupations by him." *Nantasket Beach Steamboat Co. v. Hinckel Brewing Co.*, 182 Mass. 147, 65 N. E. 57.

¹⁶ *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57.

¹⁷ *Dow v. Northern R. Co.*, 67 N. H. 1, 36 Atl. 510; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Metropolitan Concert Co. v. Abbey*, 52 N. Y. Super. Ct. 97.

¹⁸ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738, aff'g 33 Fed. 440; *Pennsylvania R. R. Co. v. St. Louis, A. & T. R. R. Co.*, 118 U. S. 290, 630, 30 L. Ed. 83; *Empire Trust Co. v. Egypt Ry. Co.*, 182 Fed. 100.

¹⁹ *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 99, 44 L. Ed. 84; *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81. See chapter on Public Utility Regulations, *infra*.

²⁰ *Bacon v. Boston & M. R. R.*, 83 Vt. 421, 437, 76 Atl. 128.

A railroad company owning the fee in land may grant to an oil transportation company, provided its own ability to serve the public is not affected, the right to use the land for laying pipes. *Benton v. Elizabeth*, 61 N. J. L. 411, 693, 39 Atl. 683.

erecting and maintaining an elevator thereon to be used in connection with its road.²¹ And a railroad company may lease a portion of its right of way to a manufacturing company, for the purpose of obtaining freight therefrom.²²

On the same principle, it is within the powers of a railroad company to let another company into the joint use and occupancy, for a long term of years, of its bridge, and of its station, tracks, and other terminal facilities at a particular city, when such joint use and occupancy does not interfere with its own present or prospective use thereof, or its ability to discharge its duties to the public. "If, in the conduct of its corporate business, a railroad corporation necessarily acquires engines and cars that at certain seasons of the year are not required for its own use, it is not then required to operate them; it is not required to hold them in idleness; it may rent them; it may sell them; and, if it necessarily constructs or acquires for its corporate purposes bridges, tracks, and depots at its terminals whose capacity is greater than its corporate use, the interest of its stockholders and creditors, the value of whose property will be thereby enhanced, and the interest of the public, who will be thereby provided with increased facilities for transportation, alike require that such surplus use shall not be left to idle waste."²³

A railroad company owning steamboats for the purpose of maintaining a ferry in connection with its road is not bound to allow them to lie idle when not needed in its business, but may lease them when not in use, and thus avoid their lying unemployed and unprofitable.²⁴

§ 1234. Power to take lease. A corporation has the implied power, in the absence of express restrictions, to take a lease of property, whenever it is a necessary or proper means of carrying out the purposes for which it was created.²⁵ Thus, it has been held that a railroad company whose line ended at the seashore in Florida could lease a hotel on the beach, where the beach was suitable for resort pur-

²¹ *Gilliland v. Chicago & A. R. Co.*, 19 Mo. App. 411.

²² *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635.

²³ *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Fed. 309, aff'g 47 Fed. 15.

²⁴ *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326; *Forrest v. Manchester, S. & L. Ry. Co.*, 30 Beav. 40.

²⁵ *United States*. Jacksonville, M.

P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515.

Illinois. *Brewer & Hofmann Brewing Co. v. Boddie*, 181 Ill. 622, 55 N. E. 49, aff'g 80 Ill. App. 353.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. *Welsh v. Ferd Heim Brewing Co.*, 47 Mo. App. 608.

New Jersey. *Crawford v. Longstreet*, 43 N. J. L. 325.

poses but lacked hotel facilities.²⁶ And a turnpike company may take a lease of premises for the purpose of storing the implements used in repairing its road, and of sheltering its employees.²⁷ A brewing company may lease, or lease and sublet, premises for the purpose of a saloon, in order to increase the sale of its beer.²⁸ Likewise, a bank may lease a building in order to exchange the use of a part of it for a building suitable for its purpose, which it urgently needs and cannot otherwise procure.²⁹

Power to purchase and hold such real estate "as shall be necessary for its immediate accommodation in the transaction of its business," authorizes a national bank to lease real estate to accomplish such purpose, under agreement that it will erect a building thereon and make such improvements as a prudent owner would do to render the property productive.³⁰

A lease by a national bank is not invalid because its capital stock is less than the aggregate rental which it agrees to pay,³¹ nor because the consent of the lessor is necessary in order to a valid assignment of the lease.³²

On the other hand, a corporation cannot take a lease of property for a purpose which is foreign to the legitimate objects of its creation.³³ It cannot take a lease merely to harass another.³⁴

²⁶ Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515.

²⁷ Crawford v. Longstreet, 43 N. J. L. 325.

²⁸ McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927; Heims Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. 286, aff'g 38 Ill. App. 95; Keeley Brewing Co. v. Mason, 116 Ill. App. 603; Keeley Brewing Co. v. Emrick, 64 Ill. App. 247; National Brewing Co. v. Ahlgren, 63 Ill. App. 475; Welsh v. Ferd Heim Brewing Co., 47 Mo. App. 608.

Where a corporation is authorized "to carry on a general brewing and malting business and manufacture and sell soda waters," it is not, as a matter of law, ultra vires for it to take a lease of premises "to be occupied for a saloon and no other purpose whatever," for the word "saloon" does not necessarily mean a place for the

sale of intoxicating liquors, and not a place for the sale of soda water. Brewer & Hofmann Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49, aff'g 80 Ill. App. 353.

²⁹ Lechenger v. Merchants' Nat. Bank of Houston (Tex. Civ. App.), 96 S. W. 638.

³⁰ Brown v. Schleier, 118 Fed. 981.

³¹ Brown v. Schleier, 118 Fed. 981.

³² Weeks v. International Trust Co., 125 Fed. 370.

³³ Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 529; Camden & A. R. Co. v. May's Landing & E. H. City R. Co., 48 N. J. L. 530, 7 Atl. 523.

³⁴ "A corporation chartered for a specific purpose has no power to take a lease of property not needed for that purpose, and of no substantial use to it, with the intention and for the purpose of harassing another party by the use, under the forms of law, of the supposed rights thus ob-

A brewing company cannot lease land, in order to erect a boarding house and saloon thereon, where more than three-fourths of the building and of the investment for its construction was for boarding house purposes, even conceding that it might, under some circumstances lease property for saloon purposes.³⁵

Where a bank is forbidden to "transact any business" until so authorized by the comptroller of the currency, it cannot, before that time, take a lease of property for offices for a term of years.³⁶

§ 1235. Power to lease all of property of strictly private corporation. The power of a corporation not a quasi public one to lease all its property is to be distinguished from the power of a quasi public corporation. In the one case, there is a limited power; in the other case, there is no power except in so far as expressly conferred by charter or statutory provisions.³⁷

What has been stated in a preceding chapter relating to the power of a corporation to alienate all its property, as against the objection of minority stockholders,³⁸ applies, it would seem, to leases as well as to absolute conveyances; but it has been held that a distinction exists between a sale of all the corporate property, and a lease of it, in that in case of a sale no further liability rests upon the stockholders, since the corporation is in fact discontinued, while in the case of a lease the business is discontinued but the stockholders' obligations may continue.³⁹ Sometimes it is broadly stated that a corporation which is not a quasi public corporation may lease all its property.⁴⁰ In other decisions it is held that a majority of the stockholders of a corporation may lease the entire property of the corporation whenever the exigencies of the business require such a lease;⁴¹ but that they

tained." *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529.

³⁵ "It would be rather a far stretch of corporate powers to say that a corporation organized to manufacture and sell beer, ale and porter and carry on a general brewer's business in all its branches, could establish and operate boarding houses for the purpose of increasing the sale of its beer." *United States Brewing Co. v. Dolese & Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N. S.) 898, 102 N. E. 753, rev'g 174 Ill. App. 394.

³⁶ *McCormick v. Market Bank*, 165 U. S. 538, 549, 41 L. Ed. 817.

³⁷ See § 1236, *infra*.

³⁸ See Chap. 32.

³⁹ *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

⁴⁰ *Cambria Steel Co. v. McCoach*, 225 Fed. 278, 281 (decided under Pennsylvania rule); *Starke v. J. M. Guffey Petroleum Co.*, 98 Tex. 542, 4 Ann. Cas. 1057, 86 S. W. 1.

⁴¹ *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 15 L. R. A. (N. S.) 846, 87 Pac. 315; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. 318.

A lease of the entire property of a

cannot do so against the dissent of the minority when it is not required by the exigencies of the business.⁴²

This question as to the rights of majority stockholders against minority stockholders is more fully considered in a subsequent chapter.⁴³

Statutes or the charter sometimes authorize a lease of all the property. And it has been held, it seems, that the power to lease all the property of a strictly private corporation may be conferred by the charter of the corporation authorizing it to lease property, without further provision as to whether the powers include a lease of all the corporate property.⁴⁴ Moreover, express power to lease lands owned by the corporation includes power of an oil company to lease its oil lands for the purpose of mining for oil, on a royalty, since the lease does not put the company out of business.⁴⁵

corporation for a term of years, made in good faith and without any element of fraud, actual or constructive, the lessee agreeing to continue the business which the corporation was organized to carry on, is not ultra vires, where the corporation is in such a condition that the business cannot be carried on profitably under its management. *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45. See also *Plant v. Macon Oil & Ice Co.*, 103 Ga. 666, 30 S. E. 567.

A purely private corporation has the power to lease temporarily its property to raise money for payment of a pressing debt, where the transaction is in the interest of all the stockholders, and the corporation has no purpose permanently to abandon its franchises. *Plant v. Macon Oil & Ice Co.*, 103 Ga. 666, 30 S. E. 567.

In California, a corporation may lease entire business whenever such a course is necessary for the best interests of the stockholders and creditors, on complying with the statute relating to consent of two-thirds of stockholders. *McTigue v. Arctic Ice Cream Supply Co.*, 20 Cal. App. 708, 130 Pac. 165.

⁴² *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Copeland v. Citizens' Gas Light Co.*, 61 Barb. (N. Y.) 60; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

A lease by the directors of a corporation organized to acquire mineral lands, and mine the same, of the lands acquired by it, for which it has given all its stock, and on which it has expended all contributions to its treasury, is a practical abandonment of its purposes for the period of the lease, and cannot be made without the unanimous consent of the stockholders. *Hennessy v. Muhleman*, 27 N. Y. Misc. 232, 57 N. Y. Supp. 232.

⁴³ Chapter on Stock and Stockholders, *infra*.

⁴⁴ *Starke v. J. M. Guffey Petroleum Co.*, 98 Tex. 542, 4 Ann. Cas. 1057, 86 S. W. 1.

⁴⁵ "They have done no more than abandon a field they failed to prove, and can mine elsewhere if they deem it wise." *Stark v. Guffey Petroleum Co.* (Tex. Civ. App.), 80 S. W. 1080, *aff'd* 98 Tex. 542, 4 Ann. Cas. 1057, 86 S. W. 1.

On the other hand, some statutes expressly authorizing corporations to lease and dispose of their property to any other corporation authorized to do the same general business, have been held applicable only to quasi public corporations.⁴⁶

§ 1236. Power of quasi public corporations—In general. A different rule applies to leases of all their property by quasi public or public utility corporations than the one which governs other corporations. In the case of the former, including railroad,⁴⁷ street railroad,⁴⁸ water,⁴⁹ light,⁵⁰ telegraph and telephone, etc., companies, they cannot lease all their property, since they are burdened with certain duties which they cannot escape by ridding themselves of all their property, unless their charter or some statute authorizes such a lease. Corporations which are within the principle cannot make a valid lease of property which is necessary to enable them to carry on their business, and thus temporarily render themselves wholly or partially unable to perform the duties which they owe to the public.⁵¹ So the corporation cannot lease its special franchises.⁵²

There is an exception, however, in case of a lease of part of the

⁴⁶ *Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & Railroad Co.*, 106 Tenn. 651, 62 S. W. 162, followed in *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 236, 118 S. W. 390.

⁴⁷ See next section, *infra*.

⁴⁸ *Middlesex R. Co. v. Boston & C. R. Co.*, 115 Mass. 347; *Moorshead v. United Rys. Co.*, 119 Mo. App. 541, 96 S. W. 261; *Ft. Worth St. Ry. Co. v. Allen* (Tex. Civ. App.), 39 S. W. 125.

⁴⁹ *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776.

⁵⁰ *Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

⁵¹ *United States. Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *American U. Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary 188, 1 Fed. 745.

Alabama. Memphis & C. R. Co. v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

Maine. Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

New Hampshire. Dow v. Northern R. R., 67 N. H. 1, 36 Atl. 510.

England. East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; *Shrewsbury & B. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. Cas. 113.

A corporation cannot successfully evade the performance of a public duty imposed on it by its charter by leasing its property. *Ryerson v. Morris Canal & Banking Co.*, 71 N. J. L. 381, 2 Ann. Cas. 859, 59 Atl. 29.

⁵² *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122; *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 399.

property which does not prevent the lessor from fulfilling its duties to the public.⁵³

§ 1237. — Railroad companies. It is too well settled to admit of controversy that, in the absence of express legislative authority, one railroad company has no power to lease its road and other property to another railroad corporation;⁵⁴ and, a fortiori, a railroad company cannot grant to a private business corporation the right to use its road.⁵⁵ So, unless authorized so to do, a railroad company cannot lease another road.⁵⁶ In fact, there can be no valid lease, unless the power of the lessor to make a lease, and the power of the lessee to take a lease, coexist.⁵⁷ Such leases are not only beyond the power of the corporation but are against public policy.⁵⁸

However, in this connection, it is necessary to distinguish between leases of all the property of a railroad, whereby the lessee obtains control of all of such property, and trackage or terminal agreements whereby one railroad company lets another company into the joint use and occupancy of part of its line or of terminal facilities, since in the latter case there is no such transfer of the property of a quasi public corporation as requires statutory or charter authority therefor.⁵⁹

⁵³ See § 1233, *supra*.

⁵⁴ **United States.** *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

Alabama. *American Lumber Co. v. Tombigbee Valley R. Co.*, 154 Ala. 385, 45 So. 911.

Montana. *State v. Montana Ry. Co.*, 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623.

New York. *Troy & R. R. Co. v. Kerr*, 17 Barb. 581.

Pennsylvania. *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81 Pa. St. 104.

⁵⁵ *American Lumber Co. v. Tombigbee Valley R. Co.*, 154 Ala. 385, 45 So. 911.

⁵⁶ *State v. Montana Ry. Co.*, 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623.

⁵⁷ See § 1232, *supra*.

⁵⁸ *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

⁵⁹ "It is sufficient to say that in every case to which the learning and research of counsel has been able to refer us, where such a contract has been held void, an attempt was made to transfer absolutely, or for a long term of years, either the entire property and franchises of the corporation, or so large and substantial a part of them that it disabled the corporation from the performance of its obligations and duties to the government and to the public. * * * By this contract, the Pacific Company does not surrender or transfer any part of its road or property; on the other hand, it retains their possession, and reserves to itself, by the express terms of the contract, the absolute control, through its own superintendent, of the operation of every train of every company that enters upon these tracks." Per

§ 1238. — **Statutory or charter authority.** Statutes or charter provisions often authorize public service corporations, other than commercial railroad companies, to lease all their franchises and other property;⁶⁰ and in nearly all the states the statutes now authorize a lease of the property of railroads, with certain exceptions.⁶¹

Authority to lease all the property of a quasi public corporation will not be implied from doubtful language;⁶² and it will not be presumed from the usual grant of powers in a railroad charter.⁶³ More-

Justice Sanborn in *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 318, 319, aff'g 47 Fed. 15.

⁶⁰ *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232, aff'd 119 Fed. 871, construing New Jersey statute of 1893 applying to street railroad; *Content v. Metropolitan St. R. Co.*, 37 N. Y. Misc. 618, 76 N. Y. Supp. 151; *Moore v. Chartiers Valley Water Co.*, 216 Pa. 457, 65 Atl. 936, construing Act June 26, 1895, under the rule that where the words of a statute are susceptible of two constructions, one of which will lead to an absurdity, the other not, the latter should be adopted, although it be a liberal instead of a literal construction.

⁶¹ *United States. Southern Ry. Co. v. North Carolina R. Co.*, 81 Fed. 595, following North Carolina decisions.

Georgia. *Georgia Railroad & Banking Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315.

New Jersey. *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964, holding that 1880 amendment applies to corporations chartered by special acts.

New York. *Wormser v. Metropolitan St. R. Co.*, 98 App. Div. 29, 90 N. Y. Supp. 714; *Fisher v. Metropolitan El. Ry. Co.*, 34 Hun 433.

North Carolina. *Hyder v. Southern R. Co.*, 167 N. C. 584, 83 S. E. 689.

Pennsylvania. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

In some states statutes authorizing a lease of railroads are expressly conditioned that rates shall not be in-

creased on any part of the road leased. *State v. Boston & M. R. R.*, 76 N. H. 146, 80 Atl. 858.

⁶² *United States. St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738.

District of Columbia. *Chesapeake & O. Ry. Co. v. Howard*, 14 App. Cas. 262, aff'd 178 U. S. 153, 44 L. Ed. 1015.

Kentucky. *McCabe's Adm'x v. Maysville & B. S. R. Co.*, 112 Ky. 861, 23 Ky. L. Rep. 2328, 66 S. W. 1054.

Pennsylvania. *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81 Pa. St. 104.

Texas. *East Line & R. R. Co. v. State*, 75 Tex. 434, 12 S. W. 690.

A lease by a railroad company of all its property, without dissolving, is not within a provision, in a general act for the organization of railroad companies, that a corporation organized under it may authorize its own dissolution and the dispositions of its property. *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 2, 32 L. Ed. 837.

Nor is a lease of all its property by one railroad company to another necessarily authorized by the use of the word "lessees" in a statute making specific grants to such corporation. *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 2, 32 L. Ed. 837. And see *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

⁶³ *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 309, 30 L. Ed. 83.

over, the lessor "must be able to point to the exact statute granting such authority."⁶⁴

The ordinary clause in a railroad charter authorizing it to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads confers no authority on the company to lease its property.⁶⁵

Power to contract with connecting lines in adjoining states for the transportation of freight or passengers, "or for the use of its said road," does not, it has been held, authorize a lease;⁶⁶ and it has been held that a corporation has no power to part with its franchise and avoid liabilities attaching to it by leasing its road to a foreign corporation, under a statute authorizing it to make contracts with individuals, corporations, and other roads with respect to the construction, completion and running of its line when completed.⁶⁷ But a grant of authority to two railroad companies to contract with each other in any manner "not inconsistent" with the scope, object, and purpose of their creation and management has been held to authorize one of them to lease its entire property to the other;⁶⁸ and power conferred on a railroad company to contract with another for the use of their respective roads in such manner as the contract may prescribe, has been construed as including the power to make a lease for a term of years.⁶⁹

The use of the words "assigns" or "successors," in a grant to a railroad company, does not necessarily imply that the corporation can lease its property to another corporation.⁷⁰

Statutory authority conferred on all railroad corporations incorporated under the laws of the state to lease roads belonging to corporations of other states, does not confer power on a foreign corpora-

⁶⁴ *State v. Atchison & N. R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164, 38 N. W. 43.

⁶⁵ *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

⁶⁶ *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 311, 30 L. Ed. 83, construing Indiana statute.

"To connect one road with another does not fairly mean to lease it or sell it to another." *Board Com'rs Tippecanoe Co. v. Lafayette, M. & B. R. Co.*, 50 Ind. 85, 110.

⁶⁷ *Brooker v. Maysville & B. S. R. Co.*, 119 Ky. 137, 83 S. W. 117, follow-

ing *McCabe's Adm'x v. Maysville & B. S. R. Co.*, 112 Ky. 861, 66 S. W. 1054.

⁶⁸ *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 135 Mo. 173, 202, 203, 33 L. R. A. 607, 36 S. W. 602.

⁶⁹ *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489; *Woodruff v. Erie R. Co.*, 93 N. Y. 609, 616.

⁷⁰ *Oregon Ry. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837; *Briscoe v. Southern Kansas Ry. Co.*, 40 Fed. 273, 279.

tion to take such a lease, where it is not authorized so to do by the laws of its own state.⁷¹

Express power to consolidate does not include authority to lease.⁷² A constitutional provision that no railroad, nor the "lessees" thereof, shall consolidate with competing lines, does not confer power to lease.⁷³ Statutory authority conferred on an insolvent corporation to mortgage its property does not impliedly prohibit a lease thereof.⁷⁴

Of course, authority granted a railroad company to lease a railroad owned by another corporation does not authorize it to lease its own road to another company.⁷⁵ Authority to a corporation to lease its property does not extend to property outside the state.⁷⁶

On the other hand, power to "dispose of" property includes power to lease it.⁷⁷ So, on the theory that the greater includes the lesser power, a railroad company, given power to purchase other railroads, has power to lease and operate a road.⁷⁸ Likewise, power to "farm out" the right of transporting property, given a railroad company by its charter, includes power to lease.⁷⁹ Furthermore, where a rail-

⁷¹ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738.

⁷² *State v. Montana Ry. Co.*, 21 Mont. 221, 243, 45 L. R. A. 271, 53 Pac. 623; *Mills v. Central R. R.*, 41 N. J. Eq. 1, 2 Atl. 453.

"The power to lease does not imply a power to consolidate, nor does the power to consolidate imply a power to lease, but these powers are distinct and independent. * * * While, in case of consolidation, the rights of the lessee pass to the new company, nothing else passes; and the lessor retains, unimpaired, its corporate existence, powers and privileges, except as affected by the agreement for such use; and hence, among the powers so retained by the lessor, is the power of consolidation." *State v. Vanderbilt*, 37 Ohio St. 590.

A grant of power to two corporations to merge or consolidate their franchises and other property does not give one of them power to lease its franchises and property to the other. *Archer v. Terre Haute & I. R. Co.*, 102

Ill. 493; *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453.

"Power to consolidate is power to take in a partner, or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger." *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453.

⁷³ *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457.

⁷⁴ *Phillips v. Eastern R. Co.*, 138 Mass. 122.

⁷⁵ *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453.

⁷⁶ *Briscoe v. Southern Kansas Ry. Co.*, 40 Fed. 273.

⁷⁷ *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81; *Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & Railroad Co.*, 106 Tenn. 651, 62 S. W. 162.

⁷⁸ *Kaufman v. Pittsburg & C. S. R. Co.*, 217 Pa. 599, 608, 66 Atl. 1108.

⁷⁹ *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *State v. Richmond & D. R. Co.*, 72 N. C. 634. See also *Central Railroad & Banking Co. v. Macon*, 43 Ga. 605.

road company is expressly authorized to lease the property of another railroad company, and there is no limitation on the power of the latter company to enter into the lease, the latter company is authorized to lease its road as lessor.⁸⁰

Under some statutes, the power to lease is limited to "connecting" or "continuous" lines.⁸¹ However, under a statute authorizing a lease of a railroad when, together, the lessor and lessee roads form a "continuous line," the leased road need not be an extension from either terminus of the main line, but it may be merely a collateral branch, forming a continuous road, by the way of the junction, to either terminus.⁸²

If the statute limits the right to lease to connecting railroads, it has been held that the roads need not be so connected that the same cars shall pass from one road to the other without interruption, but only that they shall be so connected that a convenient interchange of passengers and freight is possible.⁸³ The connection may be an intervening road which one of the parties has the right to operate or use.⁸⁴

The leasing of competing or parallel lines by a railroad company is often prohibited by statute;⁸⁵ and a statute authorizing railroad companies to lease intersecting and continuous lines does not authorize a railroad company to lease its line to another company operating a parallel and competing road.⁸⁶ If a statute merely authorizes a lease, without saying anything about connecting or competing lines, it has been held that a lease may be made to a parallel or competing line.⁸⁷

⁸⁰ *Hunting v. Hartford St. Ry. Co.*, 73 Conn. 179, 46 Atl. 824; *Kaufman v. Pittsburg & C. S. R. Co.*, 217 Pa. 599, 609, 66 Atl. 1108; *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229, 44 Atl. 284.

⁸¹ *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388; *Van Steuben v. Central R. Co.*, 178 Pa. St. 367, 374, 34 L. R. A. 577, 35 Atl. 992.

⁸² *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 36 L. Ed. 755, construing Kentucky statute, and followed in *Empire Trust Co. v. Egypt Ry. Co.*, 182 Fed. 100.

⁸³ *Hampe v. Pittsburg & B. Traction Co.*, 165 Pa. St. 468, 30 Atl. 931; *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

⁸⁴ *Atchison, T. & S. F. Ry. Co. v. Fletcher*, 35 Kan. 236.

⁸⁵ *New Orleans, Ft. J. & G. I. R. Co. v. New Orleans Southern R. Co.*, 124 La. 471, 50 So. 467; *Scott v. Missouri, O. & G. Ry. Co.*, — Tex. Civ. App. —, 151 S. W. 578.

⁸⁶ *Eel River R. Co. v. State*, 155 Ind. 433, 455, 57 N. E. 388.

⁸⁷ *State v. Montana Ry. Co.*, 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623.

In New York, under the 1839 statute, the lease of a parallel line, merely to abandon the road and put it out of business, was held unauthorized. *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107.

A statute authorizing a lease of a railroad to a parallel and competing line for a term of ten years does not violate a constitutional provision prohibiting a consolidation of parallel or competing lines.⁸⁸

Whether railroads can be said to be "parallel or competing lines"⁸⁹ is sometimes a question of considerable difficulty; but it is settled that parallel are not necessarily competing lines,⁹⁰ while competing lines need not be parallel.⁹¹ Moreover, the word "parallel" does not mean two lines of railroad that are equidistant from each other, but it means "lines of railway having the same general direction, and therefore likely to come in competition with each other."⁹²

"Competing" railroads embrace not only those "which run between the same two principal points on their own lines, but those which, having one common terminus, yet are actually connected with other railroads, and which, by arrangements with such other railroads concerning the transportation of freight and passengers, are so related to one another in fact as to give them the opportunity by geographical situation to directly cut rates to principal or terminal points."⁹³

Authority to lease "to any railroad company of this state" does not authorize a lease to a foreign corporation.⁹⁴ However, a general power to lease, without qualifications, seems to authorize a lease to a foreign corporation.⁹⁵

The power to make a lease depends on the statutes of the state where the road is located and the lessor was incorporated rather than the law of the state where the lessee was incorporated.⁹⁶ Likewise, the

⁸⁸ *State v. Montana Ry. Co.*, 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623.

But it has been held that a lease for ten years was a "consolidation" within a constitutional prohibition against consolidations of competing and parallel railroads. *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed. 735, construing Illinois Constitution.

⁸⁹ See generally *Kimball v. Atchison, T. & S. F. R. Co.*, 46 Fed. 888; *Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co.*, 217 Ill. 504, 75 N. E. 562; *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. 970, 6 So. 888; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 410, 1 L. R. A. 849, 13 Am. St. Rep. 815, 10 S. W. 81; *East Line & R. R. Ry. Co. v. Rushing*, 69 Tex. 306, 313, 6 S. W. 834.

Ownership of competing bridges, see *Com. v. Louisville & N. R. Co.*, 148 Ky. 94, 146 S. W. 767.

⁹⁰ *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 697, 698, 40 L. Ed. 849.

⁹¹ *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed. 735.

⁹² *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed. 735, 742.

⁹³ *State v. Montana Ry. Co.*, 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623.

⁹⁴ *Freeman v. Minneapolis & St. L. Ry. Co.*, 28 Minn. 443, 10 N. W. 594.

⁹⁵ *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 23 Atl. 529; *Day v. Ogdensburg & L. C. R. Co.*, 107 N. Y. 129, 13 N. E. 765.

⁹⁶ *Van Steuben v. Central R. Co.*,

validity of a lease, so far as the power to make it is concerned, is governed by the law of the place where the lease was made rather than the law of the forum.⁹⁷

§ 1239. — Approval by public utility commission. In some states, statutes require leases by quasi public corporations of their property to be approved by the public utility or railroad commissioners.⁹⁸

§ 1240. — Ratification by legislature. Power to lease may be conferred by a statute ratifying and validating a lease already made.⁹⁹ Ratification, however, of a transfer of its franchises and property by a quasi public corporation is not to be inferred from an ambiguous and doubtful language in a statute. Thus, it was held by the Supreme Court of the United States that an ultra vires lease of its franchises and property by one railroad company to another was not ratified and rendered valid by an act of the legislature supplementing the act incorporating the lessor company, and declaring that it should be unlawful "for the directors, lessees, or agents of said railroad" to charge more than a certain rate for carrying passengers or freight. Mr. Justice Miller said: "The mention of the lessees no more implies a ratification of the contract of lease than the word 'directors' would imply a disapproval of the contract. It is not by such an incidental use of the word 'lessees' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the state."¹

178 Pa. St. 367, 34 L. R. A. 577, 35 Atl. 992.

⁹⁷ St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 405, 36 L. Ed. 738.

⁹⁸ West Jersey & S. R. Co. v. Board Public Utility Com'rs, 87 N. J. L. 170, 94 Atl. 57, holding board has discretion to approve or disapprove lease, and that it has power to determine whether the proposed lease contains provisions inimical to the interests of the state and its citizens, or omits provisions requisite for the protection of those interests. This case affirms 85 N. J. L. 468, 89 Atl. 1017.

Approval is required "for the purpose of preventing a lease from being made which, in its judgment, em-

braced provisions which would be inimical to the interests of the state and its citizens, or which omitted provisions which were requisite for the protection of those interests." As so construed, the statute is not unconstitutional as delegating to the board a power which can only be exercised by the legislature itself. West Jersey & S. R. Co. v. Board Public Utility Com'rs, 87 N. J. L. 170, 94 Atl. 57.

See chapter on Public Utility Regulations, infra.

⁹⁹ Terre Haute & I. R. Co. v. Cox, 102 Fed. 825; State v. Steber, 154 Wis. 505, 143 N. W. 156.

¹ Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950.

III. FORM, CONTENTS, VALIDITY AND CONSTRUCTION

§ 1241. Form and execution. In general, a lease by or to a corporation is in practically the same form as a lease by or to an individual, and there are no rules of law peculiar to corporate leases. However, of course, statutory provisions, if any, as to the mode of executing the lease, must be complied with.² So far as the signature is concerned, it is governed by the rules relating to the signature of all corporate contracts.³ A modification of a corporate lease must be executed with the same formalities as required by statute in the case of an original lease.⁴

A mistake in the location of the lessee corporation, made in the lease, where not objected to, may be treated as mere surplusage.⁵

Conditions in a lease may be waived by the lessor.⁶

A person taking a lease from an agent of a corporation takes it at his peril, so far as the authority of the agent to bind the corporation by a lease is concerned.⁷

§ 1242. Necessity for consent of stockholders. While there is some authority to the contrary,⁸ the general rule, independently of statute, is that the board of directors cannot lease all the property of the corporation, but that the consent of the stockholders is necessary.⁹ Furthermore, though as to this there is considerable conflict of opinion, it has been held that the unanimous consent of the stockholders is necessary.¹⁰ However, especially in regard to railroad leases, it is now often provided by statute that a certain proportion of the stockholders must consent.¹¹ But it has been held that a statute requiring the consent of a majority of the stockholders, at a meeting, to authorize a lease, does not apply to a lease of part only of the

² *Louisiana & N. W. R. Co. v. State*, 75 Ark. 435, 5 Ann. Cas. 637, 88 S. W. 559.

³ See Chap. 35.

⁴ *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 242, 79 N. E. 1026.

⁵ *Hosteter v. Wear-U-Well Shoe Co.*, 171 Iowa 346, 152 N. W. 1.

⁶ *Metropolitan Trust Co. v. Columbus, S. & H. Ry. Co.*, 95 Fed. 18.

⁷ *Berlin v. Belle Isle Scenic R. Co.*, 141 Mich. 646, 12 Det. L. N. 573, 105 N. W. 130.

⁸ *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489.

⁹ *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 322; *Cass v. Manchester Iron & Steel Co.*, 9 Fed. 640. See also chapters on Stock and Stockholders, and on Officers, *infra*.

¹⁰ Chapter on Stock and Stockholders, *infra*.

¹¹ See *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299 (construing Tennessee statutes).

property of a corporation nor to leases by strictly private, as distinguished from quasi public corporations.¹²

Even if not properly authorized by the stockholders in the first place, the lease may be afterwards ratified by them.¹³ This question will be considered more in detail in a subsequent chapter.¹⁴

§ 1243. Validity of particular provisions in lease. A corporation cannot lease its property on other terms than those specified in its charter.¹⁵

If a railroad company leases its road, it can only impose upon its use by the lessee such restrictions as are consistent with the discharge by the lessee of those duties which, as a common carrier, the lessee owes to the public.¹⁶ A provision in a railroad lease whereby the lessor renounces all its duties to the public has been held to vitiate the lease.¹⁷ However, a provision in a lease by a railroad company of a portion of its right of way for a warehouse that the lessee assumes all risk of fire even if caused by the negligence of the employees of the railroad, is not invalid as against public policy.¹⁸

A provision in a corporate lease for a reference in case of differences in regard thereto is valid, although the lessee corporation controls the lessor corporation.¹⁹

§ 1244. Construction—In general. The construction of a lease by or to a corporation is governed by the same rules applicable to all leases.²⁰

¹² Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & Railroad Co., 106 Tenn. 651, 62 S. W. 162.

¹³ Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

¹⁴ Chapter on Stock and Stockholders, *infra*.

¹⁵ Taylor v. Dulwich Hospital in Surrey, 1 P. Wms. 655.

¹⁶ "Restrictions in the nature of conditions subsequent, which, in respect to the demised premises, forbid the lessee to do its public duties as a common carrier, would, if enforced, prevent the lessee from enjoying the demised premises at all in a lawful manner, and are therefore repugnant to the grant and void." Metropolitan

Trust Co. v. Columbus, S. & H. R. Co., 95 Fed. 18, 22.

¹⁷ Anderson v. Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874.

¹⁸ Checkley v. Illinois Cent. R. Co., 257 Ill. 491, 44 L. R. A. (N. S.) 1127, Ann. Cas. 1914 A 1202, 100 N. E. 942.

¹⁹ Wolf v. Pennsylvania R. Co., 195 Pa. St. 91, 45 Atl. 936.

²⁰ See Grand Trunk Western Ry. Co. v. Chicago & E. I. R. Co., 141 Fed. 785; Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. C. 368, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 61 S. E. 185.

As to the effect of an agreement to save the lessor harmless from suits of "any and all kinds whatsoever arising

In order to ascertain the intention of the parties, the court should consider "the occasion which gave rise to the contract, the obvious design of the parties, and the object to be attained, as well as to the language of the instrument itself, and give the agreement that construction which will effectuate the real intent and meaning of the parties as thus ascertained from the entire instrument and by reference to the circumstances attending the making of it."²¹ So a lease between two railroad companies must be construed with reference to the objects proposed by the existing charters of each at the time the lease was made.²² And the court must "examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed."²³ Also the lease should be construed together with other contemporaneous writings.²⁴

Words in a lease are presumed to have been used in their ordinary and popular sense.²⁵ However, a lease should not be broadened by construction beyond its fair import and the purpose sought to be accomplished;²⁶ and the rule that, if a lease is susceptible of two constructions, the one most favorable to the lessee must prevail, does not apply where the intention of the parties is determinable from the language used, when examined in the light of surrounding conditions and circumstances.²⁷

Where a subway is leased, and it is agreed that the equipment of the railway is to be installed by the lessee but that the entrances to

out of, or in any manner appertaining to or connected with, the maintenance, operation or management of said demised railways, premises," etc., see *Boyd v. Northern Pac. Ry. Co.*, 170 Fed. 779.

For the construction of a particular street railway lease, see *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 124 N. Y. App. Div. 896, 109 N. Y. Supp. 31.

For the construction of the provision in a street railway lease as to liability for expenditures by the lessee, see *Pennsylvania Steel Co. v. New York City Ry. Co.*, 225 Fed. 106.

The lessee of a railroad has been held to have power to dispose of property of the lessor not needed for railroad purposes, under particular clauses

of lease. *Little v. Old Colony R. Co.*, 202 Mass. 277, 88 N. E. 896.

²¹ *Southern Ry. Co. v. Franklin & P. R. Co.*, 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485.

²² *March v. Eastern R. Co.*, 43 N. H. 515.

²³ *Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.*, 143 U. S. 609, 36 L. Ed. 277, aff'g 45 Fed. 304.

²⁴ *Louisville & N. R. Co. v. Schmidt*, 112 Ky. 717, 66 S. W. 629.

²⁵ *Michigan Cent. R. Co. v. Pere Marquette R. Co.*, 128 Mich. 333, 87 N. W. 271.

²⁶ *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 N. Y. App. Div. 465, 135 N. Y. Supp. 990.

²⁷ *Pere Marquette R. Co. v. Wabash R. Co.*, 141 Mich. 215, 104 N. W. 650.

the tunnel should be furnished and paid for by the lessor, the lessor must pay for elevators and the machinery necessary to take passengers from the surface sixty feet down to where a subway station is located.²⁸

Agreements in a lease which are in reality covenants should be treated as such, although not expressly designated as covenants.²⁹ Whether an agreement is a lease depends on the terms of the particular instrument.³⁰ An instrument is not a lease merely because designated as such;³¹ and trackage agreements are not to be considered as leases.³²

²⁸ *Boston v. Boston El. R. Co.*, 213 Mass. 407, 100 N. E. 601.

²⁹ *South Carolina & G. R. Co. v. Augusta Southern R. Co.*, 111 Ga. 420, 36 S. E. 593.

³⁰ See *South Carolina & G. R. Co. v. Carolina, C. G. & C. Ry. Co.*, 93 Fed. 543; *Louisville & N. R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448, 51 N. E. 824; *United States Rolling Stock Co. v. Potter*, 48 Iowa 56; *Michigan Cent. R. Co. v. Pere Marquette R. Co.*, 128 Mich. 333, 87 N. W. 271; *March v. Eastern R. Co.*, 43 N. H. 515; *Houston & T. C. Ry. Co. v. McFadden*, 91 Tex. 194, 42 S. W. 593, 40 S. W. 216; *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1.

An agreement by a railroad company transferring its property and franchises for twenty years, in consideration of half the gross earnings of the road, with the usual covenants, is a lease, although the lessor reserves the right to discharge any of the servants of the lessee. *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

Admitting another railroad company into the joint use of terminal facilities creates the relation of landlord and tenant, although the amount of compensation is not agreed upon. *Rome R. Co. v. Chattanooga, R. & C. R. Co.*, 94 Ga. 422, 21 S. E. 69.

³¹ *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243.

³² *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 318, aff'g 47 Fed. 15; *Richmond & D. R. Co. v. Durham & N. Ry. Co.*, 104 N. C. 658, 10 S. E. 659. See also § 1237, *supra*.

"In several places in this instrument it is called a 'lease' and the parties are called 'lessor' and 'lessee,' while, on the other hand, in the record of the proceedings of the executive committee of the Pacific Company and of its stockholders, it is called an agreement 'granting trackage rights' between Council Bluffs and South Omaha. But what it was styled by the parties does not determine its character or their legal relations." *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 582, 41 L. Ed. 265.

"The contract here is a mere license or privilege for hire. It is not a lease conveying an interest in the realty, but an agreement containing mutual stipulations in the nature of a license. It is clear the intent was to permit the first licensee to run its cars over the tracks mentioned. Had it been designed to cover any more than such a privilege, other terms would have been used to indicate such an intention." *Coney Island & B. R. Co. v. Brooklyn Cable Co.*, 53 Hun (N. Y.) 169, 6 N. Y. Supp. 108.

The fact that the lessor is to share in the profits does not create a trust relation, nor does it constitute a partnership where there is to be no sharing of losses.³³

§ 1245. — As to property included. The property included in a railroad lease depends on the terms of the particular lease.³⁴

The word "property," as used in a railroad lease, extends to every species of valuable right and interest, and includes the right of the lessor in a fund received by the trustees, under a mortgage of the railroad property given by its predecessor to secure the payment of bonds, from a committee of the bondholders purchasing at a foreclosure sale.³⁵

The lease may be broad enough to cover all special franchises of the lessor.³⁶

A lease of a railroad, where making no reference to railroads to be acquired in the future by the lessor, does not include such future acquired roads.³⁷

Where a railroad company which, in addition to its own road, has leased another road, thereafter leases to another "the whole of (their) railroad * * * with the appurtenances of every nature whatsoever," the lease held by the lessor passes.³⁸

Where there is a grant by a railroad of the "possession and use of all its tracks, buildings, stations, sidings and switches on and along its line of railway, * * * intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid," it passes all land occupied by the stations, tracks, etc., and all other land used in the daily operation of the road, as appurtenant to the railway.³⁹

If a railroad "is leased with its terminal facilities the implication is strong that it was the lease of the road which induced the lease

³³ South Carolina & G. R. Co. v. Augusta Southern R. Co., 107 Ga. 164, 33 S. E. 36.

³⁴ See Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co., 143 U. S. 596; 36 L. Ed. 277; Gray v. Massachusetts Cent. R. Co., 171 Mass. 116, 50 N. E. 549; Norwich & W. R. Co. v. Worcester, 147 Mass. 518, 18 N. E. 409; Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215, 104 N. W. 650; Phillips v. Pittsburg, V. & C. Ry. Co., 189 Pa. St. 309, 42 Atl. 194.

³⁵ Gray v. Massachusetts Cent. R. Co., 171 Mass. 116, 125, 50 N. W. 549.

³⁶ Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 65 L. R. A. 561, 105 Am. St. Rep. 428, 36 So. 266.

³⁷ Johnson v. Southern Pac. R. Co., 154 Cal. 285, 97 Pac. 520.

³⁸ Philadelphia & E. R. Co. v. Catawissa R. Co., 53 Pa. St. 20, 58.

³⁹ Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co., 143 U. S. 596, 614, 36 L. Ed. 277.

of the terminals, and the contract should not be construed as importing a separate lease of such terminals without clear language to that effect."⁴⁰

§ 1246. Covenants—In general. When a corporation has the power to take or make a lease, it has, as an incident thereto, the power to agree to any terms or conditions which are usual or proper in such contracts, and which are not prohibited by its charter or by law. Thus, it may enter into a covenant to keep the premises in repair and to surrender them in as good condition as they were at the date of the lease,⁴¹ or a covenant to keep the premises insured.⁴²

Under the rule that a covenant restraining alienation by the owner of the property in fee is void, except where the covenantee has a reversion in the property, a provision in a railroad lease requiring payment of interest on the lessor's bonds as a part of the rent that the lessor should not issue any additional bonds is void, where intended to restrict the power of the lessor to mortgage its reversion.⁴³

In most jurisdictions a corporation is not bound by covenants in an ultra vires lease.⁴⁴

§ 1247. — As to rent. The rent agreed upon is the consideration for the lease.⁴⁵

If one company owns substantially all the stock and bonds of another company, a lease of the property of the latter in consider-

⁴⁰ *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 612, 36 L. Ed. 277.

⁴¹ *Abby v. Billups*, 35 Miss. 618, 631, 72 Am. Dec. 143, holding that the lessee does not thereby engage in the insurance business.

⁴² "No one could deny that it would not be competent for a railroad company, without the authority of the legislature, to carry on an insurance business. But this covenant to keep the premises insured is correlative to the obligation of the lessors to rebuild in case the hotel should be destroyed by fire, and to the provision that, in such an event, the rents should cease until the hotel should be put in habitable condition and repair by the lessors. Such mutual covenants are quite

usual in leases of this kind, and are merely incidental to the principal purpose of the contract." *Jacksonville, M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 526, 40 L. Ed. 515.

⁴³ *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026.

⁴⁴ *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950. See generally § 1255 et seq., *infra*.

⁴⁵ "And here the rent agreed on, was, in effect, the price or purchase-money to be paid for the ownership of the premises during the continuance of the lease." *Abby v. Billups*, 35 Miss. 618, 631, 72 Am. Dec. 143.

ation of rent to be paid to the former has been held not invalid for want of consideration.⁴⁶

Power to deal with the rent is implied in power to make a lease of its property and reserve the rent.⁴⁷ So power to lease includes power to fix the rent in money or money securities, which may be done from time to time by modifying it in amount, or by changing it from one security to another.⁴⁸

Unless otherwise provided, the lessee is the only one liable for the rent.⁴⁹

The parties may agree for the payment of rent in money or in the bonds or promises of the lessee, or by discharging an obligation of the lessor.⁵⁰

Oftentimes the rent, in whole or in part, consists of an obligation to pay specified dividends on the stock of the lessor;⁵¹ and an agreement to guaranty the payment of the interest on the bonds of the lessor is valid.⁵² The parties may agree that the rent shall be applied to payment of interest on the bonds of the lessor.⁵³

If the lease provides for a certain per cent. of the gross earnings of the lessee railroad, as compensation, such percentage becomes, in equity, the property of the lessor as soon as received by the lessee.⁵⁴

Sometimes the lease provides for a deposit of bonds or other property to secure the payment of the rent.⁵⁵

An obligation to pay rent arises although there is no express lease.⁵⁶ If no amount of rent is agreed on, the law will imply an agreement to pay what is fair and reasonable.⁵⁷

An intention to hold a lessee for future payments after it has ceased

⁴⁶ Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309.

⁴⁷ Hazard v. Vermont & C. R. Co., 17 Fed. 753.

⁴⁸ Hazard v. Vermont & C. R. Co., 17 Fed. 753, 756.

⁴⁹ East St. Louis Connecting R. Co. v. Jarvis, 92 Fed. 735.

⁵⁰ Day v. Ogdensburgh & L. C. R. Co., 107 N. Y. 129, 13 N. E. 765.

⁵¹ Pennsylvania Steel Co. v. New York City Ry. Co., 225 Fed. 96.

Payment of rent may be made under agreement by paying interest on specified bonds and dividends on stock at a certain rate. Aetna Ins. Co. v. Albany & S. R. Co., 156 Fed. 132.

⁵² Eastern Townships Bank v. St. Johnsbury & L. C. R. Co., 40 Fed. 423.

⁵³ Sidell v. Missouri Pac. Ry. Co., 78 Fed. 724.

⁵⁴ Terre Haute & I. R. Co. v. Cox, 102 Fed. 825.

⁵⁵ Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854, construing particular provision.

⁵⁶ South Carolina Terminal Co. v. South Carolina & G. R. Co., 52 S. C. 1, 29 S. E. 565.

⁵⁷ Rome R. Co. v. Chattanooga, R. & C. R. Co., 94 Ga. 422, 21 S. E. 69.

to use the leased property must be very plain to warrant the adoption of such a construction.⁵⁸

§ 1248. — As to taxes. Statutes sometimes provide that the taxes, or certain taxes, shall be paid by the lessee.⁵⁹ However, provisions as to who shall pay the taxes are generally contained in corporate leases. Generally, railroad leases require the lessee to pay the taxes.⁶⁰ However, such covenants do not ordinarily apply to taxes already assessed and levied before the lease is executed.⁶¹

Where a railroad lease provided that the lessee should pay the taxes for the year but should be reimbursed by the lessor, a pro rata portion thereof to cover the part of the year prior to the taking effect of the lease, it was held to mean the calendar year rather than the fiscal year.⁶²

A covenant by the lessee to pay all taxes upon the leased property and on the earnings from or business thereof, does not cover the shares of the capital stock of the lessor.⁶³

Where the lessee has the right to deduct from the rent due, the amount paid out as taxes on the corporate property, it can not deduct

⁵⁸ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 204 Fed. 513, 193 Fed. 721, 764.

⁵⁹ *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1, 10 L. R. A. 562, 21 Atl. 262.

⁶⁰ See *Pennsylvania Steel Co. v. New York City Ry. Co.*, 176 Fed. 469; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 140.

A tax imposed on the franchise of the lessor is a tax imposed "by reason of the ownership" of the road, within a provision in the lease requiring the lessee to pay such taxes. *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 93 Fed. 587.

But an agreement to pay all taxes upon "the real and personal property, franchises, capital stock or gross receipts" does not include a tax levied on dividends. The court said: "If it had been contemplated that the lessee should pay all taxes whatever, any detailed specification of them would

have been worse than useless; and if it had been intended to especially impose upon the lessee the obligation to pay taxes payable upon dividends, it is scarcely conceivable that such intent would not have been manifested by the express inclusion of them in the discriminative enumeration which was, in fact, inserted in the covenant." *Jersey City Gaslight Co. v. United Gas Improvement Co.*, 58 Fed. 323, 326.

⁶¹ *Cleveland v. Spencer*, 73 Fed. 559.

⁶² *Pere Marquette R. Co. v. Kalamazoo, L. S. & C. R. Co.*, 158 Mich. 40, 122 N. W. 356.

⁶³ "The lease sued on did not stipulate for the payment by the lessee of all taxes imposed on the lessor company, but of all taxes on the property demised, and was so understood and acted on by the parties for thirty years." *Erie & P. R. Co. v. Pennsylvania R. Co.*, 208 Pa. 506, 509, 57 Atl. 980.

for taxes paid on land purchased by the lessee and not intended to be the corporate property of the lessor.⁶⁴

If the lease provides that if the taxes are paid by the lessee, they "shall be deducted from the rent herein covenanted to be paid by said lessee," and the lessee covenants to pay the rent semiannually, the taxes paid must be deducted from the instalment of rent falling due next after such payment, and if not so deducted then cannot be taken out at all.⁶⁵

If a franchise tax is assessed against the lessee of a railroad, and the statute provides that it can only be assessed against the corporation "operating" the road, the tax, even if considered as a tax on the franchise of the lessor as well as the franchise of the lessee, is incapable of apportionment, so that the lessee which has paid all of the tax can recover no portion of it from the lessor.⁶⁶

A provision in a lease as to payment of taxes by the lessee is for the sole benefit of the lessor, and hence cannot be enforced by the state or municipality.⁶⁷

Where a railroad lease provided that the lessee should assume the payment of all taxes and assessments upon the "yearly payments herein agreed to be made," the lessee is liable for the amount of the federal income tax on the amount of rent paid by the lessee, and this is so although at the time the lease was executed, there was no such thing as a federal income tax.⁶⁸

Where a railroad lease executed in 1871 provided for the payment of a small cash rental, and also certain dividends on the stock of the lessor to be paid directly to the stockholders, and it also provided that the lessee should pay all taxes on the property and on the business done by the road, but not "the present income tax upon the aforesaid interest and dividends, or any tax thereon imposed, or hereafter to be imposed, by whatever name the same may be called," the lessee is not liable for the present income tax upon the rent.⁶⁹

§ 1249. — As to repairs and return of property. A corporation has power to covenant to keep the leased property in repair and to

⁶⁴ *Lewiston & A. R. Co. v. Grand Trunk R. Co.*, 97 Me. 261, 54 Atl. 750.

⁶⁵ *Lewiston & A. R. Co. v. Grand Trunk R. Co.*, 97 Me. 261, 267, 54 Atl. 750.

⁶⁶ *Lewiston & A. R. Co. v. Grand Trunk R. Co.*, 97 Me. 261, 268-270, 54 Atl. 750.

⁶⁷ *Chicago, R. I. & P. Ry. Co. v. Ottumwa*, 112 Iowa 300, 51 L. R. A. 763, 83 N. W. 1074.

⁶⁸ *North Pennsylvania R. Co. v. Philadelphia & R. R. Co.*, 249 Pa. 326, 95 Atl. 100.

⁶⁹ *Rensselaer & S. R. Co. v. Delaware & H. Co.*, 168 N. Y. App. Div.

return it to the lessor in good condition at the end of the lease.⁷⁰ And, of course, if the lease provides that the lessee shall make all repairs, he cannot recover against the lessor the amount thereof.⁷¹ If the lessee of a railroad is required by the lease to return it in as good repair as when leased, natural wear only excepted, it must make all repairs in the road rendered necessary by decay or accident.⁷²

An agreement to restore the premises to the lessor in good repair at the end of the lease, "unless prevented by unavoidable casualty, legal proceedings or operation of law," must be fulfilled although the lease is terminated by a foreclosure sale.⁷³

IV. ASSIGNMENT OF LEASE OR SUBLETTING

§ 1250. Power. Unless there is a covenant to the contrary in the lease,⁷⁴ or a statute forbidding it, the lessee may sublet or assign the lease.⁷⁵

A corporation which has leased property belonging to another, where strictly a private corporation, may transfer or otherwise dispose of the lease, at least with the consent of the lessor, the same as an individual.⁷⁶

If there is covenant not to assign or sublet, the question of what constitutes a breach thereof is governed by the rules relating to leases in general. Thus, an assignment of a part of the property leased is a breach of the covenant not to assign or sublet.⁷⁷ Moreover, such covenant cannot be directly evaded by a circuitry of language or other verbal device.⁷⁸ However, a clause in a railroad lease providing that none of the rights or privileges thereby granted should be assigned

699, 154 N. Y. Supp. 739, rev'g on this point 88 N. Y. Misc. 639, 152 N. Y. Supp. 376.

⁷⁰ See § 1246, *supra*.

Covenant to return street railroad in "good order and repair." *Pennsylvania Steel Co. v. New York City Ry. Co.*, 217 Fed. 423. See also *Pennsylvania Steel Co. v. New York City R. Co.*, 225 Fed. 106.

Agreement of lessee of street railroad to return the equipment. *Pennsylvania Steel Co. v. New York City Ry. Co.*, 219 Fed. 939.

⁷¹ *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

⁷² *Sturges v. Knapp*, 31 Vt. 1.

⁷³ *Louisville & N. R. Co. v. Schmidt*, 112 Ky. 717, 66 S. W. 629.

⁷⁴ *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 448, 23 Atl. 529.

⁷⁵ *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

⁷⁶ *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, 127 N. W. 226.

⁷⁷ *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 448, 23 Atl. 529.

⁷⁸ *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 448, 23 Atl. 529.

to any other corporation, has been construed as merely forbidding an assignment of such rights or privileges separate and apart from the tangible property of the railroad.⁷⁹ So a license to use part of the right of way for railroad tracks is not a subletting so as to be a breach of a covenant not to sublet.⁸⁰

§ 1251. Form, contents and effect. It has been held that the assignment of a railroad lease must be in writing;⁸¹ but where a railroad company leased certain trackage and terminal facilities belonging to another company, and the road of the lessee was sold under foreclosure, the purchaser was held bound by the lease without any formal assignment where it and the lessor acted thereunder and recognized the lease as binding both of them.⁸²

Technical terms or special words are not necessary to an assignment, but any language which shows an intention to transfer the property from one party to the other is sufficient.⁸³ The assignment may be in the form of a lease by the lessee.⁸⁴

The effect of the assignment of the lease by the lessee is the same as in case of leases by or to individuals.⁸⁵

A conveyance of the entire interest of the lessee is an assignment of the lease, while if it is only a part of the unexpired term it is a sublease.⁸⁶ If the conveyance is of only a part of the leased property, but passes the entire interest of the lessee in such portion, it is an assignment pro tanto.⁸⁷

⁷⁹ *Minneapolis & St. L. Ry. Co. v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 265, 28 N. W. 705.

⁸⁰ "There is nothing to show that any tenancy has been created. There is no reservation of rent; no term; no contract between Camp & Walker and the defendant under which the latter has any right of use, or occupation of any kind, except at the mere pleasure of the former * * *." *State v. St. Paul, M. & M. R. Co.* (Minn.), 11 N. W. 80.

⁸¹ *Frank v. New York, L. E. & W. R. Co.*, 7 N. Y. St. Rep. 814.

⁸² *Jacksonville, L. & St. L. R. Co. v. Louisville & N. R. Co.*, 150 Ill. 480, 37 N. E. 924, aff'g 47 Ill. App. 414.

⁸³ *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 448, 23 Atl. 529.

⁸⁴ "As the lease from Woodruff to the Erie company embraced all that he had acquired from his lessor it operated as an assignment in fact, although not such in form, of the entire term granted by the original lease." *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332.

⁸⁵ See *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200.

⁸⁶ *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 135 Mo. 173, 33 L. R. A. 607, 36 S. W. 602; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200.

⁸⁷ *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 23 Atl. 529.

The assignment creates a privity of estate between the original lessor and the assignee,⁸⁸ but in case of a sublessee there is no privity either of contract or estate.⁸⁹

It follows from these rules that the "assignee" of the lease is bound by the covenants therein which run with the land,⁹⁰ while the "sublessee" is not bound by covenants in the original lease unless it has expressly agreed to become bound.⁹¹

The lessor, lessee, and assignee of a railroad lease may modify its terms by reducing the amount of rent, even though there is a mortgage upon the property, where there is no covenant on the part of the assignee for the benefit of the mortgagee.⁹²

V. DURATION AND TERMINATION

§ 1252. Duration. A lease may be for the entire term of the lessor corporation.⁹³

The lease may also be made, where the power to lease exists, for a term longer than the period of corporate existence of the lessor, where the charter is subject to renewal;⁹⁴ and it is well settled that a lease, the term of which extends beyond the period of the corporation's existence, is valid for the corporation's term of existence and for any period for which its existence is extended, not of course exceeding the period of the lease.⁹⁵ So a lease of corporate property taken "by"

⁸⁸ *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 135 Mo. 173, 33 L. R. A. 607, 36 S. W. 602.

⁸⁹ *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 135 Mo. 173, 33 L. R. A. 607, 36 S. W. 602.

⁹⁰ *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200; *West Virginia, C. & P. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

⁹¹ *Missouri, K. & T. R. Co. v. Keahey*, 37 Tex. Civ. App. 330, 83 S. W. 1102.

⁹² *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332.

⁹³ *United States*. *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629.

California. *Reynolds v. Pacific Elec. R. Co.*, 146 Cal. 261, 80 Pac. 77.

Missouri. *Moorshead v. United Rys. Co.*, 119 Mo. App. 541, 96 S. W. 261.

New Jersey. *Shepard v. East Orange*, 69 N. J. L. 133, 53 Atl. 1047.

New York. *People v. Feitner*, 61 App. Div. 129, 70 N. Y. Supp. 500.

⁹⁴ *Union Pac. Ry. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 41 L. Ed. 265, aff'g 51 Fed. 309.

When the law permits the charter of a corporation to be extended from time to time, a lease of its property for a longer period than that for which it was created is valid. *Gere v. New York Cent. & H. River R. Co.*, 19 Abb. N. Cas. (N. Y.) 193.

⁹⁵ *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, 127 N. W. 226; *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

a corporation is not ultra vires simply because the lease outlasts the period of its chartered life.⁹⁶

Under a statute which authorizes a corporation, without limitation as to time, to lease its property and franchise or to take a lease of the property and franchises of another corporation, such lease by one corporation to another of the same state so long in point of time as to be virtually equivalent to an absolute conveyance of its property is not beyond the power of either the lessor or lessee corporation.⁹⁷ Thus, express statutory power to make or take a lease of all the property of other companies includes the power to make or take a lease for nine hundred and ninety-nine years, although in effect a conveyance in fee, especially where leases for that length of time were well known when the statute authorizing such leases was enacted.⁹⁸ Especially is this so where the lease provides that it shall bind "the assigns and successors" of each party to it, during the existence of their several corporate existences, and where the charter of the corporation provides that its existence may be renewed from time to time.⁹⁹ A lease for nine hundred and ninety-nine years is not within the statute prohibiting perpetuities.¹

A general statute providing that all leases of land for a period of longer than fifteen years shall be redeemable at the option of the tenant does not apply to railroad leases, where a special statute pro-

⁹⁶ *Weeks v. International Trust Co.*, 125 Fed. 370; *Brown v. Schleier*, 118 Fed. 981.

"If a corporation is empowered to acquire real estate by purchase or lease for the transaction of its business, it matters not that it acquires an estate or interest which will not expire until after the death of the corporation, provided the estate or interest so acquired is vendible. * * * If the rule were otherwise, no corporation, unless it had a perpetual existence, could acquire land in fee, and in that event the objection made to the lease, based on the length of the term thereby created, would apply equally well if the grant had been in fee." *Brown v. Schleier*, 118 Fed. 981, 984.

⁹⁷ *Dickinson v. Consolidated Traction Co.*, 119 Fed. 871.

A decision of the United States Supreme Court sometimes cited as holding the contrary (*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 748), while holding a nine hundred and ninety-nine year lease invalid, was based on the theory that no lease of all the property of a railroad is valid unless expressly authorized by the charter or a statute.

⁹⁸ *Dickinson v. Consolidated Traction Co.*, 119 Fed. 871, aff'g 114 Fed. 232; *Wormser v. Metropolitan St. R. Co.*, 98 N. Y. App. Div. 29, 90 N. Y. Supp. 714.

⁹⁹ *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 328.

¹ *Todhunter v. Des Moines, I. & M. R. Co.*, 58 Iowa 205, 12 N. W. 267.

vides that a railroad company may lease its road to any other railroad for any period of time.²

§ 1253. Holding over. The rule that a lessee who continues in possession after the expiration of the year where he pays a certain sum per year as rent, is a tenant for the succeeding year and liable for rent, applies to corporations which are lessees as well as to individuals.³

§ 1254. Termination by acts of parties. The termination of a lease by act of the parties is governed by the same rules that relate to the termination of leases in general.⁴

Power to execute a lease includes power to cancel it with the consent of the lessee and to execute a new lease for a longer term to another lessee;⁵ but the same formalities required on executing a lease, including the consent of stockholders, where required, are ordinarily necessary to modify or rescind a lease.⁶ The surrender of a mining lease, if express, requires corporate action; and mere notice of intent not to pay more rents and to give up the lease is insufficient.⁷

Of course, if a lessee desires to rescind a lease for fraud or breach of warranty, he must act promptly upon discovery of the fraud or of the breach of warranty.⁸

The fact that a provision in a lease forbidding increases in local freight charges is in the form of a covenant, and that it is not mentioned in the clause of forfeiture and re-entry, shows that its violation was not intended by the parties to be ground for terminating the lease.⁹

VI. POWERS, DUTIES, RIGHTS AND LIABILITIES OF LESSOR AND LESSEE

§ 1255. Powers and rights of lessor. The rights of the lessor depend largely upon the terms of the lease. However, if not provided

² *Buckler v. Safe Deposit & Trust Co. of Baltimore*, 115 Md. 222, 80 Atl. 899, holding that a lease for nine hundred and ninety-nine years was authorized.

³ *Crawford v. Longstreet*, 43 N. J. L. 325.

⁴ *Chicago Great Western R. Co. v. Iowa Cent. R. Co.*, 142 Iowa 459, 119 N. W. 261.

⁵ *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, 127 N. W. 226.

⁶ *March v. Eastern R. Co.*, 43 N. H.

515; *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026, aff'g 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27.

⁷ *Laing v. Price*, 75 W. Va. 192, 83 S. E. 497.

⁸ *Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co.*, 124 N. Y. App. Div. 210, 108 N. Y. Supp. 707.

⁹ *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606. 55 S. E. 854.

for therein, the lessor, where the lease is of a railroad, retains the power of eminent domain.¹⁰ Nor does the execution of a lease for a limited time deprive the lessor of the power to mortgage his estate.¹¹

Where the state owns a railroad and leases it and the state has no power to regulate rates of freight in interstate commerce, no such power can be conferred on it by agreement with the lessee.¹²

§ 1256. Liabilities of lessor—In general. In the case of a strictly private corporation, a lease of part or all its property ordinarily absolves it from all liability in connection therewith, where it retains no right of control. It is different, however, in regard to public service corporations which are given extraordinary rights and privileges and as to which corresponding liabilities attach. This is most frequently illustrated in railroad leases by the holding that a railroad company upon which a public duty is imposed by its charter cannot relieve itself of such duty by leasing its property.¹³ However, the lessor is not liable in all cases, at least in some jurisdictions. Its liability may depend on whether the duty neglected is a statutory one imposed on railroads generally,¹⁴ or one which the company owes to the public,¹⁵ or whether the negligence is wholly that of the lessee in the operation of the road.¹⁶

Of course, the lessor is not liable for the torts of its lessee in carrying on an entirely separate and distinct, although similar, business of its own, and which does not fall within the duties of the lessor road to the public.¹⁷

Statutes in some states provide that all domestic railroad corporations leasing their property shall remain liable for the torts of the lessee as if they operated the roads themselves;¹⁸ and the lessor of a railroad is liable for a conversion of property by the lessor, in operating the road, under a statute providing that a quasi public corporation cannot dispose of its property so as to relieve itself from

¹⁰ *Kip v. New York & H. R. Co.*, 67 N. Y. 227, 229. See the chapter on Eminent Domain, *infra*.

¹¹ *Hazard v. Vermont & C. R. Co.*, 17 Fed. 753. See also Chap. 34.

¹² *State v. Western & A. R. Co.*, 138 Ga. 835, 843, 76 S. E. 577.

¹³ *Pickens v. Georgia Railroad & Banking Co.*, 126 Ga. 517, 55 S. E. 171; *Ryerson v. Morris Canal Co.*, 71 N. J. L. 381, 2 Ann. Cas. 859, 59 Atl. 29.

“The lessees occupy the relation of

servants of the company, as to third persons.” *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105, 109.

¹⁴ See § 1257, *infra*.

¹⁵ See § 1258, *infra*.

¹⁶ See § 1259, *infra*.

¹⁷ *McCulloch v. Southern R. Co.*, 149 N. C. 305, 62 S. E. 1096.

¹⁸ *Brown v. Louisiana & M. R. R. Co.*, 256 Mo. 522, 165 S. W. 1060, holding statute repealed contrary provision in charter.

liability for acts done or omitted, without legislative sanction expressly exempting it from liability.¹⁹

§ 1257. — Statutory liability. Statutes often expressly impose certain liabilities on railroad corporations, without regard to their negligence, and the question often arises as to whether a company escapes liability thereunder where it has leased its road to another company. Thus, under statutes imposing a liability for injuries to animals where the railroad is not fenced or provided with cattle guards, it is generally held that the lessor is liable notwithstanding the injury results from trains run by the lessee,²⁰ although there is some authority to the contrary.²¹ Likewise, if a statute imposes on railroad companies a liability for all damages from fire communicated by locomotives, it is generally held that the lessor is liable.²²

However, where the statute fixes liability for fires communicated by "its" locomotives, the authorities are in conflict. Thus, in Massachusetts it is held that the locomotives of the lessee must be considered those of the lessor, and that the lessor is liable;²³ but in South Carolina the statute is strictly construed and it is held that the lessor is not liable where the fire is started by a locomotive belonging to the lessee.²⁴

In Indiana, it is properly held that a statute providing a penalty against "every corporation * * * operating a railroad within this state" for failure to give blackboard notices of the time for the

¹⁹ Georgia Railroad & Banking Co. v. Haas, 127 Ga. 187, 119 Am. St. Rep. 327, 9 Ann. Cas. 677, 56 S. E. 313.

²⁰ California. Fontaine v. Southern Pac. R. Co., 54 Cal. 645.

Indiana. Ft. Wayne R. Co. v. M. & C. Hinebaugh, 43 Ind. 354.

Missouri. Price v. Barnard, 70 Mo. App. 175.

Oregon. Eaton v. Oregon Ry. & Nav. Co., 19 Ore. 391, 24 Pac. 415.

Vermont. Nelson v. Vermont & C. R. Co., 26 Vt. 717, 62 Am. Dec. 614.

Washington. Oregon Ry. & Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415.

"Defects" in fences or cattle guards, constructed by the lessor, are governed by the same rule. Whitney v. Atlantic & St. L. R. Co., 44 Me.

362, 69 Am. Dec. 102; Harris v. Quincy, O. & K. C. R. Co., 124 Mo. App. 45, 101 S. W. 601.

²¹ Stephens v. Davenport & St. P. R. Co., 36 Iowa 327; Throne v. Lehigh Valley Ry. Co., 88 Hun (N. Y.) 141, 34 N. Y. Supp. 525.

²² Balsley v. St. Louis, A. & T. H. R. Co., 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859, rev'g 18 Ill. App. 79; Bean v. Atlantic & St. L. R. Co., 63 Me. 293; Stearns v. Atlantic & St. L. R. Co., 46 Me. 95.

²³ Ingersoll v. Steckbridge & P. R. Co., 8 Allen (Mass.) 438.

²⁴ Lipfeld v. Charlotte, C. & A. R. Co., 41 S. C. 285, 19 S. E. 497; Hunter v. Columbia, N. & L. R. Co., 41 S. C. 86, 19 S. E. 197.

arrival of trains at certain stations, does not apply to the lessor of a railroad.²⁵

The lessor of a railroad is not criminally liable for the act of its lessee in running cars over the road, in violation of a statute requiring railroads to indicate which compartments are for white and which for colored people, in the absence of knowledge at the time of making the lease that the lessee would violate the statute.²⁶

§ 1258. — Negligent omission of duty owed to the public. A railroad company is liable for any injury caused by its omission of some duty which it owes to the public in the first instance, notwithstanding that at the time the road was in the hands of its lessee.²⁷ Thus, there is a difference between negligence of the lessee or its employees in operating trains and the like, and negligence of the lessor in the construction of the road. It can readily be seen, as a matter of reason, why a railroad company which is lessor, even if not liable in the former case, should be liable in the latter case, even though the road is in possession of a lessee.²⁸ And it is universally held that the lessor of a railroad is liable for injuries resulting from improper construction of the road.²⁹ Furthermore, this liability extends even to the employees of the lessee. Thus, a lessor railroad is liable for injuries

²⁵ *State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 135 Ind. 578, 35 N. E. 700.

²⁶ *Louisville R. Co. v. Com.*, 130 Ky. 738, 132 Am. St. Rep. 408, 114 S. W. 343.

²⁷ *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, 47 Pac. 923; *St. Louis, W. & W. Ry. Co. v. Curl*, 28 Kan. 622.

²⁸ "And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the

charter company, cannot, in the absence of statutory exemption, discharge itself of legal responsibility." *Nugent v. Boston, C. & M. R. R.*, 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797.

²⁹ *Illinois Cent. R. Co. v. Sheegog's Adm'r*, 215 U. S. 308, 54 L. Ed. 208, aff'g 126 Ky. 252, 103 S. W. 323; *Alexandria & G. Ry. Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. Ed. 675; *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448; *De Lashmutt v. Chicago, B. & Q. R. Co.*, 148 Iowa 556, 126 N. W. 359. To the same effect, see *Montgomery & F. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

"And in any event, the liability of the lessor company for damages caused by defects in the roadbed is universally held." *Southern Ry. Co. v. Sittasen*, — Ind. App. —, 74 N. E. 898, rev'd on other grounds 166 Ind. 257, 76 N. E. 973.

to a brakeman of the lessee resulting from the negligent construction of a station house by the lessor,³⁰ or from a defective roadbed,³¹ or from the failure to keep in repair a platform which had become a part of the track.³²

In Louisiana, however, the lessor has been held not liable to an employee of the lessee, where the duty neglected was the failure to light the yard of the railroad company, on the theory that such duty was not one owing to the public but merely one of the implied obligations of the contract of employment.³³

The lessor of a railroad which constructed a pit which necessarily collected surface water has been held liable for injuries to an adjoining owner from the seepage of water from the pit, although the road was in the hands of a lessee.³⁴ However, it has been held in New York that a railroad company which has leased its road is not liable for the negligence of its lessee in not keeping in good condition a fence erected by the lessor along the line of an excavation, whereby a person was injured by falling into the excavation, on the theory that the lessor is not liable for any nuisance which did not exist at the time of the lease.³⁵

§ 1259. — Negligence of lessee. In regard to the liability of the lessor of a railroad for injuries resulting from the negligence of the lessee, there are certain established rules. For instance, it is well settled that if no statute or charter provision authorizes a railroad company to make a lease of its property, the lessor remains liable,³⁶

³⁰ *Nugent v. Boston, C. & M. R. R.*, 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797.

³¹ *Trinity & S. Ry. Co. v. Lane*, 79 Tex. 643, 16 S. W. 18, 15 S. W. 477.

³² The lessor remains "bound to keep the tracks in safe condition." *Rome R. Co. v. Thompson*, 101 Ga. 26, 28 S. E. 429.

³³ *Travis v. Kansas City, S. & G. R. Co.*, 119 La. 489, 10 L. R. A. (N. S.) 1189, 121 Am. St. Rep. 526, 44 So. 274.

³⁴ *Canon City & C. C. R. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. 1127.

³⁵ *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, rev'g 5 Hun (N. Y.) 165.

³⁶ *United States. Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165.

Kentucky. *Brooker v. Maysville & B. S. R. Co.*, 119 Ky. 137, 83 S. W. 117; *Louisville & N. R. Co. v. Breeden's Adm'x*, 111 Ky. 729, 64 S. W. 667.

Minnesota. *Freeman v. Minneapolis & St. L. Ry. Co.*, 28 Minn. 443, 10 N. W. 594.

New York. *Abbott v. Johnstown, G. & K. Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572.

Texas. *International & G. N. R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484, 4 S. W. 472; *International & G. N. R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216; *Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.), 75 S. W. 579.

West Virginia. *Ricketts v. Chesapeake & O. Ry. Co.*, 33 W. Va. 433,

although it has been held that even in such a case there is no liability to an employee of the lessee who is injured through the negligence of the lessee.³⁷ Furthermore, it seems unquestionable that if the lessor company retains a control over the operation of the road, it is liable for injuries resulting from such operation.³⁸ Moreover, if the lessee is operating the railroad wholly in the interest of the lessor so as to occupy the position of operating agent, the lessor is liable.³⁹ So it seems that the facts that the business of the leased road was carried on in the name of the lessor, and the cars and tickets bore its name, and there was no change to the outside world in the business and management of the company after the execution of the lease, warrant a recovery against the lessor for injuries to a passenger from the negligence of the employees of the lessee.⁴⁰

The fact that, by the terms of the lease, the lessee assumes the liability, does not exonerate the lessor, so far as third persons are concerned, where the lessor is otherwise liable;⁴¹ and the existence of a statute making lessees liable to the same extent as the lessor of a corporation, for negligence of the lessee, does not affect the liability of the lessor of a railroad.⁴²

In some states, statutes or constitutional provisions expressly make the lessor liable,⁴³ and such statutes have been held constitutional.⁴⁴

On the other hand, some statutes expressly authorize a lease so as to relieve the lessor from liability; but where, under statutory authority, a railroad company may lease its road so as to relieve itself from personal liability for injuries resulting from the negligent operation

7 L. R. A. 354, 25 Am. St. Rep. 901, 10 S. E. 801.

³⁷ *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 745; *Baltimore & O. & C. R. Co. v. Paul*, 143 Ind. 23, 28 L. R. A. 216, 40 N. E. 519; *East Line & R. R. Co. v. Culberson*, 72 Tex. 375, 3 L. R. A. 567, 13 Am. St. Rep. 805, 10 S. W. 706.

³⁸ *Chesapeake & O. R. Co. v. Howard*, 178 U. S. 153, 44 L. Ed. 1015; *Driscoll v. Norwich & W. R. Co.*, 65 Conn. 230, 32 Atl. 354; *Heron v. St. Paul, M. & M. Ry. Co.*, 68 Minn. 542, 71 N. W. 706; *Quigley v. Toledo Railways & Light Co.*, 89 Ohio St. 68, Ann. Cas. 1915 D 992, 105 N. E. 185.

³⁹ *Southern Ry. Co. v. Boukright*, 70 Fed. 442, 449, 30 L. R. A. 823.

⁴⁰ *Bower v. Burlington & S. W. R. Co.*, 42 Iowa 546.

⁴¹ *St. Louis, W. & W. Ry. Co. v. Curl*, 28 Kan. 622.

⁴² "It will be readily seen, however, that the remedy against lessees is cumulative only." *Bower v. Burlington & S. W. R. Co.*, 42 Iowa 546.

⁴³ *Keller v. Kansas City, St. L. & C. R. Co.*, 135 Fed. 202, under Missouri statute; *Little Rock & Ft. S. Ry. Co. v. Daniels*, 68 Ark. 171, 56 S. W. 874; *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, 47 Pac. 923.

⁴⁴ *Vandeventer v. Chicago & A. R. Co. (Mo.)*, 177 S. W. 834; *Brown v. Louisiana & M. R. R. Co.*, 256 Mo. 522, 165 S. W. 1060.

and handling of trains by the lessee, it is necessary to show that the lease complies with such statute.⁴⁵

Where a lease is authorized, and the liability is not fixed by constitutional provision or statute, and the lessor retains no control over the operation of the road, the question whether the lessor is liable for the negligence of the lessee gives rise to a decided conflict in the decisions. In many jurisdictions the lessor is liable as if there were no lease, even though the negligence relied on is solely that of the employees of the lessee.⁴⁶

⁴⁵ *Johnson v. Southern Pac. R. Co.*, 154 Cal. 285, 97 Pac. 520.

⁴⁶ *United States. Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521, following Illinois law.

California. *Johnson v. Southern Pac. R. Co.*, 154 Cal. 285, 97 Pac. 520; *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, 47 Pac. 923.

Connecticut. *Driscoll v. Norwich & W. R. Co.*, 65 Conn. 230, 255, 32 Atl. 354.

Georgia. *Green v. Coast Line R. Co.*, 97 Ga. 15, 27, 33 L. R. A. 806, 54 Am. St. Rep. 379, 24 S. E. 814; *Singleton v. Southwestern R. R.*, 70 Ga. 464, 48 Am. Rep. 574.

Illinois. *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 414, 66 L. R. A. 75, 70 N. E. 654, aff'g 104 Ill. App. 57; *Chicago & W. I. R. Co. v. Doan*, 195 Ill. 168, 62 N. E. 826, aff'g 93 Ill. App. 247; *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1; *Wabash R. Co. v. Keeler*, 127 Ill. App. 265.

Kentucky. *McCabe's Adm'x v. Maysville & B. S. R. Co.*, 112 Ky. 861, 66 S. W. 1054.

Louisiana. *Muntz v. Algiers & G. R. Co.*, 111 La. 423, 64 L. R. A. 222, 100 Am. St. Rep. 495, 35 So. 624.

Massachusetts. *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64, 13 N. E. 65, applying rule to injury to passenger on street railroad.

Mississippi. See *Illinois Cent. R. Co. v. Lucas*, 89 Miss. 411, 42 So. 607.

Nebraska. *Chollette v. Omaha &*

R. V. R. Co., 26 Neb. 159, 4 L. R. A. 135, 41 N. W. 1106.

North Carolina. *Perry v. Western N. C. R. Co.*, 129 N. C. 333, 40 S. E. 191, 128 N. C. 471, 39 S. E. 27; *Benton v. North Carolina R. Co.*, 122 N. C. 1007, 30 S. E. 333; *Logan v. North Carolina R. Co.*, 116 N. C. 940, 21 S. E. 959.

South Carolina. *Jenkins v. Atlantic Coast Line R. Co.*, 89 S. C. 408, 71 S. E. 1010; *Parr v. Spartanburg, U. & C. R. Co.*, 43 S. C. 197, 49 Am. St. Rep. 826, 20 S. E. 1009; *Hart v. Charlotte, C. & A. R. Co.*, 33 S. C. 427, 10 L. R. A. 794, 12 S. E. 9; *Harmon v. Columbia & G. R. Co.*, 28 S. C. 401, 13 Am. St. Rep. 686, 5 S. E. 835.

Vermont. See *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614.

"The reason for holding a railroad company responsible for the performance of all the duties and obligations imposed upon it by its charter, or the general law of the state, while it is being operated by a lessee, does not, we conceive, rest upon the narrow ground alone of the latter being in the exercise of a franchise which belonged to the former, and in so acting is to be held as the servant or agent of the lessor corporation. In consideration of the grant of its charter, the corporation undertakes for the performance of duties and obligations towards the public, and there is a matter of public policy concerned that it should not be relieved from the

This line of decisions seems to be based on no good ground. If the state permits a railroad company to lease all its property, why should its statutory permit be limited and qualified by holding that the lessor, although having no control over the lessee or its employees, is liable for the negligence of the lessee wholly disconnected from the original construction of the road?

It is submitted that the better rule, prevailing in several states⁴⁷ and adopted in most of the federal decisions,⁴⁸ is that a railroad company which leases its road is not liable for injuries resulting from the negligence of the employees of the lessee. However, this latter line of decisions does not extend to liabilities incurred by the lessor prior to the lease.⁴⁹

Some of the courts holding the lessor liable go to the extreme limit

performance of its obligations without the consent of the legislature." *Balsley v. St. Louis, A. & T. H. R. Co.*, 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859.

⁴⁷ *Arkansas. Little Rock & Ft. S. Ry. Co. v. Daniels*, 68 Ark. 171, 56 S. W. 874.

Kansas. Caruthers v. Kansas City, Ft. S. & M. R. Co., 59 Kan. 629, 44 L. R. A. 737, 54 Pac. 673; *St. Louis, W. & W. Ry. Co. v. Curl*, 28 Kan. 623.

Maine. Nugent v. Boston, C. & M. R. Co., 80 Me. 62, 76, 6 Am. St. Rep. 151, 12 Atl. 797.

Michigan. See Ackerman v. Cincinnati, S. & M. R. Co., 143 Mich. 58, 61, 114 Am. St. Rep. 640, 8 Ann. Cas. 118, 106 N. W. 558, dicta.

Minnesota. Heron v. St. Paul, M. & M. Ry. Co., 68 Minn. 542, 71 N. W. 706.

Missouri. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249.

Pennsylvania. Moser v. Philadelphia, H. & P. R. Co., 233 Pa. 259, 266, 40 L. R. A. (N. S.) 519, 82 Atl. 362.

Texas. Missouri Pac. R. Co. v. Watts, 63 Tex. 549. But see *Galveston, H. & H. Ry. Co. v. Burnett* (Tex. Civ. App.), 37 S. W. 779.

If a statute expressly authorized a quasi public corporation to lease its

property, and is silent as to liability for negligence, the lessor is not liable for the torts of the lessee or his agents. *Moorehead v. United Rys. Co. of St. Louis*, 203 Mo. 121, 100 S. W. 611, 96 S. W. 261.

"It is settled law in Pennsylvania that, when a railroad company leases its road to another company, the former is exempted from liability for any default or negligence in the operation of the road by the lessee. *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. 229." *Moser v. Philadelphia, H. & P. R. Co.*, 233 Pa. 259, 266, 40 L. R. A. (N. S.) 519, 82 Atl. 362.

⁴⁸ *Curtis v. Cleveland, C., C. & St. L. R. Co.*, 140 Fed. 777; *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943; *Hayes v. Northern Pac. R. Co.*, 74 Fed. 279; *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165.

"The rule of law in question is not local, or the effect of a statute, or its construction, but exists as a general rule of the common law, which the federal courts determine for themselves." *Curtis v. Cleveland, C., C. & St. L. Ry. Co.*, 140 Fed. 777, 779.

⁴⁹ *Moser v. Philadelphia, H. & P. R. Co.*, 233 Pa. 259, 267, 40 L. R. A. (N. S.) 519, 82 Atl. 362.

of holding the lessor not only liable to third persons injured by the negligence of the lessee but also to employees of the lessee whose cause of action results solely from the negligence of their immediate employer;⁵⁰ but the great weight of authority is to the contrary,⁵¹ providing the injury does not result from the condition of the track or other property leased,⁵² even where a statute makes lessor railroad companies liable generally for the negligence of the lessee.⁵³

A like conflict of opinion exists as to the liability to passengers and shippers. In some jurisdictions it is held that the lessor is liable to its own passengers and shippers for the negligence of the lessee,⁵⁴ while in other states the contrary rule prevails.⁵⁵

§ 1260. — Liability on contracts. A corporation cannot escape contract obligations by leasing all its property.⁵⁶

⁵⁰ *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 414, 66 L. R. A. 75, 70 N. E. 654, aff'g 104 Ill. App. 57; *Brown v. Atlanta & C. Air Line R. Co.*, 131 N. C. 455, 42 S. E. 911; *Smith v. Atlanta & C. R. Co.*, 130 N. C. 344, 42 S. E. 139; *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959. See also *Davis v. Atlanta & C. Air Line Ry. Co.*, 63 S. C. 370, 41 S. E. 468.

⁵¹ *United States*. *Gibson v. Chesapeake & O. Ry. Co.*, 215 Fed. 24, Kentucky law; *Curtis v. Cleveland, C. C. & St. L. Ry. Co.*, 140 Fed. 777; *Williard v. Spartanburg, U. & C. R. Co.*, 124 Fed. 796; *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165.

Georgia. *Banks v. Georgia Railroad & Banking Co.*, 112 Ga. 655, 37 S. E. 992.

Indiana. *Baltimore & O. R. Co. v. Paul*, 143 Ind. 23, 28 L. R. A. 216, 40 N. E. 519.

Kentucky. *Lewis v. Maysville & B. S. R. Co.*, 25 Ky. L. Rep. 948, 76 S. W. 526.

Texas. *Evans v. Sabine & E. T. R. Co. (Tex.)*, 18 S. W. 493; *East Line & R. R. Ry. Co. v. Culbertson*, 72 Tex. 375, 3 L. R. A. 567, 13 Am. St. Rep. 805, 10 S. W. 706; *Texas & P. Ry. Co. v. Moore*, 8 Tex. Civ. App. 289, 27 S. W. 962.

Virginia. *Virginia Midland Ry. Co.*

v. Washington, 86 Va. 629, 7 L. R. A. 344, 10 S. E. 927.

The lessor of a railroad and its appliances is not liable for injuries to an employee of the lessee caused by defects in such appliances. *Buckner v. Richmond & D. R. Co.*, 72 Miss. 873, 18 So. 449.

⁵² See § 1258, *supra*.

⁵³ *Axline v. Toledo, W. V. & O. R. Co.*, 138 Fed. 169, and *Beltz v. Baltimore & O. R. Co.*, 137 Fed. 1016, both construing Ohio statutes. *Contra*, *Markey v. Louisiana & M. R. R. Co.*, 185 Mo. 348, 359-362, 84 S. W. 61.

⁵⁴ *Central Trust Co. of New York v. Denver & R. G. R. Co.*, 97 Fed. 239; *Tillett v. Norfolk & W. R. Co.*, 118 N. C. 1031, 24 S. E. 111; *Bouknight v. Charlotte, C. & A. R. Co.*, 41 S. C. 415, 19 S. E. 915; *National Bank v. Atlanta & C. Air Line Ry. Co.*, 25 S. C. 216.

The lessor of a railroad is liable in tort for the act of an employee of its lessee in not stopping a train to let off a passenger. *Pickens v. Georgia Railroad & Banking Co.*, 126 Ga. 517, 55 S. E. 171.

⁵⁵ *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68; *Murch v. Concord R. Corporation*, 29 N. H. 9, 61 Am. Dec. 631.

⁵⁶ *National Bank v. Atlanta & C. Air Line Ry. Co.*, 25 S. C. 216, 222,

On the other hand, contracts made by the lessee are not ordinarily binding on the lessor.⁵⁷ Thus, the lessor is not liable for labor performed or material furnished the lessee road in the operation or maintenance of the railroad.⁵⁸ However, it would seem that if the lease was unauthorized, the lessee will be considered as the agent of the lessor, and the lessee's contracts will be held binding upon the lessor.⁵⁹ Furthermore, the lessor has been held liable for the debts of the lessee where the lessee was merely a dummy, and the officers and directors of both corporations were the same.⁶⁰

§ 1261. Rights and liabilities of lessee—Rights. The rights of the lessee are ordinarily measured by the terms of the lease,⁶¹ subject to the rule that the lessee acquires no greater rights than those enjoyed by the lessor.⁶² Oftentimes, the question arises in connection with leases by and to public service corporations, as to what secondary franchises have passed to the lessee and the extent thereof. It may be said that ordinarily a lease of the property of a public service corporation carries with it the secondary franchises necessary to conduct the business; such as the right to use streets; and the lessee ordinarily has the same rights in the streets and the right of way as the lessor had, where the lease is authorized.⁶³

In case of a railroad lease, it is generally held that the lessee succeeds to all the rights and privileges of the lessor.⁶⁴ Thus, the lessee

holding that a lease by a railroad does not absolve it from liability for goods received by its line for carriage and not delivered.

⁵⁷ *Peoria & P. U. R. Co. v. United States Rolling-Stock Co.*, 28 Ill. App. 79; *Galveston, H. & S. A. R. Co. v. Scheidmantel* (Tex. Civ. App.), 24 S. W. 328.

⁵⁸ *Empire Trust Co. v. Egypt Ry. Co.*, 182 Fed. 100.

⁵⁹ "The lessors must, at all events, be held responsible for just what they expected the lessees to do, and probably for all which they do do, as their general agents." *Nelson v. Vermont & C. R. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614.

⁶⁰ *Barrie v. United Rys. Co. of St. Louis*, 138 Mo. App. 557, 199 S. W. 1020.

⁶¹ Construction of lease, see § 1244, *supra*.

⁶² See *infra*, this section.

⁶³ *Earnhardt v. Southern R. Co.*, 157 N. C. 358, 72 S. E. 1062; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763, 23 Atl. 884. See also Chap. 31.

⁶⁴ *Portland & O. C. R. Co. v. Grand Trunk Ry. Co.*, 46 Me. 69, right to connect with another railroad; *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268, 65 L. R. A. 561, 105 Am. St. Rep. 428, 36 So. 266; *Fisher v. New York Cent. & H. River R. Co.*, 46 N. Y. 644; *Reeves v. Philadelphia Traction Co.*, 152 Pa. St. 153, 25 Atl. 516; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 563, 23 Atl. 884.

The lessee of a railroad, in using

of a railroad ordinarily may lay its tracks wherever its lessor could.⁶⁵ Furthermore, if a street railway has a right under its lease to charge certain fares, a sublessee or assignee of the lease has the same right.⁶⁶

On the other hand, the lessee can exercise no right which its lessor could not exercise, unless expressly conferred by statute.⁶⁷

The lessee of one of the New York city subways has been held to have the right to maintain in its stations weighing and vending machines.⁶⁸

§ 1262. — Liabilities. The lessee must carry out and perform the public legal obligations of the lessor.⁶⁹ It takes the property subject to all the duties and obligations of the lessor in regard thereto.⁷⁰ This rule is often applied to leases of railroads.⁷¹ Thus, the duty to maintain a depot at a county seat, imposed on a railroad company devolves upon the lessee.⁷²

Statutory duties imposed upon railroad companies are generally applicable to lessees.⁷³ The lessee has even been held to come within a statute requiring the keeping of railroad crossings in repair, at the

such road, may charge the rates fixed by the charter of the lessor, although in excess of those fixed by its own charter. *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205.

⁶⁵ *Willis v. Pittsburgh Rys. Co.*, 234 Pa. 120, 82 Atl. 1117.

⁶⁶ *Enton v. Nassau Elec. R. Co.*, 68 N. Y. Misc. 22, 124 N. Y. Supp. 555.

⁶⁷ *Stone v. Illinois Cent. R. R. Co.*, 116 U. S. 347, 29 L. Ed. 650; *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa 340, 344; *State v. Mobile, J. & K. C. R. Co.*, 86 Miss. 172, 122 Am. St. Rep. 277, 38 So. 732; *Port Richmond & P. P. Elec. R. Co. v. Staten Island Rapid Transit R. Co.*, 144 N. Y. 445, 39 N. E. 392.

The lessee cannot collect tolls in excess of those authorized by the lessor's charter, although not in excess of those authorized by its own charter. *McGregor v. Erie R. Co.*, 35 N. J. L. 89.

⁶⁸ *New York v. Interborough Rapid Transit Co.*, 53 N. Y. Misc. 126, 104 N. Y. Supp. 157.

⁶⁹ *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 277, 55 S. E. 692. To

the same effect, see *Smith v. Chicago, B. & Q. R. Co.*, 83 Neb. 387, 119 N. W. 669.

⁷⁰ *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637, 12 Atl. 38.

⁷¹ *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637, 12 Atl. 38.

If the charter of a street railway requires it to pay one per cent. of the fares to the city, its lessee is bound so to do. *Mayor of New York v. Twenty-Third St. Ry. Co.*, 113 N. Y. 311, 21 N. E. 60.

⁷² *State v. Mobile, J. & K. C. R. Co.*, 86 Miss. 172, 122 Am. St. Rep. 277, 38 So. 732.

⁷³ *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637, 12 Atl. 38.

Statutes requiring fencing of railroads and maintenance of cattle guards at crossings apply to lessees. *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282; *Missouri Pac. Ry. Co. v. Morrow*, 32 Kan. 217, 4 Pac. 87; *Gould v. Bangor & P. R. Co.*, 82 Me. 122, 19 Atl. 84; *McCall v. Chanberlain*, 13 Wis. 637.

Statutes making railroad companies liable for fires set by their locomotives

joint expense of the companies "owning the tracks."⁷⁴ The lessee cannot evade statutory duties, as against the state, on the ground that the lease provides for the performance of such duties by the lessor.⁷⁵ The lessee of a street railway is liable for license fees.⁷⁶

If the lessee relies on a lease to give it the right to use a railroad, it cannot deny the validity of the lease when sued as lessee for negligence or failure to comply with statutes regulating railroads.⁷⁷

The lessee of a railroad is also liable for injuries resulting from its negligent operation of the leased railroad,⁷⁸ and this is so although the lease was unauthorized⁷⁹ and though the lessor is also liable in damages for the act.⁸⁰ The lessee is liable for maintaining and continuing a nuisance, even though created by the lessor.⁸¹ The lessee is liable for damages resulting from failure to meet changing conditions with reasonable care.⁸²

Of course, the lessee is not liable for the torts of the lessor before

tives apply to lessees. *Davis v. Providence & W. R. Co.*, 121 Mass. 134; *MacDonald v. New York, N. H. & H. R. Co.*, 23 R. I. 558, 51 Atl. 578.

The fact that the lessor is liable does not exonerate the lessee. *Davis v. Providence & W. R. Co.*, 121 Mass. 134.

In some states, statutes expressly provide that the lessee of a railroad shall be liable in the same manner as if it owned the road, in case of not fencing it. *Clary v. Iowa Midland Ry. Co.*, 37 Iowa 344; *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa 327.

⁷⁴ "The terms 'owner' and 'owning' depend somewhat for their signification upon the connection in which they are used." *Baltimore & O. R. Co. v. Walker*, 45 Ohio St. 577, 16 N. E. 475.

⁷⁵ *State v. Southern Kansas Ry. Co. of Texas* (Tex. Civ. App.), 99 S. W. 167.

⁷⁶ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 191 Fed. 216; *Jersey City v. North Jersey St. R. Co.*, 78 N. J. L. 72, 73 Atl. 609.

⁷⁷ *Gould v. Bangor & P. R. Co.*, 82 Me. 122, 19 Atl. 84.

⁷⁸ *Linfield v. Old Colony R. Corporation*, 10 Cush. (Mass.) 562, 57 Am. Dec. 124; *Cantlon v. Eastern Ry. Co. of Minnesota*, 45 Minn. 481, 48 N. W. 22, damages caused by fires; *International & N. R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484, 4 S. W. 472.

"It is well settled in practice, and by repeated decisions that the lessees of railroads are liable to the same extent as the lessors would have been, while they continue to operate the road." *Sprague v. Smith*, 29 Vt. 421, 425, 70 Am. Dec. 424.

⁷⁹ *Chesapeake & O. R. Co. v. Howard*, 14 App. Cas. (D. C.) 262, aff'd 178 U. S. 153, 44 L. Ed. 1015; *Gould v. Bangor & P. R. Co.*, 82 Me. 122, 19 Atl. 84; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 405, 12 Am. Rep. 720; *McCluer v. Manchester & L. R. R.*, 13 Gray (Mass.) 124, 74 Am. Dec. 624.

⁸⁰ *Davis v. Providence & W. R. Co.*, 121 Mass. 134.

⁸¹ *Western & A. R. Co. v. Cox*, 93 Ga. 561, 20 S. E. 68; *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212, 216, 36 Am. Rep. 608.

⁸² *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, 116 N. W. 859.

the lease was executed,⁸³ nor for permanent injuries to property due to the original construction of the road,⁸⁴ but it is liable for injuries resulting from the defective condition of stations, track, or other like property, although such defects existed at the time of the lease or related to the original construction.⁸⁵

If a railroad company, created by a special statute, leases a railroad from a company incorporated under the general railroad act, the lessee is governed by the provisions of the general railroad law so far as the business transacted on the leased road is concerned, and cannot claim the benefits of such exemptions as are contained in its general charter.⁸⁶

If a lease of a building by a corporation is assigned to trustees with full control to manage it, the corporation is not liable for injuries to a servant of the trustees.⁸⁷

While the lessee may, in consideration of the lease, assume the debts of the lessor,⁸⁸ there is no liability, in the absence of such an agreement, except as to debts constituting a lien on the leased property,⁸⁹ and except that where all the property of the lessor is leased, the theory that the property is a trust fund may perhaps require the application of the property to the debts of the lessor.⁹⁰ So the lessee is not ordinarily bound by contracts previously made by the lessor.⁹¹

§ 1263. — Implied covenant to operate railroad. Generally, a lessee of a railroad is bound to operate it during the life of the lease,⁹²

⁸³ *Pittsburgh, C. & St. L. R. Co. v. Kain*, 35 Ind. 291.

⁸⁴ *Kearney v. Central R. Co.*, 167 Pa. St. 362, 31 Atl. 637; *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87. But see *supra*, note 81, as to liability for continuing nuisance.

⁸⁵ *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478, 2 L. R. A. 502, 20 N. E. 103; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787.

⁸⁶ *McMillan v. Michigan Southern & N. I. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

⁸⁷ *Falardeau v. Boston Art Students' Ass'n*, 182 Mass. 405, 65 N. E. 797.

⁸⁸ *Welden Nat. Bank of St. Albans v. Smith*, 86 Fed. 398; *Pennsylvania Co. v. Erie & P. R. Co.*, 108 Pa. St. 621.

⁸⁹ If there is a lien on the right of way, the lessee takes subject to such lien. *Hurley v. Big Sandy & C. R. Co.*, 137 Ky. 216, 125 S. W. 302.

⁹⁰ See *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U. S. 116, 28 L. Ed. 915, which case, however, was a sale and not a lease.

⁹¹ *Pennsylvania Co. v. Erie & P. R. Co.*, 108 Pa. St. 621, holding that a contract made by lessor to give an annual pass, in consideration of a right of way, was not binding on the lessee.

⁹² *People v. St. Louis & A. T. H. R. Co.*, 176 Ill. 512, 35 L. R. A. 656, 52 N. E. 292; *State v. Mobile, J. & K. C.*

even though it cannot be operated except at a loss.⁹³ The lessee cannot repudiate such obligation on the ground that the lessor was and is financially unable to discharge the obligations and that it may cause loss to the lessee.⁹⁴

Even if an express covenant to operate a leased railroad during the term of the lease is not found among the provisions thereof, yet where the obligation to operate the road throughout the entire term of the lease is plainly contemplated by the provisions of the lease, the courts will enforce it as an implied covenant as fully as if the obligation was expressed in appropriate words.⁹⁵

A lease granting the "right and privilege" to use the tracks of another railroad company is not a covenant by the lessee to use such property for the term of the lease.⁹⁶

There is no duty to operate the road where the lease is void.⁹⁷

§ 1264. Liabilities of lessor and lessee of railroad as between themselves. Leaving out of consideration the question as to the liability of the lessor or lessee to third persons for negligence, it is sometimes necessary to determine what are the responsibilities and rights, where one or the other is negligent, as between themselves. Generally, this is regulated by the terms of the lease. Where the lease is silent in regard thereto, but it is agreed that both the lessor and lessee shall use the track of the railroad to run trains with separate employees, under an implied promise that all the employees will obey the orders of the superintendent employed by both jointly, the lessee is liable to the lessor for the pecuniary loss sustained from a collision between the trains of the lessor and the lessee, where caused by the employees of the lessee disregarding the orders of the superintendent.⁹⁸

R. Co., 86 Miss. 172, 122 Am. St. Rep. 277, 38 So. 732.

⁹³ *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 38 L. R. A. 809, 41 S. W. 1015; *Southern Ry. Co. v. Franklin & P. R. Co.*, 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485.

⁹⁴ *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 55 S. E. 692.

⁹⁵ "Necessary implication is, beyond doubt, as much a part of an instrument as if that which is so implied was plainly expressed."

Southern Ry. Co. v. Franklin & P. R. Co., 96 Va. 693, 44 L. R. A. 297, 32 So. 485.

⁹⁶ *Grand Trunk Western Ry. Co. v. Chicago & E. I. R. Co.*, 141 Fed. 785; *Chicago & W. I. R. Co. v. Chicago & E. I. R. Co.*, 260 Ill. 246, 103 N. E. 264.

⁹⁷ *People v. Colorado Cent. R. Co.*, 42 Fed. 638.

⁹⁸ *Central Trust Co. of New York v. Colorado Midland Ry. Co.*, 89 Fed. 566.

A covenant in a railroad lease to "save the lessor harmless," etc., is an obligation which in nowise affects the liability of the lessor to a third person, for negligence, but is simply a contract for reimbursement.⁹⁹

⁹⁹ Nugent v. Boston, C. & M. R. R.,

80 Me. 62, 6 Am. St. Rep. 151, 12 Atl.
797.

